

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2001 SPECIAL 301 REPORT



**SUBMITTED TO THE
UNITED STATES TRADE REPRESENTATIVE
FEBRUARY 16, 2001**

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

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February 16, 2001

Mr. Joseph Papovich
Assistant USTR for Services,
Investment and Intellectual Property
Office of the United States
Trade Representative
600 17th Street, N.W., Room 301
Washington, D.C. 20508

Re: Request for Public Comment on the Identification of
Countries Under Section 182 of the Trade Act of
1974 (as amended) ("Special 301"), 66 Fed. Reg.
3640 (Jan. 16, 2001)

Dear Mr. Papovich:

This filing responds to the Request for Written Submissions appearing on January 16, 2001 in the Federal Register. The request invites submissions from the public on policies and practices that should be considered in connection with designating countries as Priority Foreign Countries pursuant to Section 182 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2242 ("Special 301"). The Special 301 provisions call upon the United States Trade Representative to identify countries which, *inter alia*, "deny adequate and effective protection" to U.S. intellectual property or deny "fair and equitable market access" to U.S. persons who rely on intellectual property protection.

The International Intellectual Property Alliance (the "IIPA" or "Alliance") submits our discussion of the status of copyright law reform and enforcement in 57 separate country reports and recommends 56 countries for ranking on the Special 301 lists. We also highlight six initiatives in this letter, and identify 13 countries which we have not recommended be on a list but which merit ongoing attention by the U.S. government.

A. IIPA AND THE COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY

The IIPA is a coalition formed in 1984 consisting of seven trade associations, each of which represents a significant segment of the copyright industry in the United States. IIPA consists of AFMA (formerly the American Film Marketing Association), the Association of American Publishers

(AAP), the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA), and the Recording Industry Association of America (RIAA).

These associations represent almost 1,500 U.S. companies producing and distributing copyright-protected materials throughout the world – all types of computer software including business applications and entertainment software (such as videogame CDs and cartridges, personal home computer CDs, and multimedia products); motion pictures, television programs, and home videocassettes; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications, and journals (in both electronic and print media).

In December 2000, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2000 Report, the eighth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that the “core” U.S. copyright industries¹ accounted for 4.9% of U.S. GDP or \$457.2 billion in value-added in 1999. In the last 22 years (1977-1999), the core copyright industries’ share of GDP grew at an annual rate more than twice as fast as the remainder of the economy (7.2% vs. 3.1%). Also over these 22 years, employment in the core copyright industries more than doubled to 4.3 million workers (3.2% of total U.S. employment) and grew nearly three times as fast as the annual employment growth rate of the economy as a whole (5.0% vs. 1.6%). In 1999, the U.S. copyright industries achieved foreign sales and exports of \$79.65 billion, a 15% gain from the prior year.

The copyright industries’ foreign sales and exports continue to be larger than exports of almost all other leading industry sectors, including automobiles and auto parts, aircraft, and agriculture. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide not only free and open markets, but also high levels of protection to the copyrights on which this trade depends.

B. OUTLINE OF IIPA’S SPECIAL 301 SUBMISSION

As in prior years, IIPA’s submission contains several separate sections. It is important for the reader to review not only each country survey in Appendix C, but also the other appendices that describe key elements (e.g., industry initiatives, methodology) that may be referenced in the country survey. Included in this year’s submission are the following:

- This letter, which (1) outlines IIPA’s recommendations for cross-cutting initiatives to be undertaken by the copyright industries and the U.S. government for 2001; (2) summarizes our submission this year, and (3) identifies additional countries – not recommended for placement on the Special 301 lists – which require continued attention by USTR and other appropriate agencies. Individual country reports are not provided for these 12 additional countries;

¹ The “total” copyright industries include the “core” industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The “core” copyright industries are those which create copyrighted materials as their primary product.

- Appendix A, which contains IIPA's country placement recommendations, estimated trade losses due to piracy, and estimated levels of piracy;
- Appendix B, which describes our members' methodology for calculating estimated trade losses and piracy levels;
- Appendix C, which includes all the country surveys;²
- Appendix D, which provides a historical chart of countries' placement on Special 301 charts by USTR since 1990;
- Appendix E, which contains the Special 301 histories of the countries which appear as our recommendations this year and many other countries which have appeared on USTR's lists in the past and are still candidates for monitoring of their intellectual property practices.

This year's submission contains surveys on a total of 57 countries.

C. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2001

Improving intellectual property protection by employing the various bilateral and multilateral tools available to the U.S. government is the goal of this submission. Without these trade tools and their aggressive implementation, the U.S. copyright industries would still be facing the 90% to 100% piracy levels throughout the developing world that we faced in 1984-85 when these trade programs commenced. The vast improvement over the last decade and a half is a largely untold success story. Significantly improved laws and their extension to U.S. copyrighted works through treaty adherence and improved enforcement have brought billions of dollars of increased revenue and millions of new jobs to both U.S. and local copyright industries. However, despite these successes, the U.S. copyright industries (and copyright creators and their industries worldwide) still face grave threats in the 21st century. These threats, emanating in part from the growth of digital and on-line technology, require a renewed commitment to use both the old and new tools available to industry and governments.

IIPA's 1999 Special 301 filing outlined five challenges facing the copyright industries: (1) the importance of implementing the WTO TRIPS Agreement; (2) the uncontrolled expansion of optical media production capacity; (3) end-user software piracy by both governments and businesses; (4) the need to implement the WIPO "digital" treaties; and (5) the growing pirate activity by highly organized international criminal syndicates. In 2000, IIPA added a sixth initiative, an issue which is a growing threat that will plague the copyright industries for years to come — stemming the explosion of copyright infringement on the Internet.

The copyright industries are extremely grateful for the U.S. government's effort in support of these objectives. IIPA urges a continuing and heightened effort to make further progress on all six

² Country surveys were prepared by Eric H. Smith, IIPA President; Steven J. Metalitz, IIPA Vice President and General Counsel; Maria Strong, IIPA Vice President and Associate General Counsel; Eric J. Schwartz, Counsel; and Michael N. Schlesinger, Counsel, and are based on information furnished by IIPA member associations. We also thank Pam Burchette, Sandra Hanna, Stefan Mentzer, Paula Jones-Yates, and Melissa Braford of our staff for their valued contributions to preparing and producing this report.

objectives this year. Ratification of the WIPO treaties remains a priority with the industries, and we and our colleagues around the world are working to achieve as many ratifications as possible in 2001, with the goal of bringing both treaties into effect early this year. Thereafter, we must work to ensure that these treaty obligations are properly and fully implemented in national law.

Below we provide a status report on these six initiatives.

1. TRIPS IMPLEMENTATION

On January 1, 1996, the World Trade Organization (WTO) TRIPS Agreement entered into force for the U.S. and for all other WTO members that do not qualify for, and take advantage of, the transition periods of four and ten years.³ Even for WTO members that do qualify for a transition period, the national treatment and MFN provisions of TRIPS applied fully as of January 1, 1996.⁴

On January 1, 2000, all TRIPS copyright obligations, including providing effective and deterrent enforcement, entered into force for all the world's developing countries (except those classified by the U.N. as the "least" developed countries). Before 2000, many of these countries successfully amended their statutory law to bring their laws into compliance (or close to compliance) with their TRIPS obligations. However, compliance with TRIPS enforcement obligations remains sparse but is essential to returning the commercial benefits that were envisioned at the conclusion of the Uruguay Round.

A good number of less developed countries simply have not taken sufficient measures to ensure that their laws and enforcement regimes (civil, criminal, provisional remedies, and border measures) are compatible with their TRIPS obligations. TRIPS obligations, both with respect to substantive law and to enforcement, are the worldwide "floor" for copyright and other intellectual property protection. Compliance with TRIPS obligations is necessary, though not alone sufficient, to meet the Special 301 statutory standard of "adequate and effective" protection.⁵ Accordingly, in the country surveys and as part of the Special 301 process itself, IIPA has paid special attention to the extent to which the countries (or territories) surveyed in this submission are in compliance with these obligations. Where TRIPS incompatibilities are found, they can appropriately be dealt with in

³ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Articles 65 and 66.

⁴ TRIPS, Article 65.2 provides that "any developing country Member is entitled to delay for a further period of four years [following the expiration of the one year period after the entry into force of the WTO generally] the date of application, as defined in paragraph 1 above, of the provisions of the Agreement other than Articles 3, 4 and 5 of Part I." Articles 3 and 4 establish the national treatment and MFN obligations of the Agreement and Article 5 excludes these obligations with respect to WIPO treaties. This exception to the use of transition is also provided in all other categories of countries which may take advantage thereof. As of November 30, 2000, 140 countries were members of the WTO, including all countries surveyed in this submission with the exception of Armenia, Azerbaijan, Bahamas, Belarus, Kazakhstan, Lebanon, Lithuania, Moldova, the Palestinian Authority, the People's Republic of China, the Russian Federation, Saudi Arabia, Taiwan, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.

⁵ Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314(c), 108 Stat. 4809 (1994) (also known as the URAA).

the context of Special 301,⁶ as well as directly through the initiation of a dispute settlement proceeding in the WTO.

USTR has already brought a number of successful cases in the WTO against developed countries for violations of TRIPS copyright and copyright enforcement obligations. Three of the copyright cases which the U.S. has brought have been resolved to the satisfaction of the U.S. and U.S. industry, without proceeding to a formal decision by a panel: (1) Japan, for its failure to provide 50 years of retroactive protection to U.S. sound recordings; (2) Sweden, for its failure to provide civil *ex parte* searches; and (3) Ireland, for its inadequate copyright law. The U.S. is still consulting with Denmark for its failure to provide civil *ex parte* searches and with Greece for its failure to enforce its laws against broadcast piracy, though the latter case seems to be nearing formal resolution.⁷

IIPA continues to urge USTR and the U.S. government as a whole to use the Special 301 process as a leverage and consultation tool to move developing countries, whose obligations under TRIPS became fully effective on January 1, 2000, toward bringing their laws and particularly their enforcement regimes fully into compliance with TRIPS. IIPA urges USTR to use all the tools available to it, including GSP,⁸ CBI,⁹ ATPA,¹⁰ CBTPA¹¹ and AGOA¹², to reach the objective of strong global copyright protection, including, as the "floor" of this protection, compliance with TRIPS. IIPA identifies TRIPS-inconsistent laws or practices in the country surveys.

IIPA and its member associations urge the U.S. government to use all available trade tools, including the possibility of formal action in the WTO, to deal with the serious copyright deficiencies in Uruguay. We also highlight TRIPS' problems in Sweden and Namibia in this letter.

⁶ Indeed, in the Uruguay Round Agreements Act, Congress envisioned that TRIPS issues might be the impetus for a Priority Foreign Country designation under Special 301. Congress amended Section 304(a)(3)(A) and (B) to extend the time limit for dealing with disputes involving allegations of TRIPS violations from six months (the normal time limit in actions under Special 301) to the longer, eighteen-month period required by the WTO Dispute Settlement Understanding. 19 U.S.C. § 2414(a)(3)(A) and (B). As noted in the Statement of Administrative Action accompanying the URAA, "[t]he six-month time limit in section 304(a)(3) will continue to apply to investigations involving intellectual property and market access matters initiated as a result of a 'priority foreign country' identification where the TRIPS Agreement or another trade agreement is not involved." Uruguay Round Agreements Act Statement of Administrative Action, reprinted in H.R. Doc. No. 103-316, vol. I, at 1029 (1994).

⁷ Snapshot of WTO Cases in the United States (updated Jan. 26, 2001) <<http://www.ustr.gov/enforcement/snapshot.html>>. The case numbers at the WTO are: WT/DS 28 (Japan), WT/DS 86 (Sweden), WT/DS 83 (Denmark), WT/DS 125 (Greece), WT/DS 82 (Ireland).

⁸ Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, tit. V, 99 Stat. 2948 (1984) (codified at 19 U.S.C. § 2461 *et seq.*).

⁹ Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, tit. II, 97 Stat. 369 (1983) (codified at 19 U.S.C. § 2701 *et seq.*).

¹⁰ Andean Trade Preference Act of 1990, Pub. L. No. 102-182, tit. II, 105 Stat. 1233 (1991) (codified at 19 U.S.C. § 3201 *et seq.*).

¹¹ U.S.-Caribbean Trade Partnership Act, Trade and Development Act of 2000, Pub. L. No. 106-200, tit. II (May 18, 2000) (codified at 19 U.S.C. § 2703 *et seq.*).

¹² African Growth Opportunities Act, Trade and Development Act of 2000, Pub. L. No. 106-200, tit. I (May 18, 2000) (codified at 19 USC § 2461 *et seq.*).

2. REGULATION OF OPTICAL MEDIA PRODUCTION

Increasingly, all sectors of the copyright industry are using a common set of media to distribute their products worldwide. These “optical media” include formats such as compact disc (CD), video CD (VCD), CD-ROM, and digital versatile disc (DVD), among others. An explosion in the world’s capacity to produce optical media products has accompanied the growing demand for these products. Unfortunately, production capacity greatly exceeds legitimate demand, and much of this excess capacity is being devoted to unauthorized production. Because pirate optical media products contain the same high-quality content as legitimate products and easily cross national borders, every sector of the copyright industry is threatened by optical media piracy. Pirate CDs, VCDs, and DVDs containing protected music, sound recordings, and audiovisual works as well as pirate CD-ROMs containing tens of thousands of dollars’ worth of software, games, and literary material can quickly decimate the market for legitimate U.S. products. IIPA urges the U.S. government to be particularly attentive and creative in working with U.S. industries and foreign governments to fashion effective regulatory solutions.

The growing optical media problem confronting the copyright sector demands new and creative solutions. Traditional enforcement mechanisms have not been enough to prevent optical media piracy from spinning out of control and flooding national, regional, and even global markets with millions of high-quality pirate products. As part of each country’s TRIPS obligation to provide deterrent enforcement against piracy on a commercial scale, every country whose optical media production facilities are producing significant pirate product must consider creating and enforcing a specialized regulatory framework for tracking the growth of optical media production capacity, including the cross-border traffic in production equipment and raw materials. This regulatory regime should also include strict licensing controls on the operation of optical media mastering and replication facilities, such as a requirement to use new identification tools that flag in what plant the production occurred and to lead the authorities to the infringer. So far such a regime has been established in China, Bulgaria, Hong Kong, and Macau, is in the process of implementation in Malaysia, and is under consideration in Thailand, Indonesia and the Philippines.

Finally, even after the adoption of regulations controlling and monitoring production, it is critical that these be enforced aggressively, to accompany general copyright enforcement.

3. PIRACY BY ORGANIZED CRIME

Copyright piracy — especially optical media piracy — is a huge and profitable business. Many pirate businesses have access to and control of large amounts of capital, exploiting complex distribution networks to engage in criminal activity of all kinds. These criminal syndicates are highly organized, are linked across national boundaries, and have powerful friends within government. In many cases, these powerful criminal networks use copyright piracy to fund other illicit activities, such as drug smuggling, trade in illegal munitions, money laundering, and other equally serious crimes.

Increasingly, the trend is for organized pirate syndicates to move into owning or controlling optical media production facilities. These syndicates control not only the production but also the distribution of pirated and counterfeit products within the domestic market and around the world. For example, syndicates with optical media production facilities in Southeast Asia work with partners in South America to conduct a thriving trans-pacific trade in pirate music CDs,

entertainment software, and other optical media products. These criminal networks are highly sophisticated and are becoming increasingly dangerous to deal with. The entertainment software industry estimates, for example, that 99% of console piracy in Asia and elsewhere is controlled by criminal syndicates, and Russian organized crime is believed to control 75% of the world's piracy in PC-based entertainment software.

The copyright industries alone cannot fight such organized criminal activity. Company representatives and counsel have in some countries already experienced threats on their lives or physical intimidation when their investigations began to make progress. In some cases, this has prevented any enforcement activities by the private sector. We look to additional leadership by the U.S. government, both here and in the appropriate bilateral and multilateral fora, to assist in placing the issue of effective copyright piracy enforcement on the agenda of agencies dealing with organized economic crime — generally, cybercrime, fraud, extortion, white-collar crime, drug enforcement, money laundering, and border and customs control.

4. RATIFICATION AND IMPLEMENTATION OF THE WIPO TREATIES

Digital piracy is a serious threat to global electronic commerce in copyrighted materials of all kinds. Combating copyright theft in order to foster the growth of electronic commerce requires a multi-faceted strategy. Technological measures to combat piracy are essential, as is public education about copyright, especially targeted to network users. But these steps are not sufficient by themselves. Strong legal protections must be adopted and vigorously enforced worldwide if sufficient intellectual property protections are to be preserved.

The two treaties adopted by the World Intellectual Property Organization (WIPO) Diplomatic Conference in Geneva in December 1996 provide the basic framework for the transmission of content in e-commerce. Effective implementation of the WIPO Copyright Treaty (WCT) and of the WIPO Performances and Phonograms Treaty (WPPT) will promote efforts to raise minimum standards of copyright protection around the world, particularly with respect to network-based delivery of copyrighted materials.

IIPA and its members have joined with their counterpart copyright industries around the world to push for ratification and full implementation of the WCT and WPPT in all countries. Following is the global status of the WIPO treaties' domestic ratifications and official deposits with WIPO:¹³

¹³ As of February 16, 2001.

	WIPO Copyright Treaty (WCT)	WIPO Performances and Phonograms Treaty (WPPT)
Number of signatories	51	50
Number of domestic ratifications	24	22
Number of deposits with WIPO (30 needed to put Treaties into force)	22	20

Because there are also a number of countries now poised to ratify and deposit, it is IIPA's hope that the treaties can be put into force early this year. In addition to securing ratifications and deposits of the treaties, IIPA is monitoring those countries that are amending their statutory regimes to make them compatible with their TRIPS obligations and encouraging these countries not to take the position that they will deal with WIPO obligations "at a later time." By that time, the prejudicial impact on electronic commerce and the protection of intellectual property online might already be irreversible. Countries should be strongly encouraged to make the necessary legal changes now. The U.S. has already implemented the changes needed to its laws to meet the standards of the treaties by enacting Title I of the Digital Millennium Copyright Act.¹⁴

5. COPYRIGHT PIRACY ON THE INTERNET

Until recently, pirates who engaged in wholesale infringements of copyrighted works served mostly local or regional markets, and in some parts of the world, like Asia, they served global markets through optical media piracy. The sudden and unprecedented growth of the Internet, however, has provided pirates with an even more highly efficient distribution network to reach the global market. Pirates offering and distributing infringing product can now reach any part of the world with great ease, no matter where they are located. Consequently, the U.S. copyright industries face the daunting task of trying to enforce their legal rights in an online world where borders and distances no longer matter.

IIPA recommends that USTR work with our industries to adopt a focused and comprehensive strategy to stem the rising tide of Internet piracy. The challenge is two-tiered. First, governments need to adopt stronger laws that are tailored to address online copyright piracy. Mechanisms like TRIPS, which requires that nations provide "effective action" and adequate "deterrence" against commercial piracy, and the two new "digital" WIPO treaties, which clarify exclusive rights in the on-line world and specifically prohibit circumvention of technological protection measures (TPMs) for copyrighted works, are essential tools to fight this new threat. In particular, the adoption of TPM legislation as part of the WIPO Treaties implementation process

¹⁴ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The United States deposited instruments of accession for both treaties on September 14, 1999.

prohibiting devices and services that circumvent technological protection measures used by right holders to protect their works, is critical to safeguarding the transmission of valuable content over the Internet.

Second, even in the online world, there is no substitute for vigorous enforcement of new and existing laws. To protect the revenue streams and millions of new jobs created by the copyright industries, governments must become flexible and fast-moving if they want to deal with a medium that is constantly shifting and evolving. Renewed emphasis on training is vital to give enforcement authorities the tools to quickly locate infringing Internet sites and pursue actions against the offenders who commit the most damage and/or refuse to remove the infringing content. Public education about the dangers of online infringement must be emphasized as well. As global boundaries continue to break down because of Internet growth, so must the usual lines separating industry, policy, and enforcement in combating Internet piracy.

6. USE OF LEGAL SOFTWARE IN GOVERNMENT AND BUSINESS

The unauthorized use and copying of software by businesses and government entities — “end-user” piracy in the private and public sector — result in greater losses to the U.S. and global economies than any other form of piracy faced by any copyright-based industry. The great majority of the billions of dollars lost to U.S. companies from business software piracy in 2000 was attributable to end-user software piracy.¹⁵

In many nations, government entities are among the largest users of software. Thus the failure of many governments to require and to oversee legal software use within national, provincial, and local agencies results in huge revenue, job, and tax losses and tends to perpetuate a lax attitude toward intellectual property protection in the economy as a whole. This, in turn, discourages investment and innovation in the software and technology fields and stunts a nation’s economic potential in these critical areas.

On the other hand, governments that make legal software use a priority not only comply with their international obligations to protect software copyrights but also set an example for private industry. In addition, they take an important step forward in intellectual property leadership and appropriate management of software technology, both of which are critical to active participation in the information age. The U.S. recognized the importance of government leadership in combating end-user piracy when President Clinton issued Executive Order 13103 on September 30, 1998, which required all Federal government agencies (as well as third parties who do business with government) to use only legal, authorized software. This very significant Presidential Order is currently being implemented within the U.S. government and serves as a model for other governments around the world.

In recognition that governments must lead the way in promoting legal software use, USTR and other agencies have been working with the industry and with their counterparts around the world, urging the adoption of similar Executive Order-style directives. Several nations, including China, Philippines, Taiwan, Thailand, France, U.K., Greece, Hungary, Colombia, Paraguay and Jordan, have already joined the United States by issuing government legalization decrees from their

¹⁵ The figures for losses due to piracy of business applications in each country survey are preliminary only.

top executive levels and, in so doing, have signaled their intent to become global leaders in the field of technology management.

D. IIPA RECOMMENDATIONS FOR 2001 SPECIAL 301 LISTS

This year IIPA has considered deficiencies in copyright protection in 56 countries and has recommended them for placement in the categories of Section 306 Monitoring, Priority Foreign Country, Priority Watch List, and Watch List. We have also recommended that 2 countries not appearing on one of these lists be subject to an Out-of-Cycle Review, and later in this letter, we highlight specific issues of concern in 12 countries, plus Jordan, which was one of the two countries not appearing on a specific list but which IIPA also recommends for an Out-of-Cycle Review.

IIPA recommends that USTR designate Ukraine as a Priority Foreign Country. Ukraine has failed to implement long-needed copyright protection. Because Ukraine fails to provide adequate protection for foreign sound recordings in violation of its bilateral treaty obligations, it has become a "safe haven" for pirate optical media production operations on a massive scale. Ukraine, as was feared, is now the leading producer and exporter of pirate optical discs in Eurasia. Although USTR placed Ukraine on the Priority Watch List in 1999, the Ukrainian government ignored repeated warnings to take legislative action and to close pirate plants. On June 5, 2000, Ukraine formally announced an Action Plan in a joint statement issued by President Clinton and Ukrainian President Kuchma. The Action Plan was meant to combat the unauthorized production and export of optical media products in Ukraine, and in that joint statement, the Government of Ukraine announced its commitment to implement the plan by November 1, 2000. Unfortunately, Ukraine has still not implemented the Action Plan, and the production and distribution of illegal optical media discs continues unabated. There have been extensive and ongoing discussions among the U.S. government, the copyright industries, and the Ukrainian government leading up to and after the November deadline passed, to correctly implement the Action Plan. As a result of these discussions and some potential progress on the legislative front, namely a first reading in the Parliament of some of the necessary changes, USTR announced on January 19, 2001, that a decision on whether to identify Ukraine as a Priority Foreign Country would be deferred until March 1, 2001.

IIPA urges USTR to continue to monitor developments closely in the People's Republic of China and Paraguay under Section 306 of the Trade Act of 1974. We recommend that the remaining countries be placed on, or maintained on, the Priority Watch List or the Watch List, where they are subject to ongoing bilateral scrutiny.

IIPA recommends that 19 countries be placed on the Priority Watch List: Argentina, Brazil, Costa Rica, Dominican Republic, Egypt, Greece, Indonesia, Israel, Kuwait, Lebanon, Lithuania, Malaysia, Philippines, Russia, Saudi Arabia, South Korea, Taiwan, Turkey and Uruguay. IIPA also recommends that 34 countries be designated on the Watch List. We also recommend that Out-of-Cycle Reviews be taken in six countries which already appear on the various 301 lists: Egypt, Italy, Macau, Malaysia, Poland, and Uruguay. IIPA also urges that an expedited Out-of-Cycle Review (in three months) be conducted in Jordan, and that an Out-of-Cycle Review be conducted in the Palestinian Authority, neither of which presently appears on any of the 301 lists.

Appendix C contains a survey of 57 countries or territories. The countries appear by recommended category and in alphabetical order within each category. The following chart summarizes how IIPA has categorized the surveyed countries or territories; in addition, the chart lists IIPA's recommendations for additional Out-of-Cycle Reviews and other countries deserving special attention.

Priority Foreign Country	306 Monitoring	Priority Watch List	Watch List	Out-of-Cycle Review (unlisted)
Ukraine (GSP)	Paraguay People's Republic Of China	Argentina Brazil (GSP) Costa Rica Dominican Republic (GSP) Egypt (+ OCR) Greece Indonesia Israel Kuwait Lebanon Lithuania Malaysia (+ OCR) Philippines Russian Federation (GSP) Saudi Arabia South Korea Taiwan Turkey (GSP) Uruguay (+ OCR)	Bahamas Bolivia Chile CIS (10) ¹⁶ Armenia (GSP) Azerbaijan Belarus Georgia Kazakhstan (GSP) Kyrgyz Republic Moldova Tajikistan Turkmenistan Uzbekistan (GSP) Colombia Czech Republic El Salvador Estonia Guatemala Hungary India Italy (+ OCR) Latvia Macau (+ OCR) Oman Pakistan Peru Poland (+ OCR) Qatar Romania Slovakia South Africa Thailand Venezuela Vietnam	<div>Palestinian Authority Jordan</div> <div>Other Countries Deserving Specific Attention</div> <div>Bulgaria Burma Cambodia Croatia Hong Kong Japan Laos Mexico Namibia Singapore Slovenia Sweden</div>
1 Priority Foreign Country	2 306 Monitoring	19 Priority Watch List	34 Watch List	2 Out-of-Cycle Review 12 Other Countries Deserving Special Attention

¹⁶ "CIS" in this filing denotes 10 former Soviet republics. Russia and Ukraine are treated separately from the CIS in this filing.

Appendix D provides a history of countries appearing on IIPA and USTR lists since 1990, a year after the Special 301 legislation became effective. Seventeen of these countries have appeared on a Special 301 list each year since 1990, and seventeen are recommended by IIPA to appear there again. With the passage of the Uruguay Round Agreements Act implementing U.S. approval of the WTO Agreement, a new amendment was made to the Special 301 enabling legislation. This amendment to Section 182 of the Trade Act dealing with identification of "priority foreign countries," provides that the U.S. Trade Representative must now take into account "the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country."¹⁷ Under this criterion, these seventeen named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the decade that Special 301 has been in existence.

We also call attention to ongoing intellectual property rights reviews under the Generalized System of Preferences (GSP) trade program. In June 1999, IIPA filed eleven GSP petitions against: Poland, Peru, Lebanon, Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Belarus, and the Kyrgyz Republic. Since that time, Congress renewed the GSP program through September 30, 2001 and the U.S. government commenced consideration of whether to grant these petitions. On February 7, 2000, IIPA withdrew its petition against Peru in light of the commitments made by that country to improve enforcement. On February 14, 2000, USTR initiated GSP IPR reviews against six countries: Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, and Kazakhstan. Our Belarus petition was not accepted because GSP benefits were being withdrawn from that country for other reasons. Hearings were held on May 12, 2000.

In August 2000, IIPA filed five petitions for GSP reviews of the IPR practices of five countries (Brazil, Russia, Guatemala, Costa Rica, and Uruguay) as part of the 2000 Annual Review. On January 10, 2001, USTR decided to initiate GSP IPR reviews against Brazil and the Russian Federation. GSP hearings are scheduled for March 9 in Washington, D.C. USTR also announced that it was terminating the GSP review against Moldova due to legislative progress recently made in that country.

E. COUNTRIES DESERVING SPECIFIC ATTENTION IN 2001

IIPA highlights issues in thirteen countries for which there are no surveys in Appendix C. These countries deserve special attention in bilateral efforts during the year.

1. Out-of-Cycle Review

Jordan. Jordan has taken nearly every possible step it could to improve its intellectual property regime within the past two years except one — committing the resources and commencing sustained enforcement actions necessary to eradicate piracy in the market and deter future infringements. The failure to do so will have the unfortunate consequence of undermining the potential value of all of Jordan's legislative accomplishments. By December 2000, Jordan

¹⁷ Uruguay Round Agreements Act Statement of Administrative Action, reprinted in H.R. Doc. No. 103-316, vol. I, at 362 (1994).

already had begun to answer this last vital call to action, as a court in Amman sentenced a representative of a computer store selling illegally copied software to three months in prison. Now the Jordanian government also needs to carry out and sustain publicized raiding against piracy of other industries' works, including home video entertainment (including video recordings), sound recordings, entertainment software, and books. Such raiding must be accompanied by the imposition of deterrent punishment and, where appropriate, the prosecution of commercial pirates that continue to cause harm to Jordan's market. IIPA recommends that an expedited Out-of-Cycle Review be conducted with respect to Jordan in July 2001, to ensure that enforcement needed to lower piracy rates for all the copyright industries and provide a deterrent is forthcoming.

2. TRIPS

Namibia. Namibia is currently in blatant and open violation of its TRIPS obligations by failing to provide legal protection for all foreign works (including sound recordings). Under current Namibian law, works first published in the United States are protected in Namibia only so long as they have been approved for such protection by the Minister of Information and Broadcasting. Section 63(1) of the Copyright Act provides that the Minister may issue a "proclamation" to extend copyright protection to other countries, but the Minister has never done so, and the government has taken the position with certain industry representatives that U.S. works are not protected in Namibia. As a result, enforcement efforts against copyright piracy, including against software piracy, are nonexistent. Namibia violates both its TRIPS substantive obligations for failing to protect U.S. works (including sound recordings) (TRIPS Articles 9 through 14) as well as its TRIPS enforcement obligations (TRIPS Articles 41 through 61) for failing to enforce copyright of U.S. works (including sound recordings).

Sweden. Sweden's copyright law establishes a levy system for the private reproduction of audiovisual works. However, the provisions of Section 26k of this law have been read by the Swedish authorities to deny to authors and producers of U.S. audiovisual works and to the performers that appear in those works the right to be paid any of the funds collected for such private reproduction. By collecting money for the reproduction of these U.S. works and then denying to the rightholders the right to receive their fair share of those funds, Sweden is in violation of its national treatment under the Berne Convention and its national treatment and MFN obligations under the TRIPS Agreement.

Uruguay. Copyright protection under the 1937 copyright law, as amended, contains several TRIPS deficiencies in its substantive provisions (e.g. short terms of protection, overbroad compulsory licensing, lack of full retransmission rights, inadequate protection for compilations of data, unclear scope of protection for pre-existing materials, unclear provisions on rental rights). In addition, several key TRIPS enforcement measures were not codified in Uruguayan law. Efforts to amend the copyright law have been underway for much of the last decade. While the mid-2000 version of the comprehensive copyright reform bill reflected significant improvements in both the levels of substantive protection as well as providing for various enforcement mechanisms over prior versions, further amendments are needed. In late 2000, one legislative chamber succeeded in passing, over the objection of the legitimate copyright industries, a *sui generis* bill for computer programs which contained TRIPS deficiencies as well as other onerous market provisions. Yet another revised version of the copyright bill recently passed out of committee and will be considered this spring. High levels of copyright piracy dominate the market, and the current legal regime is simply inadequate to satisfy Uruguay's TRIPS obligations.

3. BILATERAL CONCERNS

Bulgaria. The entertainment software industry reports that estimated levels of piracy for its videogame products are at 80% – virtually eliminating the legitimate market for US videogame products. Three years ago Bulgaria was one of the world's leading exporters of pirate optical media products. New laws and decrees to license or restrict productions, followed by concrete action, resulted in significant progress in fighting the export problem, although some videogame material is reportedly being exported to Malta. Now, however, enforcement within Bulgarian borders, especially against rampant videogame piracy, needs to improve.

Burma. Reportedly four pirate optical disc plants containing six production lines have relocated to Burma, perhaps from Malaysia. This is a serious development since Burma has failed to update its copyright law (a version of the 1911 colonial British law is still in effect) or join any of the international copyright treaties or conventions. Although courts do occasionally decide copyright cases, the current law is inadequate and enforcement is virtually nonexistent. As a result, there is no protection at all for U.S. copyrighted materials in Burma.

Cambodia. Reportedly one pirate optical disc plant containing two production lines has relocated to Cambodia, which is not a member of the WTO, the Berne Convention, or the WIPO digital treaties. Currently Cambodia has neither an adequate copyright law nor enforcement mechanisms (or other regulatory schemes) in place to control the production, distribution, and importation of pirate optical media product or the raw materials for producing pirate product.

Croatia. According to IDSA, despite several enforcement actions against small pirate operations, piracy rates for videogame products remain at 95% in Croatia. In addition, retail stores openly sell pirate console videogames for \$5 and pirate personal computer videogames for \$3. Croatia joined the WTO on November 30, 2000 and to be in compliance with TRIPS must deal with this problem.

Hong Kong. Although Hong Kong authorities undertook largely successful enforcement actions against optical media piracy in 2000, Hong Kong continues to be the site of significant infringement of U.S. works. Book piracy, which authorities have neglected over the past several years, has been especially devastating for U.S. publishers. In addition, Hong Kong must speed up implementation and enforcement of the new amendment to the Copyright Ordinance clarifying that end-user software piracy is a criminal offense. These amendments will not enter into effect until April 1, 2001, and will have little value if they are not aggressively enforced beginning immediately. HKSAR government efforts to educate the public on the new law and to enforce it vigorously could have a significant effect on the level of business software piracy in Hong Kong this year.

Japan. Issues with Japan turn principally on its implementation of TRIPS, the WCT, and on its failure to date to ratify and implement the WPPT. With respect to the WCT, legislation is needed to ensure that temporary copies are considered reproductions as required by the Berne Convention and TRIPS. With respect to the WPPT, Japan should ratify this Treaty immediately. In addition, the Copyright Law should be amended further to provide an exclusive right to record producers for digital broadcasts that go beyond traditional broadcasts, and to ensure that U.S. record producers receive the national treatment they are entitled to receive with respect to remuneration for broadcasts of sound recordings.

Various ministries in the Japanese government have also released reports on how they would deal with the liability of Internet service providers in the online environment. Ideas proffered to date are seriously deficient, and IIPA and the U.S. government have expressed concerns to those Ministries. This is another key issue for establishing a framework for e-commerce and the Japanese government must be urged to follow the prevailing international precedent in this area. Finally, the Japanese government should also take concrete steps to ensure that government offices are free of infringing software. In keeping with the APEC government legalization initiative, and in light of its leadership position in the region, the Japanese government should (a) issue an order from the Prime Minister requiring all government entities to take steps to ensure that they use software only with authorization; (b) establish a clear and mandatory plan to implement the order in each government office; and (c) educate the public on the need for proper software asset management, using these activities as a model.

Laos. Reportedly two pirate optical disc plants containing two production lines have relocated to Laos from other Asian territories, such as Hong Kong. At the same time, Laos is not a member of the WTO, Berne Convention, and WIPO digital treaties and currently has no copyright law to even begin to combat the problem. As a result, because there is no protection or enforcement for US works, the market for legitimate US copyrighted works in Laos is nonexistent.

Mexico. High levels of piracy, combined with non-deterrent criminal and administrative enforcement and penalties, continue to harm the development of legitimate copyright markets and industries in Mexico. Despite amendments to both the copyright law and the criminal code aimed at enhancing the scope of legal protection, pirate product is still too prevalent across all the copyright industry sectors. During 2000, efforts by criminal authorities (PGR) and administrative officials (IMPI) demonstrated, in some instances, that the government can make inroads in the fight against piracy. While those results marked a promising start that could benefit all copyright industries, much more work needs to be done. Criminal cases rarely result in indictments. IMPI cases are slow-moving and result in small fines that do not deter pirates. Border enforcement is an area where even greater progress is needed. Moreover, those pirates who are indicted are rarely fully prosecuted, and when those rare cases reach judgment, the courts usually do not impose deterrent sentences. IIPA recommends that the U.S. and the new Mexican government commence a new bilateral engagement at a high level to address these problems with a new understanding of the damage that occurs to both economies.

Singapore. While progress has been made in moving Singapore's government toward a more aggressive posture against piracy, a number of concerns remain as to enforcement policies, optical media controls, Internet piracy (particularly the responsibilities of telecommunications service providers), and some remaining TRIPS compliance issues. IIPA anticipates that many of these issues will be addressed in the ongoing negotiations toward a U.S.–Singapore Free Trade Agreement.

Slovenia. Anti-piracy enforcement efforts have improved somewhat over the past year with specialized IP courts and market and customs inspections. Nevertheless, the effectiveness of enforcement remains disappointing. Piracy levels are high, especially for videogame consoles and personal computer videogames. Another significant problem is Internet piracy. Reports indicate that pirates routinely download music and other copyright-protected materials from the Internet, burn the material onto CDs, and then resell these products online.

F. ESTIMATED LOSSES DUE TO PIRACY

As a result of the deficiencies in the copyright regimes of the 58 countries for which losses have been estimated, the U.S. copyright-based industries suffered estimated trade losses due to piracy nearly **\$7.9 billion** in 2000.

Appendix A presents a chart quantifying these losses for the five copyright-based industry sectors — the business applications, entertainment software, motion picture, sound recording and music, and book publishing industries — for 1999 and 2000. In each survey, IIPA has described the piracy levels in each of these countries (where available). In many surveys, estimated piracy losses and levels are listed for the last six years, from 1995 through 2000. This should prove helpful in identifying trends and in determining whether enforcement efforts have actually been successful in reducing piracy levels in the particular country.

ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY IN 58 SELECTED COUNTRIES IN 2000 (in millions of U.S. Dollars)

INDUSTRY	ESTIMATED LOSSES
Motion Pictures	\$1,242.5
Sound Recordings and Musical Compositions	\$1,835.6
Business Software Applications	\$2490.9 ¹⁸
Entertainment Software	\$1,658.4 ¹⁹
Books	\$675.1
TOTAL	\$7,903.3

Appendix B summarizes the methodology used by IIPA member associations to calculate these estimated losses. These losses are a crushing burden on the U.S. economy, on U.S. job growth, and on world trade generally. They result from the blatant theft of one of this country's most valuable trade assets — its cultural and technological creativity.

G. CONCLUSION

Special 301 remains a cornerstone of U.S. intellectual property and trade policy. We urge the Administration to use Special 301, as well as the tools available under the GSP, CBI, ATPA, CBTPA, and AGOA programs, to encourage the countries identified in our recommendations this

¹⁸ BSA's 2000 estimates are preliminary.

¹⁹ IDSA's 2000 estimates are preliminary.

year to make the political commitments, followed by the necessary concrete actions, to bring their copyright and enforcement regimes up to international standards. The U.S. government should also use the multilateral tools in the WTO's dispute settlement machinery to encourage countries to bring their substantive and enforcement regimes into compliance with their international obligations under TRIPS. We look forward to our continued work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric H. Smith", with a stylized flourish at the end.

Eric H. Smith
President

APPENDIX A

ESTIMATED TRADE LOSSES DUE TO PIRACY & PIRACY LEVELS (1999-2000)

**FOR
IIPA's 2001 SPECIAL 301 RECOMMENDATIONS**

IIPA 2001 "SPECIAL 301" RECOMMENDATIONS
IIPA 1999-2000 ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and 1999-2000 ESTIMATE LEVELS OF COPYRIGHT PIRACY

	Motion Pictures				Records & Music				Business Software Applications ¹				Entertainment Software ¹				Books			
	Loss		Video Piracy		Loss		Piracy		Loss		Piracy		Loss		Piracy		Loss		TOTAL LOSSES	
	Level		Level		Level		Level		Level		Level		Level		Level		Level			
	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999
PRIORITY FOREIGN COUNTRY																				
Ukraine (GSP)	40.0	40.0	99%	99%	200.0	210.0	95%	95%	SEE CIS	NA	SEE CIS	NA	NA	NA	NA	NA	NA	NA	240.0	250.0
306 MONITORING																				
Paraguay	2.0	2.0	80%	80%	200.0	200.0	90%	90%	6.6	6.7	82%	82%	9.7	8.1	99%	99%	3.0	3.0	221.3	219.8
People's Republic of China	120.0	120.0	90%	90%	70.0	70.0	85%	90%	658.7	437.2	93%	91%	NA	1382.5	99%	95%	130.0	128.0	978.7	2137.7
PRIORITY WATCH LIST																				
Argentina	32.0	32.0	45%	45%	76.0	50.0	46%	33%	151.7	156.7	60%	62%	141.4	90.3	94%	92%	8.5	8.0	409.6	337.0
Brazil (GSP) ²	120.0	120.0	33%	35%	300.0	300.0	98%	95%	269.8	319.3	57%	58%	248.2	116.2	94%	90%	18.0	18.0	956.0	873.5
Costa Rica	2.0	2.0	40%	95%	3.0	3.0	40%	40%	9.0	9.4	68%	71%	0.2	NA	50%	NA	NA	NA	14.2	14.4
Dominican Republic (GSP)	2.0	2.0	60%	80%	2.0	2.0	80%	80%	12.3	12.5	70%	72%	6.0	NA	NA	NA	1.0	1.0	23.3	17.5
Egypt (OCR)	15.0	15.0	35%	50%	12.0	12.0	48%	50%	NA	26.4	NA	75%	14.9	6.2	94%	65%	30.0	30.0	71.9	89.6
Greece	10.0	12.0	18%	15%	10.0	10.0	50%	50%	40.1	47.5	65%	71%	38.1	20.1	78%	68%	7.0	7.0	105.2	96.6
Indonesia	25.0	25.0	90%	90%	19.6	3.0	87%	20%	32.9	33.2	87%	85%	NA	80.4	99%	92%	32.0	32.0	109.5	173.6
Israel	15.0	15.0	50%	50%	45.0	70.0	30%	45%	NA	54.8	NA	44%	52.0	30.9	NA	54%	1.0	1.0	113.0	171.7
Kuwait	8.0	8.0	85%	85%	3.0	1.0	50%	45%	9.7	10.5	79%	81%	NA	3.1	NA	82%	2.5	2.5	23.2	25.1
Lebanon	8.0	8.0	60%	60%	2.0	2.0	45%	45%	1.5	1.6	87%	88%	1.5	0.5	96%	70%	2.0	2.5	15.0	14.6
Lithuania	1.5	NA	80%	100%	7.0	5.0	85%	85%	NA	NA	76%	80%	3.5	NA	98%	NA	NA	NA	12.0	5.0
Malaysia (OCR)	41.0	42.0	80%	85%	16.0	5.0	60%	40%	96.0	67.8	66%	71%	NA	164.0	98%	99%	8.0	8.0	161.0	286.8
Philippines	25.0	18.0	70%	65%	1.3	2.0	33%	20%	28.2	26.7	66%	70%	41.0	23.8	98%	89%	44.0	44.0	139.5	114.5
Russian Federation	250.0	250.0	90%	90%	250.0	200.0	70%	70%	124.4	134.5	89%	89%	NA	241.1	94%	95%	48.0	48.0	672.4	873.6
Saudi Arabia	40.0	40.0	65%	65%	8.0	12.0	40%	45%	28.0	31.8	62%	64%	28.0	20.2	NA	59%	14.0	14.0	118.0	118.0
South Korea	20.0	20.0	20%	20%	7.0	10.0	23%	20%	102.3	118.9	52%	50%	157.0	119.0	90%	63%	39.0	39.0	325.3	306.9
Taiwan	30.0	20.0	30%	20%	60.5	60.0	40%	35%	127.3	97.6	53%	54%	319.3	115.7	90%	68%	20.0	21.0	557.1	314.3
Turkey (GSP)	50.0	50.0	50%	85%	4.0	4.0	40%	30%	68.3	78.2	69%	74%	116.2	95.1	96%	82%	28.0	32.0	266.5	259.3
Uruguay (OCR)	2.0	2.0	65%	65%	4.0	4.0	35%	35%	15.4	16.0	67%	70%	16.3	6.9	82%	70%	2.0	2.0	39.7	30.9
WATCH LIST																				
Bahamas	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Bolivia	2.0	2.0	100%	100%	15.0	15.0	85%	85%	4.1	4.1	84%	85%	1.5	NA	NA	NA	5.5	5.0	28.1	26.1
Chile	2.0	2.5	40%	25%	5.0	NA	30%	NA	47.0	47.7	50%	51%	41.0	NA	80%	78%	1.0	NA	96.0	50.2
CIS (10) ³									32.7		90%								32.7	NA
Armenia (GSP)	NA	NA	NA	NA	5.0	5.0	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	5.0	5.0
Azerbaijan	NA	NA	NA	NA	12.0	10.0	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	12.0	10.0
Belarus	NA	NA	NA	NA	28.0	25.0	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	28.0	25.0
Georgia	NA	NA	NA	NA	5.0	5.0	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	5.0	5.0
WATCH LIST (continued)																				
CIS (continued) ³																				

IIPA 2001 "SPECIAL 301" RECOMMENDATIONS
IIPA 1999-2000 ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and 1999-2000 ESTIMATE LEVELS OF COPYRIGHT PIRACY

	Motion Pictures				Records & Music				Business Software Applications ¹				Entertainment Software ¹				Books			
	Loss		Video Piracy		Loss		Piracy		Loss		Piracy		Loss		Piracy		Loss		TOTAL LOSSES	
	Level		Level		Level		Level		Level		Level		Level		Level		Level			
	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999	2000	1999
Kazakhstan (GSP)	NA	NA	NA	NA	25.0	20.0	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	25.0	20.0
Kyrgyz Republic	NA	NA	NA	NA	10.0	10.0	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	10.0	10.0
Moldova (GSP)	NA	NA	NA	NA	6.0	NA	90%	NA		NA		NA	NA	NA	NA	NA	NA	NA	6.0	0.0
Tajikistan	NA	NA	NA	NA	3.0	0.5	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	3.0	0.5
Turkmenistan	NA	NA	NA	NA	5.0	3.0	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	5.0	3.0
Uzbekistan (GSP)	NA	NA	NA	NA	30.0	20.0	90%	90%		NA		NA	NA	NA	NA	NA	NA	NA	30.0	20.0
Colombia	40.0	40.0	90%	55%	60.0	60.0	60%	60%	48.0	50.5	55%	58%	39.0	7.0	85%	75%	6.0	6.0	193.0	163.5
Czech Republic	8.0	10.0	18%	30%	35.0	60.0	20%	8%	19.2	30.2	39%	42%	45.0	12.0	81%	NA	4.5	4.5	111.7	116.7
El Salvador	2.0	2.0	50%	80%	5.0	5.0	40%	40%	13.5	13.6	82%	83%	0.1	NA	50%	NA	1.0	NA	21.6	20.6
Estonia	2.0	NA	60%	60%	9.0	9.0	60%	70%	NA	NA	69%	72%	3.7	NA	98%	NA	NA	NA	14.7	9.0
Guatemala	2.0	2.0	60%	70%	4.0	4.0	60%	60%	12.6	12.7	79%	80%	0.1	NA	60%	NA	2.3	2.5	21.0	21.2
Hungary	18.0	22.0	40%	40%	3.0	4.0	20%	20%	21.0	30.1	50%	52%	9.6	NA	86%	NA	4.0	4.0	55.6	60.1
India	47.0	66.0	60%	80%	6.0	8.0	40%	40%	195.2	160.2	63%	61%	NA	42.8	80%	86%	36.0	35.0	284.2	312.0
Italy (OCR)	140.0	160.0	20%	25%	50.0	60.0	25%	25%	NA	338.4	NA	44%	NA	60.9	65%	52%	23.5	23.0	213.5	642.3
Latvia	1.5	NA	85%	100%	4.0	4.0	65%	65%	NA	NA	77%	84%	NA	NA	NA	NA	NA	NA	5.5	4.0
Macau (OCR)	NA	NA	NA	NA	NA	NA	30%	NA	NA	NA	NA	NA	4.0	NA	90%	NA	NA	NA	4.0	0.0
Oman	2.0	3.0	50%	50%	0.1	NA	25%	NA	7.3	7.8	87%	88%	NA	1.8	NA	91%	2.3	14.9	11.7	27.5
Pakistan ⁴	10.0	9.0	60%	60%	65.0	3.0	90%	90%	16.9	14.1	84%	83%	NA	NA	NA	NA	45.0	42.0	136.9	68.1
Peru	4.0	4.0	75%	50%	55.0	50.0	96%	85%	21.5	22.2	61%	63%	3.8	NA	70%	NA	9.5	10.0	93.8	86.2
Poland (OCR)	25.0	25.0	25%	25%	21.0	22.0	30%	40%	92.6	130.0	55%	60%	103.1	70.9	85%	60%	7.0	7.5	248.7	255.4
Qatar	0.5	0.5	25%	30%	0.2	NA	25%	NA	3.3	3.5	79%	80%	NA	NA	NA	NA	0.0	NA	4.0	4.0
Romania	6.0	6.0	60%	60%	11.0	25.0	55%	85%	NA	9.8	NA	81%	6.9	NA	91%	NA	2.0	2.0	25.9	42.8
Slovakia	2.0	2.0	20%	20%	0.5	NA	10%	NA	5.2	7.9	45%	46%	7.0	NA	85%	NA	NA	NA	14.7	9.9
South Africa	12.0	12.0	10%	10%	11.0	NA	13%	NA	62.6	68.4	47%	47%	22.4	NA	70%	NA	21.0	20.0	129.0	100.4
Thailand	24.0	21.0	60%	55%	16.0	6.0	45%	40%	47.0	66.5	78%	81%	130.5	116.3	98%	95%	33.0	33.0	250.5	242.8
Venezuela	25.0	30.0	65%	65%	30.0	30.0	62%	62%	45.5	46.4	58%	60%	47.0	50.9	78%	70%	22.0	21.0	169.5	178.3
Vietnam	7.0	5.0	100%	100%	NA	NA	100%	100%	13.5	10.5	98%	98%	NA	20.1	NA	96%	8.0	8.0	28.5	43.6
2001 RECOMMENDATION OCR																				
Jordan	2.0	1.0	60%	50%	0.4	NA	55%	NA	NA	NA	NA	NA	0.4	NA	NA	NA	1.5	NA	4.3	1.0
Palestinian Authority	NA	NA		NA	NA	25.0	NA	90%	NA	NA	NA	NA	NA	NA	NA	NA	2.0	6.0	2.0	31.0
	1242.5	1268.0			1835.6	1723.5			2490.9	2761.9			1658.4	2906.8			675.1	685.4	7902.5	9345.6
See Endnotes.																				

IIPA 2001 "SPECIAL 301" RECOMMENDATIONS
IIPA 1999-2000 ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and 1999-2000 ESTIMATE LEVELS OF COPYRIGHT PIRACY
ENDNOTES

¹BSA and IDSA estimates for 2000 are preliminary.

²Brazil - The recording industry reports CD piracy rates at 34% and cassette piracy at 98%.

³ CIS - The business software industry reports losses of \$32.7 million and a piracy rate of 90% for all of the countries of the CIS, including Ukraine, but excluding Russia

⁴ The estimated losses to the sound recording/music industry due to domestic piracy are U.S.\$3 million for 2000, but this number excludes any losses on sales of exported discs. Total record industry losses for 2000 (including export piracy losses) were U.S.\$65 million in 2000.

APPENDIX B

METHODOLOGY USED TO CALCULATE ESTIMATED PIRACY LOSSES AND PIRACY LEVELS

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

METHODOLOGY

Estimated trade losses due to piracy are calculated by IIPA's member associations. Since it is impossible to gauge losses for every form of piracy, we believe that our reported estimates for 2001 actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries.

Piracy levels are also estimated by IIPA member associations and represent the share of a country's market that consists of pirate materials. Piracy levels together with losses provide a clearer picture of the piracy problem in different countries. Low levels of piracy are a good indication of the effectiveness of a country's copyright law and enforcement practices. IIPA and its member associations focus their efforts on countries where piracy is rampant due to inadequate or non-existent copyright laws and/or lack of enforcement.

BUSINESS SOFTWARE APPLICATIONS

The Business Software Alliance (BSA)'s calculation method compares two sets of data – the *demand* for new software applications, and the legal *supply* of new software applications.

Demand: PC shipments for the major countries are estimated from proprietary and confidential data supplied by software publishers. The data is compared and combined to form a consensus estimate, which benefits from the detailed market research available to these member companies.

Two dimensions break the shipments into four groups. Splitting the PC shipments between Home and Non-Home purchasers represents the market segments of each country. The PC shipments are also compared to the change in the installed base of existing PCs. The part of PC shipments which represents growth of the installed base is called "new shipments" and is separated from the "replacement shipments" which represent new PCs that are replacing older PCs.

A scale of the installed base of PCs by country compared to the number of white-collar workers was developed. PC penetration statistics are a general measure of the level of technological acceptance within a country. The level of penetration, for a variety of reasons, varies widely from country-to-country. This level is then ranked and each country is assigned to one of five maturity classes.

The number of software applications installed per PC shipment is provided by member companies, and the following ratios for the four shipment groups are developed:

Home-New Shipments
Non-Home - New Shipments
Home - Replacement Shipments
Non-Home - Replacement Shipments

For each shipment group, ratios are developed for each of five maturity classes. U.S. historical trends are used to estimate the effects of lagged technological development by maturity class.

Piracy rates can vary among applications. Grouping the software applications into three Tiers and using specific ratios for each Tier further refined the ratios. The Tiers were General Productivity Applications, Professional Applications, and Utilities. These were chosen because they represent different target markets, different price levels, and it is believed, different piracy rates.

Software applications installed per PC shipped are researched and estimated using these dimensions:

1. Home vs. Non-Home
2. New PCs vs. Replacement PCs
3. Level of Technological Development
4. Software Application Tier

From this work, a total software applications installed estimate was calculated for each country.

Supply: Data was collected by country and by 26 business software applications. Shipment data was limited in some instances, hence, uplift factors were used to estimate U.S. and world-wide shipments.

Piracy Estimates: The difference between software applications installed (demand) and software applications legally shipped (supply) equals the estimate of software applications pirated. The piracy rate is defined as the amount of software piracy as a percent of total software installed in each country.

Dollar Losses: The legal and pirated software revenue was calculated by using the average price per application. This is a wholesale price estimate weighted by the amount of shipments within each software application category.

To develop the wholesale dollar losses for U.S. software publishers, the wholesale dollar losses due to piracy were reduced by the ratio of the software shipped by U.S. software publishers as a percent of software shipped by all software publishers.

ENTERTAINMENT SOFTWARE

The Interactive Digital Software Association (IDSA) draws piracy rates from numerous estimates provided by member and non-member company representatives, distributors and enforcement personnel based on local market conditions. Separate estimates of piracy rate pertaining to console- and PC-based software are calculated, and then averaged into a single piracy rate based on the prevalence of each platform in the market.

Trade loss figures reported in this 2001 Special 301 Report are preliminary and are based only on partial data samples. These figures are likely to underestimate those to be reported upon completion of our review.

This year's dollar loss figures rely in part on estimates provided by member companies. These estimates are generated using proprietary methodologies that integrate market data of dedicated platform and PC entertainment software in both compact disc and cartridge formats and hardware shipments. These methodologies take into account market conditions including but not limited to the installed base of a given platform (console, PC-based, handheld, etc.) and actual distribution and sales figures.

Dollar loss figures also incorporate inferences from seizure statistics that result from border and other enforcement actions in the countries of production, export and import. These losses are attributed to the country of production where such is known. This aspect of the methodology relies on conservative estimates about the total number of piratical goods produced based on the numbers seized.

The methodology also assumes that piratical goods in the marketplace displace to some degree legitimate product sales. In these instances, displaced sales are multiplied by the wholesale price of legitimate articles rather than the retail price of the pirate goods.

MOTION PICTURES

Many factors affect the nature and effect of piracy in particular markets, including the level of development of various media in a particular market and the windows between release of a product into various media (theatrical, video, pay television, and free television). Piracy in one form can spill over and affect revenues in other media forms. Judgment based on in-depth knowledge of particular markets plays an important role in estimating losses country by country.

Video: As used in the document the term encompasses movies provided in video cassette as well as in all optical disc formats. Losses are estimated using one of the following methods:

1. For developed markets:
 - a. The number of stores that rent pirate videos and the number of shops and vendors that sell pirate videos are multiplied by the average number of pirate videos rented or sold per shop or vendor each year;
 - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
2. For partially developed markets:
 - a. The number of legitimate videos sold or rented in the country each year is subtracted from the estimated total number of videos sold or rented in the country annually to estimate the number of pirate videos sold or rented annually in the country;

- b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
3. For fully pirate markets:

The estimated number of pirate videos of U.S. motion pictures sold or rented in the country each year is adjusted to reflect the wholesale price of legitimate videos which equals losses due to video piracy.

TV, Cable and Satellite: Losses are estimated using the following method:

1. The number of TV and cable systems that transmit U.S. motion pictures without authorization is multiplied by the average number of U.S. motion pictures transmitted without authorization by each system each year;
2. The resulting total number of illegal transmissions is multiplied by the average number of viewers per transmission;
3. The number of viewers of these illegal transmissions is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate transmissions of the motion picture that would have been made is also estimated;
4. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal transmissions.

Public Performance: Losses are estimated using the following method:

1. The number of vehicles and hotels that exhibit videos without authorization is multiplied by the average number of viewers per illegal showing and the number of showings per year;
2. The resulting total number of viewers of unauthorized public performances is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate TV and cable transmissions that would have been made of the motion pictures is also estimated;
3. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate TV, cable and satellite transmissions, as appropriate, to estimate the lost revenue from the illegal performances.

SOUND RECORDINGS AND MUSICAL COMPOSITIONS

RIAA generally bases its estimates on local surveys of the market conditions in each country. The numbers produced by the music industry generally reflect the value of sales of pirate product rather than industry losses, and therefore undervalue the real harm to the interests of record companies, music publishers, performers, musicians, songwriters and composers.

Where RIAA has sufficient information relating to known manufacture of pirate recordings that emanate from a third country, this loss data will be included in the loss number for the country of manufacture rather than the country of sale.

In certain instances where appropriate, RIAA employs economic data to project the likely import or sale of legitimate sound recordings, rather than merely reporting pirate sales. In these instances, projected unit displacement is multiplied by the wholesale price of legitimate articles in that market rather than the retail price of the pirate goods.

BOOKS

The book publishing industry relies on local representatives and consultants to determine losses. These experts base their estimates on the availability of pirate books, especially those found near educational institutions, book stores and outdoor book stalls. A limitation here is that experts can only gauge losses based on the pirated books that are sold; it is impossible to track losses for books which are pirated but not available for public purchase. The trade loss estimates are calculated at pirate prices which are generally (but not always) below the prices which would be charged for legitimate books. Also included are conservative estimates of losses due to unauthorized systematic photocopying of books.

APPENDIX C

COUNTRY SURVEYS

PRIORITY FOREIGN COUNTRY

International Intellectual Property Alliance

2001 Special 301 Report

UKRAINE

EXECUTIVE SUMMARY¹

As the result of a very weak legal regime, and the absence of any meaningful enforcement activity by the government, Ukraine has maintained its position as the largest producer and exporter of illegal optical media disks (CDs, CD-ROMs, DVDs) in Central and Eastern Europe. However, during the past year, the government of Ukraine did commit itself to the adoption and implementation of new laws to end its status as the number one pirate CD producing country in the region. So, in mid-2000, there was good reason for optimism. On June 5, 2000, Ukraine formally announced an Action Plan in a joint statement issued by President Clinton and Ukrainian President Kuchma. The Action Plan was meant to combat the unauthorized production and export of optical media products in Ukraine. In that joint statement, the government of Ukraine announced its commitment to implement the plan by November 1, 2000. The Action Plan consisted of three parts: (1) to close the plants, seize illegal material, and only to reopen the plants when there is a legal licensing scheme in place; (2) to adopt proper optical media production and distribution regulations, including identification (SID) coding and the monitoring of raw material and manufacturing equipment, as well as of exports of product; and (3) to improve significantly the copyright law and to introduce other legal reforms, including criminal and administrative penalties, necessary to implement a modern copyright regime.

Unfortunately, Ukraine has still not implemented the Action Plan, and the production and distribution of illegal optical media disks continues unabated. There have been extensive and ongoing discussions among the U.S. government, the copyright industries and the Ukrainian government leading up to and since the November deadline passed, to correctly implement the Action Plan. As a result of these discussions and some progress on the legislative front, namely a first reading in the Parliament of some of the necessary changes, then-USTR Ambassador Barshefsky announced on January 19, 2001, that a decision on whether to identify Ukraine as a Priority Foreign Country would be deferred until March 1, 2001.

IIPA is in full agreement with the decision by USTR and recommends that Ukraine be designated a Priority Foreign Country on March 1, 2001 if they do not fully implement the Action Plan by that date. If Ukraine does implement the plan by that date, they should be remain on the Priority Watch List so that continued implementation, including closure of plants found to be engaged in the production of illegal CDs and on-the-ground licensing and effective and sustained regulation of the plants and material, can be monitored. And, if upon regular and continued monitoring by the U.S. government after March 1, Ukraine fails faithfully to continue its implementation of the Action Plan, then the U.S. government should immediately designate Ukraine as a Priority Foreign Country.

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" Appendix to filing.

The problem of optical media production can be summarized as follows: there are at least five known CD plants and Ukraine is capable of producing over 70 million disks a year, which is more than Bulgaria produced at the height of its capacity. Losses to the music industry alone are estimated at \$210 million for the second straight year. This illegal material, consisting of musical CDs, and business and entertainment software CD-ROMS, is still flooding other countries, completing disrupting the already vulnerable markets throughout Central and Eastern Europe (including the Commonwealth of Independent States, C.I.S.), as well as established markets in Western Europe. In April 2000, for the first time, audiovisual VCDs (over 11,000) made in Ukraine were seized by the motion picture anti-piracy organization, in this case in Bulgaria. Since June 2000, literally hundreds of thousands of pirate CDs made in Ukrainian plants have been seized in at least 12 countries in Eastern and Western Europe. The high level of optical media piracy has been fueled by persistent legal deficiencies and a lack of any meaningful on-the-ground enforcement, including, but not limited to, the absence of optical media production controls and effective border enforcement. Only recently did Customs authorities take some action, seizing several thousand CDs. However there has, for the moment, not been any follow-up to these seizures.

In addition to the optical media regulations, other major legal reforms are needed to provide effective protection and enforcement for works and sound recordings. It was only in February 2000 that Ukraine even began to protect foreign sound recordings, as a result of its accession to the Geneva Phonograms Convention. That was a positive step. However, older works and sound recordings remain unprotected. Ukraine must amend its law to fix this problem, something it has long promised to undertake and is obligated to do under a bilateral trade agreement with the United States, as well as to comply with the World Trade Organization TRIPS Agreement for accession.

As an example, foreign sound recordings released prior to February 18, 2000, and works published prior to May 27, 1973 (the date of adherence to the Universal Copyright Convention) remain unprotected in Ukraine. Ukraine made progress in 2000 by finally agreeing to address this problem for works and sound recordings. However, in November, when amendments to the copyright law were adopted in the Parliament (and subsequently vetoed by the President), the provisions were absent from the bill.

In addition to adopting the legal reforms necessary to protect pre-existing material, Ukraine must adopt an effective criminal code, criminal procedures code, customs code, and administrative regulatory code so that commercial pirates who violate the copyright and neighboring rights laws, as well as the optical media production provisions, can be appropriately punished using a wide array of enforcement tools. The criminal code, criminal procedures code, customs code, and administrative code reforms were not considered in 2000.

On May 6, 1992, Ukraine signed a bilateral trade agreement with the U.S. that entered into force on June 23, 1992. That agreement included wide-ranging commitments for Ukraine to enact and enforce modern laws protecting intellectual property rights and to provide effective enforcement. In exchange, the U.S. granted Ukraine Most Favored Nation (MFN), now Normal Trade Relations (NTR), treatment; the Ukrainian deadline for meeting the IPR obligations was December 31, 1993. In December 1993, Ukraine did enact a new law on copyright and neighboring rights. On October 25, 1995, Ukraine adhered to the Berne Convention (Paris Act). On February 18, 2000, Ukraine adhered to the Geneva Phonograms Convention. All three of these acts were obligations, even if undertaken belatedly, to comply with the bilateral agreement.

During the seven years that Ukraine slowly and only in piece-meal fashion, implemented the bilateral IPR obligations, it became a “safe haven” for an increasing number of pirate manufacturers of musical recordings, business and entertainment software, and more recently, audiovisual material. A combination of legal reform and enforcement deficiencies have created conditions ripe for piracy: until 2000, foreign sound recordings weren’t protected at all; older material including works and sound recordings, remain unprotected thereby undercutting any marketplace for newer material; the optical media plants are completely unregulated; and, there are no administrative or criminal sanctions, much less on-the-ground enforcement activities, to deter piracy. Until these problems are fixed and there is an operational system of deterrent criminal enforcement, pirated products will continue to flood Ukraine and the region, and the Ukraine marketplace for legitimate sound recording and works will not get itself established.

The failure to provide effective enforcement is a breach of the U.S. trade agreement (and any eventual World Trade Organization accession). Although criminal sanctions do exist for violations of copyright pertaining to works, they are currently insufficient to deter commercial piracy. These provisions are not even applicable to the violation of the rights of producers of sound recordings and other holders of neighboring rights. Consequently, there are currently no criminal sanctions for the violation of the rights of the record companies, whose products are so widely pirated in Ukraine. New provisions to revise the Criminal Code were drafted by the Ukrainian government (within the Ministry of Interior) in 1998. They are now finally being considered by the Parliament in early 2001. The Criminal Code must be amended to include strong sanctions to deter piracy of copyright works and sound recordings. The Criminal Procedure Code must be amended to provide police the authority to act *ex officio* to initiate criminal intellectual property cases.

In addition, Ukraine does not have an effective Customs code to deter piracy at the border; the current Customs Code does not even directly stipulate IPR infringements among the many other violations, nor does it provide customs officials with *ex officio* authority to seize material at the border. These failures permit illegal material to flow freely into and out of Ukraine. The Customs code must be amended to make border enforcement effective. Equally important as the copyright legal reform failures is the failure to take the steps necessary to properly enforce its copyright laws with police, prosecutor and judicial action to deter commercial piracy. The improvements in the enforcement legal regime of Ukraine – to the criminal, criminal procedure, civil, administrative, and customs codes – plus the implementation of on-the-ground enforcement, are necessary for compliance with the bilateral trade agreement and for Ukraine’s accession to the World Trade Organization.

COPYRIGHT PIRACY

The Need to Regulate Optical Media Production in Ukraine, and to Control the Export of Illegal Material in the Region

The absence of optical media regulation and criminal enforcement provisions has allowed Ukrainian plants to become a major source of the production, distribution and export of illegal optical disk media (CDs containing musical works, audiovisual DVDs, and CD-ROMs containing entertainment and business software). This has resulted not only in a flood of illegal optical media

product in Ukraine, but the export of millions of pirate CDs throughout Eastern, Central and Western Europe.

It is estimated by the recording industry (International Federation of the Phonographic Industry, IFPI) that the production capacity of optical media material is still around 70 million units per year; the demand for legitimate CDs in Ukraine is not more than 5 million units. The recording industry is aware of at least five plants that are producing predominantly pirate product; these five plants, also identified in last year's report, have been operating with impunity, allowing Ukraine to become one of the pirate CD manufacturing capitals of the world.

The Action Plan, originally announced by the Ukraine and U.S. governments in June 2000; was intended to address this problem to take the steps necessary to regulate optical disk plants, and to improve border enforcement to contain the problem within the borders of Ukraine. Proper optical media regulation in Ukraine would consist of: (1) instituting plant licensing, SID code and optical media regulations and penalties for noncompliance that include the closing of offending plants; and (2) appointment of the proper agencies and officials, as was done in Bulgaria, with the authority to undertake this enforcement effort and responsibility for putting these regulations in place.

The Action Plan, consistent with what the copyright industries have requested, would require Ukraine to immediately stop production of the illegal material and to set up plant monitoring procedures, like those established in Bulgaria in 1998, to regulate the production, distribution and export of optical media. Such regulations include provisions to close plants that are caught illegally producing copyrighted material; to seize infringing product and machinery; to introduce criminal liability for infringing these regulations; and to monitor the importation of raw materials (optical grade polycarbonate) used in the production of CDs, DVDs and CD-ROMs (and other optical disk media). All of the plants would be required under the Action Plan to adopt source identification (SID) codes, so that the source of illegally produced CDs can be traced and any necessary actions taken against infringing manufacturers.

The history of copyright enforcement in Ukraine the past few years has unfortunately consisted of a series of missteps, undercutting effective enforcement. Distribution, including the import, export, wholesale and retail trade of audio and audiovisual products, could have been properly regulated by Presidential Decree # 491 of May 20, 1998. At the time, IIPA welcomed adoption of the decree as a positive step against piracy, but unfortunately, the decree was never implemented. Instead, on March 23, 2000, the Parliament adopted the Ukraine Law on Distribution of Copies of Audiovisual Works and Phonograms (the "Hologram Sticker" law). This law did not contribute at all to the improvement of copyright enforcement against CD plants. Adopted over the objections of the copyright industries, this new law instead offered a harmful alternative to plant licensing regulations. It is unclear whether the new law actually, or only effectively, repealed the 1998 Decree but it clearly ended any hope of proper implementation of the 1998 provisions.

The controversial Hologram Sticker law was finally implemented in January 2001. And the Hologram Sticker law has already proven to be open to abuse and fraud. To make matters worse, the law completely exempts exports, the real problem with the overproduction problem that exists in Ukraine; and it exempts manufacturers, the real source of the problem. Finally, such a system establishes an unworkable administrative burden on legitimate businesses and keeps legal product from the market, thus permitting more pirate material to flourish in the vacuum. The copyright

industries expect that the Hologram Sticker law will be critically reviewed as part of the proper implementation of the Action Plan, and be replaced with effective optical media regulations.

Another step, undertaken in 1999, was the closure and reorganization in a weaker form of the Ukraine Copyright Agency (SCAU). The government of Ukraine needs to clarify the authority and role of the Ukraine Copyright Agency vis-à-vis other government agencies, including its role, if any, in verifying the legality of the issuance of certificates for import, export, and the wholesale and retail trade of copyright material. The Copyright Agency, in essence an authors' collecting society, and the State Department on Intellectual Property are not equipped to monitor and close down plants that are engaged in piratical activity. That should be left to the economic police authorities in an enforcement based agency within the government.

COPYRIGHT LAW AND RELATED ISSUES

Amendments to the Copyright Act and Related Enforcement Laws are Necessary

IIPA remains concerned that Ukraine has not, to date, enacted the crucial legal reforms necessary for a modern and effective copyright regime. In 2000, some of the important provisions were drafted but not enacted. Key pieces of enforcement reform were not considered at all. In early January 2001, the Parliament scheduled consideration of copyright law amendments after a previous version adopted in November 2000 that was unsatisfactory was partially vetoed by the President and therefore not enacted. Unfortunately, the Law as currently under Parliamentary consideration would still not properly correct a number of grave copyright deficiencies; also, other important legal reforms are needed.

In sum, the legislative deficiencies in Ukraine include the lack of: (1) protection for sound recordings created before February 18, 2000 and for works created prior to May 27, 1973, as required by the Berne Convention and WTO/TRIPS; (2) full national treatment of neighboring right-holders with regard to rights and remedies; (3) optical media plant regulations to stem the commercial-scale pirate production of CDs, CD-ROMs and DVDs; (4) criminal penalties and procedures and administrative regulations to deter commercial piracy; (5) Customs code amendments to grant clear *ex officio* authority to Customs officials to seize suspected illegal material at the border; and (6) civil *ex parte* search procedures necessary for effective end-user piracy actions (and required by WTO/TRIPS).

Not since 1993 has Ukraine adopted any significant revision of its copyright law. The Supreme Soviet of Ukraine passed a new Law on Copyright and Neighboring Rights on December 23, 1993, which came into force on February 23, 1994. That law was closely modeled on the Russian Federation's 1993 copyright law. Separate legislation and regulations on broadcasting were also adopted.

In 1998, a criminal penalties bill was drafted, but it has never been adopted by the Parliament. The absence of adequate criminal penalties for copyright and neighboring rights violations is a major deficiency in the current legal regime. As part of the Action Plan, Ukraine has agreed to enact a criminal penalties bill, as well as appropriate administrative remedies to deter

piracy. *It is imperative that the criminal and administrative remedies are adopted quickly to stem the growth of organized criminal activity in the production of illegal material, including optical disk media.* At present, for example, there are no criminal sanctions for the violation of the rights of record producers.

In the 1992 bilateral trade agreement with the United States, Ukraine acknowledged its successor status to the Soviet Union's adherence to the Universal Copyright Convention, effective May 27, 1973. This confirmed that the point of attachment for copyright relations between the United States and Ukraine existed from this date forward at least for works (but likely not including sound recordings). The 1992 agreement also stipulated a bilateral obligation of both countries to provide a full retroactive term of protection to each other's works on the date when both countries became members of the Berne Convention in accordance with Article 18 of Berne (this is also a WTO/TRIPS obligation). The United States unilaterally provides full retroactive protection for all Ukrainian works and sound recordings; that protection was extended from a term of 75 years to a term of 95 years in amendments adopted by the Congress in 1998.

In October 25, 1995, when Ukraine adhered to the Berne Convention, its instrument of accession included a declaration stating that it would *not* apply Berne's Article 18 obligations to protect pre-existing foreign works in Ukraine. Ukraine's decision not to grant protection to pre-existing U.S. copyrighted works (prior to May 1973) is incompatible with its bilateral trade agreement with the U.S., as well as with Ukraine's Berne (Article 18), national treatment, and any future TRIPS obligations for works and sound recordings. As part of the Action Plan, Ukraine agreed to correct this deficiency with amendments to the Copyright Law for both works and sound recordings.

On February 18, 2000, Ukraine adhered to the Geneva Phonograms Convention, also an obligation of the bilateral trade agreement. However, the copyright law does not provide protection for pre-existing sound recordings. This creates an intolerable situation for the recording industry. By waiting almost seven years to join Geneva Phonograms, Ukraine permitted an explosive growth of illegal cassette tape and optical media disk piracy of foreign musical recordings to flourish. And by excluding pre-existing sound recordings, Ukraine continues to act as a safe haven for back-catalog pirates. There can be no adequate enforcement efforts against music piracy in Ukraine until protection is afforded for new and older material. As noted above, as a part of the Action Plan, Ukraine agreed to correct this deficiency with amendments to the copyright law but has so far continually failed to comply with the ensuing obligations.

As mentioned, a major legal shortcoming in Ukraine is the lack of effective criminal penalties to deter piracy. Current Ukrainian law provides absolutely no criminal sanctions for the violation of the rights of record producers. In the Soviet era, identical criminal sanctions for copyright infringement were a part of the criminal codes in each of the republics of U.S.S.R. The codes of several of the countries of the C.I.S., including Ukraine, contain important deficiencies that have not been corrected. These include the lack of jail terms; no protection for infringements involving producers of sound recordings or performers; and sanctions that are extremely small (only negligible fines and obligatory labor provisions).

Ukrainian law (Article 136) currently provides for up to two years' imprisonment and fines ranging from 50 to 120 times the minimum wage (roughly U.S.\$1,000 to \$2,400) for copyright violations (and is silent for sound recording infringements). In any case, these penalties, which have never been applied, are insufficient to deter commercial piracy.

The Action Plan requires passage of an effective IPR criminal and administrative penalties bill. The current draft criminal penalties bill would amend Article 136 to increase penalties of up to three years' imprisonment and up to 400 times the minimum wage (U.S.\$8,000) for repeat offenders. It would also make criminal penalties applicable against phonogram (sound recording) piracy. However, the draft bill still contains a provision that should be eliminated before final adoption. As in Russia, the penalties under the draft could only be imposed for "substantial material damage" – this is a standard that creates an unwarranted threshold for copyright piracy. Instead of this vague standard, the law should be amended to include a low and clear threshold to instigate a criminal action; not only would this help to identify criminal infringing acts for prosecutors, but it would also provide critical guidance for the police when they are conducting initial raids and need to assess, in a particular situation, whether a case should be brought under the criminal code or the administrative code.

The criminal code revision now under consideration needs improvement before adoption. The Ukraine government should raise the penalties that were in the draft circulated last year. In particular, the fines should be raised to deterrent levels, and the Code must eliminate any unnecessary thresholds that will act to prevent police and prosecutors from effectively stopping commercial piracy. The availability and application of criminal penalties at levels sufficient to deter piracy are necessary to effective copyright protection, as well as WTO/TRIPS obligations.

With respect to criminal procedures, police should be able to act *ex officio*, and to initiate an intellectual property criminal case for further investigation and submission to the court, including the authority to hold confiscated products and equipment for use at trial. None of this is currently permissible under the existing criminal procedures code. The current draft criminal code amendments, IIPA understands, would not provide any of this authority in Ukraine; provisions granting this authority should be adopted in 2001.

Ukrainian criminal procedures require rightholders to file complaints to initiate actions. Prosecutors, not the police, are responsible for initiating infringement cases. Enforcement would be improved if the police were afforded *ex officio* authority to initiate cases without any formal complaint of the copyright owner; the criminal procedure code should be so amended. It is not clear if the proposed amendments to the criminal code would make any changes to the criminal procedure code as well, but these also should be part of any amendments package in 2001.

As a result of its Normal Trade Relations (NTR, formerly known as MFN) status, Ukraine is now a beneficiary under the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible countries; that is, duty-free tariffs on certain imports. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . ." This includes whether a country is providing adequate and effective protection and enforcement of copyright and neighboring rights. Ukraine is not fulfilling the statutory obligations of GSP. So, at the same time that Ukraine is causing millions of dollars of losses to the U.S. due to piracy, it imported \$27.3 million worth of products without duty, or over 5.2% of its total imports into the U.S. in 1999 (the last full year of available GSP statistics), and over \$36.6 million in the first 10 months of 2000, an increase of 47.1% during the same period in 1999.

IIPA filed a petition with the U.S. government on June 16, 1999 to request the suspension or withdrawal of Ukraine's GSP benefits. That petition was accepted on February 14, 2000 and

public hearings were held on May 12, 2000. The U.S. government has not yet made a final decision on suspending or withdrawing Ukraine's GSP benefits, but IIPA continues to believe that suspension of these trade benefits should be undertaken when it is apparent that such measures are necessary to get adequate and effective copyright protection and enforcement in Ukraine.

Amendments to the civil code (Chapter IV) pertaining to copyright are also under consideration in Ukraine. This is one draft law that Ukraine should be discouraged from passing because it is a dangerous development in breach of the bilateral trade agreement. It is also a development not unique to Ukraine, as it has been considered in several countries of the C.I.S., including the Russian Federation, as part of the comprehensive reform of the civil codes of these nations. In Ukraine, as in other countries in the C.I.S., the efforts to revise the civil code will result in the addition into that code of new copyright provisions inconsistent with Berne, WTO/TRIPS, and the bilateral trade agreement. Efforts to so revise the civil code in Ukraine should be opposed.

Last, Ukraine was not a signatory to either of the two new WIPO "digital" treaties. Ukraine should be encouraged to accede to and implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). Acceding to and implementing these treaties will protect against Internet and other forms of digital piracy, and help the development of electronic commerce in Ukraine. Accession and implementation provisions were agreed to by the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States (C.I.S.) in December 2000 in St. Petersburg as a way to modernize the copyright and neighboring rights laws of countries in this region. In fact, these resolutions and recommendations were agreed to by all 12 members states of the C.I.S., working in conjunction with officials from the W.I.P.O.

ENFORCEMENT

Until the Action Plan is fully implemented, the enforcement situation for the copyright industries will continue best to be summarized as one of complete failure. The general lack of protection and enforcement of the rights of copyright owners is preventing entry by the U.S. creative industries into the country, and stifling the development of local copyright industries. There is no effective legal structure in place to stop rampant optical media production, almost no border enforcement to stop the exporting of that material, and little internal police or judicial activity to crack down on commercial pirates, much less on retail-level activity.

The Ukraine enforcement problem is twofold. First, there are extremely high levels of piracy of all copyrighted products – music, sound recordings, business applications software, interactive entertainment software (on all platforms, CDs and cartridges), motion pictures, videos, television programming, and books and journals, throughout Ukraine (and the C.I.S.). Second, levels of piracy in the entire region are expected to get worse until the government fully implements the Action Plan and imposes strict monitoring of the illegal optical disk media production facilities in Ukraine that are producing these disks in Ukraine for foreign distribution.

The International Federation of the Phonographic Industry (IFPI) and the Recording Industry Association of America (RIAA) report that Ukraine is still the second largest music market after Russia in the C.I.S.; and it is the largest center of pirate music production. The recording industry

reports that piracy of international repertoire is estimated to be at least 95%. The total value of pirate sales, including exported CDs, is estimated at some \$200 million.

It is estimated the Ukraine exported at least 30 to 40 million pirate CDs in 2000. These include not only declared exports of product, but also many thousands of smuggled shipments as well.

The pirate production is damaging not only the Ukrainian market, but also other markets in the region, as well as in the EU. For example, Bulgarian authorities reported significant numbers of pirate CDs entering their market from the Ukraine — an ironic twist that clearly indicates that the Ukraine has firmly taken the mantle from Bulgaria as one of the world's prime producers and exporters of pirate CDs. Hundreds of thousands of pirate CDs (Latin American and international repertoire) have also been transported from the Ukraine to South America.

To add to the severity of the problem, Ukrainian CD plants and their related distribution companies offer their entire illegal catalog of recordings for sale via the Internet. These companies have no licenses from any music publishers or sound recording producers to replicate this material.

Throughout 2000, seizures of Ukrainian-made pirate CDs took place all across Europe. In one instance at the Frankfurt Airport in Germany, a shipment of 500,000 pirate CDs was seized. In July, a shipment of 110,000 pirate Ukrainian CDs was intercepted in Lithuania. Thousands of pirate CDs from Ukraine were seized on Malta in the Summer of 2000. In March, 50,000 illegal CDs were destroyed in the Kiev Stadium as part of an anti-piracy event organized by Ukraine's Tax Police. The illegal CDs were seized in February during a wide-scale operation on 2,000 retail outlets. In December 2000, 10,000 CDs were seized in London, all originating from Ukraine, illustrating how far the Ukraine problem has reached into Western European markets. And these are just some of the many examples of such seizures of Ukraine-produced material.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000 (these are preliminary figures for 2000 and will be finalized later in 2001). The level of piracy was estimated to be 90%. The software industry continued to experience exceptionally high levels of pirate product from Ukraine in particular. There was one reported seizure of mostly computer programs (along with sound recording material and videocassettes) in February 2001; a total of 30,000 optical disks was seized. So the software industry is vulnerable to the same optical media production and distribution problems that plague the recording (and audiovisual) industries.

In 2000, the industry began working with Ukrainian police to accomplish the first raids of reseller pirates, but this initiative did not progress very far. Criminal and civil litigation remain nonexistent, and the absence of *ex parte* provisions makes it impossible for rightholders to collect evidence without police assistance. Disappointingly, attempts at a government legalization decree remained bogged down for another year, and were unsuccessful.

The entertainment software industry (Interactive Digital Software Association, IDSA) is also vulnerable to the same optical media production and distribution problems as the other industries. The IDSA reports that material has been confiscated throughout Eastern and Central Europe that was made illegally in Ukraine, and that production levels are up several hundred percent from recent years in Ukraine. As in the music industry, the Ukraine producers have created a regional problem not just of production, but of the distribution and export of material throughout Ukraine,

the Czech Republic, Poland, Hungary, Russia, Belarus and the rest of the countries of the C.I.S. These are region-wide organized criminal operations for the most part.

The Motion Picture Association (MPA) reports that for the sixth straight year, the video piracy rate is at 99% and broadcast piracy remains at 95% (cable and satellite rates are unavailable). As in prior years, the main piracy problem for MPA remains rampant video piracy in shops and street kiosks. Pirate films regularly appear in Ukrainian kiosks within weeks of their U.S. theatrical release. Most are back-to-back copies of videos recorded from U.S. cinema screens. Police lack legislative enforcement tools, and organized criminal groups are believed to be heavily involved.

Broadcast television piracy is also widespread. There are three national television stations, two run by Ukrainian State Television, which broadcast original Ukrainian programming and retransmitted Russian signals. There also are many regional channels, which almost exclusively broadcast pirated films. Some of these stations use legitimate U.S. videos to make pirate broadcasts, often broadcasting the U.S. FBI anti-piracy warning at the beginning of those videos.

The Ukrainian Copyright Agency and the National Council for Television and Radio, which has licensing authority over Ukrainian television, have not been effective. The Ukrainian government should require compliance by broadcasters with copyright laws to obtain and maintain their licenses.

MPA estimates that trade losses in 2000 due to audiovisual piracy in Ukraine remained at \$40 million (unchanged since 1995).

The book industry continues to experience piracy as well, with most of the problem being books illegally printed in the Ukraine for sale in Russia. This includes both overruns of licensed works and the production of unlicensed works, which flow freely into Russia and the other countries in the C.I.S. as the result of lax border enforcement.

Last, in 1998, the Ukraine government promised to establish an interministerial committee on intellectual property enforcement. In February 2000, the Ukraine government announced that it was finally going to organize this committee. To date, there are no reports it has formally met, and if it has, there are no apparent signs of its activity or effectiveness in combating the spread of pirated material especially aimed at the production and distribution of optical disk media. As noted elsewhere, effective enforcement entails not only domestic (internal) enforcement, but proper border enforcement, to stop the flow of goods into and out of Ukraine. This necessitates that Ukrainian authorities coordinate their activities as well as provide customs officials with the proper authority to seize illegal material at the border without a court order, and give police and other enforcement officials the equivalent proper *ex officio* authority. Without this clear authority on the part of police and border officials, piracy will continue to worsen.

In sum, copyright piracy threatens not only foreign investment but also the development of local copyright industries in Ukraine and in the other countries of the C.I.S. This threat must be met by a coordinated legal and enforcement response. All enforcement agencies (that is, the police, prosecutors, judges, customs officials and the ministries of Justice, Interior, and Taxation) should treat commercial copyright infringement as a serious crime, and should have the tools in the criminal, criminal procedure, customs, and administrative codes to deal appropriately with the problem. In addition to the legal tools, clear government strategies and lines of authority should be

developed. And finally, the training of judges, prosecutors, customs officials, and police should be part of ongoing enforcement efforts once the legal reforms are in place, to develop an effective enforcement regime.

306 MONITORING

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

PARAGUAY

EXECUTIVE SUMMARY

The good news is that Paraguay deposited its instruments of ratification to both the WIPO treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – in November 2000. The dismaying news is that piracy levels remain high and enforcement by Paraguayan authorities remains generally ineffective in deterring the torrent of piracy. Estimated trade losses due to piracy amounted to \$221.3 million in 2000.

Paraguay still serves as a major transshipment point for pirated optical media product from Asia. In addition, industry-led raids in 1999 revealed Paraguay to be an industrial-capacity producer of pirated product. Organized crime elements continue to control aspects of production and distribution of pirated product. As in prior years, almost all of the anti-piracy actions which have been taken continue to be the result of industry-led, not government-led, investigative efforts. There is support from the government, but only after the industry conducts the investigation and presents the case to the authorities.

During 2000, the copyright industries were extremely dismayed to learn that members of the Paraguayan government had supported the construction of optical media plants in Ciudad del Este. Both plants were producers of blank CD-R's, destined solely for the pirate markets. In the case of one facility, the plant was authorized by the Vice Minister of Industry. When a second plant appeared, the defendants claimed to have Government's authorization. Industry has not been able to verify any such authorization but the GOP, through the Ministry of Commerce, has not been helpful to the industry investigation of the second plant.

There are hopes that the IPR prosecutors can improve matters, but they have not yet been effective or successful. The border remains porous; the various mechanisms Paraguay promised to implement to improve border checks have proven ineffective, though there have been some interdictions resulting in seizures involving substantial amounts of infringing product. Although small progress was achieved in 2000, the judiciary remains a hurdle to effective enforcement.

IIPA supports continued monitoring of copyright developments in Paraguay under Section 306 of the U.S. Trade Act of 1974.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings/ Musical Compositions	200.0	90%	200.0	90%	280.0	90%	130.0	90%	100.5	68%	20.0	72%
Motion Pictures	2.0	80%	2.0	80%	2.0	80%	2.0	85%	2.0	85%	2.0	85%
Business Software Applications ¹	6.6	82%	6.7	83%	5.2	85%	4.1	87%	4.6	89%	14.2	95%
Entertainment Software ²	9.7	99%	8.1	99%	8.4	99%	8.3	99%	7.5	97%	6.4	95%
Books	3.0	NA	3.0	NA	2.5	NA	2.5	NA	2.5	NA	2.0	NA
TOTALS	221.3		219.8		298.1		146.9		117.1		44.6	

BILATERAL ENGAGEMENT ON IPR

Overview of 1998 Special 301 Investigation

Three years ago, USTR identified Paraguay as Priority Foreign Country under Section 301 of the U.S. trade law in January 1998, beginning a nine-month investigation in February 1998. Right before the statutory deadline, on November 17, 1998, USTR announced its determination that certain acts, policies and practices of the Government of Paraguay regarding the protection and enforcement of intellectual property rights were “unreasonable and discriminatory and constitute a burden or restriction on United States commerce.” The investigation was concluded when Paraguay and the U.S. signed a “Memorandum of Understanding and an Enforcement Action Plan” (MOU) in which the Paraguayan government committed to take a number of near-term and longer term actions to address these inadequate practices. USTR terminated both the Section 301 investigation as well as its review of Paraguay’s IPR practices under the Generalized System of Preference program, which had commenced in October 1996 as part of the 1995 GSP Annual Review. Presently, USTR is monitoring Paraguay’s implementation of this MOU under Section 306 of the 1974 Trade Act.³

Summary of the 1998 MOU/Enforcement Action Plan

The November 1999 Memorandum of Understanding and Enforcement Action Plan includes both near-term and long-term commitments made by the Paraguayan government. The MOU focuses heavily on concrete actions related to enforcement and commitments to make

¹ BSA estimates for 2000 are preliminary. In IIPA’s February 2000 Special 301 submission, BSA’s 1999 loss and level figures of \$6.2 million and 82%, respectively, were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

³ In 1999, \$16.2 million in Paraguayan imports to the United States benefited from the GSP program, accounting for 34.5% of its total imports to the U.S. For the first 11 months of 2000, \$18.2 million of Paraguayan goods entered the U.S. under the duty-free GSP program.

maximum efforts to pass certain legislation and improve training of enforcement officials. For example, a “Special Enforcement Period” between November 17, 1998 and March 15, 1999 was established. A regular consultation mechanism through the year 2000 was scheduled, and the agreement will remain in effect until January 1, 2003. A brief overview is provided below to assist in placing 1999 developments in context.

Under the 1998 MOU, the Special Enforcement Period could be extended beyond March 15, 1999, if there was no significant reduction in piracy and counterfeiting. Paraguay agreed to take raids, seizures, investigations, prosecutions, border actions, and make timely disposition of cases. Paraguayan officials were to investigate all reports of judicial corruption. And the government promised to pursue persons and entities who fail to pay taxes. In addition, the MOU includes components related to education and training for judges, police, prosecutors and appropriate government officials, as well as cooperation and technical assistance between both governments

The MOU also addresses legislative reform needed to enhance criminal penalties for copyright infringement. The Supreme Court was to present to the Congress by November 30, 1998, amendments to the Criminal Code and the Criminal Procedure Code which would make copyright piracy a “public” offense (thus allowing the government to commence copyright cases on its own initiative). The Paraguayan government was to make maximum efforts to achieve enactment of this legislation by December 20, 1998 (the last day of the legislative session). It would also make maximum efforts to make trademark counterfeiting a public offense. If criminal penalties against piracy and counterfeiting were deemed insufficient to deter piracy, then maximum efforts were to be taken to achieve such deterrence, by further legislative reform. The Paraguayan government also agreed to take steps to ensure that civil *ex parte* remedies would be available.

The Paraguayan government also promised to issue a software decree by December 31, 1998, to require the use of legal software in all federal agencies. Rules and procedures on the use and acquisition of legitimate software were to be issued, and an inventory of existing software was to be prepared. The government was to ensure that all ministries eliminated all pirate copies of software by December 31, 1999. This executive decree (Decreto No. 1524) was issued on December 31, and entered into effect immediately. In addition, the government issued another decree on January 27, 1999 which apparently will place import controls on blank media (e.g., blank compact discs, audiotapes and videotapes).

The “Enforcement Action Plan” separately provides more detailed commitments and actions promised by the Paraguayan government which affect a wide range of activities, including conducting investigations, seizing and destroying infringing products, filing and bringing criminal prosecutions as permitted under law, revising customs procedures and increasing inspections, taking judicial efforts to resolve swiftly IPR cases, and improving public awareness.

One of the copyright industries’ most frustrating issues was that it took many months for the MOU obligations to circulate throughout the Paraguayan agencies. A flurry of resolutions and plans were prepared in advance of the bilateral IPR consultations held in September 1999. One of the key results was that the Special Enforcement Period was extended to mid-February 2000, in recognition of the Paraguayan government’s desire to achieve results under its new enforcement initiatives.

The copyright industries represented locally in Paraguay will continue to coordinate with Paraguayan enforcement officials, and the private sector is closely watching what actions are and are not being taken.

COPYRIGHT PIRACY IN PARAGUAY

Optical Media Piracy and Transshipment Remain Priority Problems.

Paraguay continued to serve as a destination for much of the pirated optical media product being produced in southeast Asia (e.g., Macau, Hong Kong, Singapore, Thailand, and Malaysia). Paraguay's dominant role in the region as a transshipper of pirate product to its neighbors continued last year. Ciudad del Este businesses continue to brazenly offer and sell obvious counterfeit optical media products from the gaming, music, software and video industries.

Over the last year, the pirates shifted their strategy and began importing blank recordable CD (CD-Rs) into Paraguay. Some 34 million units of CD-Rs were imported during 2000. These 34 million CD-Rs could cover 35% of the current legitimate CD market in Brazil. Pirates also began installing manufacturing plants to make blank CD-Rs in Paraguay. These plants serve both Paraguayan and Brazilian illegal CD-R replicators.

Paraguay's role as a substantial local manufacturer of pirated optical media was revealed in 1999. The recording industry found, with great surprise, that clandestine CD manufacturing companies had made their way into Paraguay via Brazil. These plants had the capacity to produce 40 million units per year (in comparison, the legal music CD market in Brazil was 85 million units for 1999). This discovery made clear the inadequacy of both Paraguayan and Brazilian customs. Moreover, when the pirates in Paraguay needed raw materials to operate these clandestine plants, these materials crossed the Brazilian-Paraguayan border very easily. These two CD plants were closed down, but now there are reports that there may be two more already in operation.

The Ministry of Industry and Commerce (MIC) authorized the two CD-R manufacturing plants that were founded under the Law de Maquila and the Investment Law. However, the government was obliged to inform – under several anti-piracy Memoranda of Understanding and agreements that have been signed – the industry about the existence of such plants. This did not happen.

Organized Crime Infiltrates and Controls Piracy in Paraguay.

Organized criminal groups are involved in the production and distribution of pirated and counterfeit product in Paraguay. Paraguay is key in the international distribution of optical media product, emanating primarily from production facilities in Southeast Asia. In Paraguay, organized crime elements from Taiwan, the Far East and the Middle East control much of the distribution in Ciudad del Este and in other cities. Much of the huge surpluses in the production capacity for the manufacture of audio compact discs, CD-ROMs, videogame cartridges and other optical media products in Southeast Asia is being devoted to pirate production and export, especially to Paraguay, for transshipment throughout Latin America. Organized groups from Korea, Lebanon, Libya, Brazil, Bolivia and Argentina are involved. Of course, Paraguayan groups also take part in these illegal activities.

The influence of organized crime pervades not only street distribution, but also affects the judiciary. In fact, both the recording industry and the business software industry, in cooperation with Paraguayan government officials, filed a request to the Supreme Court to place sanctions on a judge who summarily ordered the removal of seized goods that were under military guard at the Guarani Airport outside Ciudad del Este. In another case, the same judge seized 500,000 CDs from the jurisdiction of another judge, and then he tried to appoint the alleged pirate as the depositary of the merchandise. The Supreme Court of Justice did not condemn this judge, due to a technicality, but did privately reprimand him.

Piracy Remains Widespread in Paraguay.

The estimated level of recording and music piracy within Paraguay remains at 90%. Estimated trade losses due to recording and music piracy in Paraguay in 2000 are \$200 million, for both local piracy and estimated losses caused by transshipment. Transshipment and local manufacturing for export of CDs has the effect of devastating the legitimate market for sound recordings and music in other countries. Increasing amounts of pirate music CDs from Paraguay – up to 90% of all transshipments – are aimed for Brazil. Thousands of pirate CDs and CD-Rs are found in the streets and shopping centers in Ciudad del Este, which continues to be the major production and trade center for the export of pirated product going to Brazil and Argentina. In addition to CD piracy, audiocassette piracy continues to be rampant in Paraguay. The domestic Paraguayan market has basically been lost to the pirates, and the industry does not have any more direct representation in Paraguay. The piracy that affects Paraguay's national legal market is dwarfed by the piracy that involves production for export, or transshipment through Paraguay, of pirate product into Brazil, Argentina, and other countries.

The piracy situation for entertainment software has not changed much in the last year. The manufacture, sale, import and export of pirated videogames and cartridges in Paraguay is widespread, with the estimated level of piracy remaining at 99%. Estimated losses due to piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Paraguay increased to \$9.7 million in 2000. This statistic does not include estimated losses due to the transshipment of pirate and counterfeit entertainment software through Paraguay; if it did, this number would be much higher.

Both CD-based piracy of videogames (which includes console CDs for PlayStation®) and cartridge-based piracy remain major problems. In the last year, Paraguayan authorities, with industry cooperation, conducted more raids and seized much pirate and counterfeit product. While such seizures are welcome, the Interactive Digital Software Association (IDSA) has had difficulties in obtaining samples from the seizures as evidence to use in criminal cases. Paraguayan authorities are so focused on destroying the illicit copies in public destruction ceremonies they forget that they are also destroying key pieces of evidence. Paraguayan pirates import counterfeit videogame components and cartridges from the People's Republic of China, Taiwan, Hong Kong and other countries. These components are assembled in Paraguay and then exported to other countries in the region. Official Paraguayan import records reveal large-scale importation of video game products and components into Paraguay in huge quantities, over relatively short time periods, by importers with no relationship to Nintendo®, Playstation, or other authentic game manufacturers.

Paraguayan assemblers of counterfeit video game products (i.e., counterfeit Nintendo cartridges) must import sophisticated counterfeit video game chips⁴ from Taiwan. The video game chips are assembled, along with other components, into completed counterfeit Nintendo video game products. The industry has had some success in working with Paraguay customs to seize shipments and destroy infringing product. However, the agreement between Taiwan and Paraguay to exchange information on suspected products is not being honored by the Taiwan government.

The problems for the business software industry are twofold. First, Ciudad del Este continues to be a major source of piracy for business software, primarily for distribution to other Latin American markets such as Brazil and Argentina. Despite repeated raids in 1999 and 2000, Ciudad del Este resellers continue to advertise brazenly and sell pirated software. In addition, the industry has severe problems with end-user piracy. As with channel piracy, the government of Paraguay did not take a leadership role in combating this type of piracy or in raising the public's awareness of this issue. Estimated trade losses due to business software piracy in Paraguay are \$6.6 million, with an 82 % piracy level in 2000.

Copyright piracy has nearly destroyed the local market for audiovisual product. Within the country, video piracy continues to be the most significant piracy problem for the audiovisual industry. The video market suffers from an estimated 80% rate of piracy. The majority of these illegal videos are back-to-back copying for individual use, but counterfeited labels, packaging and security stickers often appear in video stores, indicating the growth of a more organized black-market production system.

Paraguay is also a significant threat to other Latin American audiovisual markets, however, because it is the center for exporting pirate product. The increasing organization of illegal reproduction, distribution and transshipment of pirate videos for export as contraband to neighboring markets such as Brazil and Argentina is a serious concern. In addition, Paraguay has long been a transshipment point for optical disc piracy (music, software and videogames), so as the market for optical discs grows in Latin America, especially in Brazil, Paraguay may inevitably be the origin of much pirate VCD and DVD. The overwhelming majority of illegal VHS production for export takes place in Ciudad del Este, along the border with Brazil and Argentina. Blank videocassettes are imported from Asia through the Brazilian ports of Santos and Paranagua to Ciudad del Este, where they are used for reproduction of products for the Brazilian market, subtitled or dubbed in Portuguese. Recent investigations indicate an increase in VCD export in this area. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Paraguay are estimated at \$2 million in 2000.

AAP reports that commercial piracy (full reprints) are available for trade book translations as well as English Language teaching materials used in schools and colleges. There are increasing amounts of photocopied materials being used in place of legitimate books in institutions of high learning. Trade losses due to book piracy were estimated at \$3.0 million for 2000.

⁴ "Counterfeit videogame chips" refers to (a) Read Only Memory (ROM) semiconductor chips which contain unauthorized copies of Nintendo videogame software, (b) counterfeit custom semiconductor chips containing Nintendo's copyrighted security code, and (c) illegal copies of Nintendo's custom microchip and picture processors.

COPYRIGHT ENFORCEMENT IN PARAGUAY

The key to effective enforcement in Paraguay is straightforward and has been clearly articulated and agreed to in the not-so-recent 1998 MOU: conducting raids against major distributors and facilities, seizing all infringing products and equipment, making arrests, and actually conducting criminal prosecutions. Administrative authorities in the various ministries should seize infringing product from streets and public venues. For the business software industry, raids against end-users who illegally copy and use software are key. Customs authorities must implement an effective IPR border control system by taking actions to stop both the import and export of pirated and counterfeit products and contraband. Prosecutors must press the cases, and judges must issue search orders and deterrent sentences. Effective judicial procedures must be adopted to expedite copyright cases through the legal system, and deterrent penalties must be imposed on defendants found guilty of infringing acts.

Police are Helpful but only after Industry Conducts the Investigations.

Part of this MOU included the creation of a special anti-piracy police unit, the Grupo Anti-Pirateria (GAP) that reports to the Minister of Interior. On September 26, 1999, the Minister of Industry and Commerce (MOIC) created an interagency anti-piracy group called "GAP" (*Grupo Anti-Pirateria*, or more formally, *El Consejo Nacional para la Protección de los Derechos de Propiedad Intelectual*). Decree No. 14870 provides that the selected federal ministries and the municipalities of Asunción, Ciudad del Este and Encarnación will work together to implement the national anti-piracy campaign and coordinate their activities toward accomplishing this objective. The GAP is comprised of 15 active intelligence officers who will perform investigations. The political and economic situation of Paraguay interrupted the formation of the GAP, which was formalized on paper but not in practice, reportedly until mid-2001. This group was to perform active investigations, especially post-raid, with access to intelligence files of other police agencies. It accomplished nothing in 2000. The government stated a requirement for private sector funding as a prerequisite for this agency. Private sector confidence has not reached the point where such a funding decision could be accepted. Effective investigation and enforcement has not been fully accepted by the private sector.

By Decree No. 2146 of March 9, 1999, the MOIC established an Inter-institutional Brigade, a specialized unit, to fight copyright piracy and trademark counterfeiting. This brigade was somehow substituted by the GAP, which is police-oriented. The Brigade was rife with corruption and the elements that were working on it are now dedicated to other matters. The recording industry conducted four actions with the Brigade, but then decided not to continue working with it because the Brigade's purpose was more political than operational.

The legitimate recording industry in Paraguay (represented by APDIF Paraguay) continues to be very active in conducting investigations and filing cases mainly against pirates operating in Ciudad del Este and Encarnación. The recording industry has continued to conduct raids based on its own investigations. In 2000, it conducted 77 raids which resulted in the seizure of over 2,960,000 units of infringing products (mostly music CDs) and the closure of 40 manufacturing facilities, most of the small-cottage CD-R replication facilities.⁵ 116 cases have commenced.

⁵ These 2000 statistics compare to 1999's results of 38 raids with 3.2 million CDs seized and the closure of 8 big manufacturing facilities.

The Interactive Digital Software Association (IDSA) initiated an anti-piracy program in Paraguay in mid-1999, resulting in 22 raids that year. Eleven cases are in process. In 2000, 19 raids involving game software were conducted, resulting in the seizure of 128,000 pieces of infringing product. Six criminal cases have been commenced and remain pending. As a result of IDSA's local anti-piracy training efforts and investigations with APDIF Paraguay, a group of police and judicial officers led a successful raid against what had been the largest clandestine CD manufacturing plant in Latin America. Two CD lines were hidden in a luxurious residence owned by the purported head of the Chinese mafia, and these lines were manufacturing pirate PlayStation videogames. In September 1999, Nintendo obtained a judicial seizure by Customs of 5,000 counterfeit Nintendo videogame chips in Ciudad del Este. Destruction of the chips was planned, as was a criminal lawsuit against the importer. In December 1999, raids were also conducted at the Galeria Page and Galeria Esperanza in Ciudad del Este, which resulted in the seizure of some 98,000 PlayStation games, memory cards, game controllers and game enhancers, valued at approximately \$325,000. In June 2000, Nintendo also had a big seizure in Ciudad del Este which resulted in destruction of the infringing products (see Customs discussion, below). The discouraging news is that cases filed more than four years ago are still pending.

Regarding business software enforcement, the BSA formally launched its anti-piracy campaign in Asunción in August 1999.⁶ The launch was conducted at a judicial/prosecutorial seminar cosponsored by the judicial college and by the U.S. Embassy. Shortly thereafter, the BSA promoted two successful raids against pirate software resellers in Ciudad del Este. One of the store's owners was arrested and spent several days in jail. Seized during the raids were approximately 1,700 pirated CD-ROMs and a CD burner. Since then, the BSA has also intervened in several actions initiated by IFPI in that city. One BSA member company is a co-complainant in the August/September 1998 raids which resulted in the seizures of hundreds of thousands of pirate audio CD and CD-ROM product in Paraguay.

In 2000, the BSA conducted eight criminal channel (retail) raids. Seven of these channel raids were concentrated in two shopping centers in Ciudad del Este, and yielded a total of 19,000 pirated CDs. Some of these establishments were repeat offenders. While previous channel raids in these shopping centers had concentrated on the establishments that sold the illegal software, this latest batch of actions also targeted the storage deposits on the top floor of one of these centers. Most of the CDs seized were found behind secret compartments in these storage rooms. Information gathered at these raids pointed to the existence of manufacturing facilities in neighboring Foz de Iguazu, Brazil. These cases are moving very slowly.

Hope for More Prosecutions Remains Dim.

There are three specialized IPR prosecutors in Paraguay, all in Asunción. The prosecutors now have the ability to pursue copyright infringement cases as "public" actions, thanks to Law No. 1.44, which entered into effect on July 9, 1999. The prosecutors began working hard on IPR cases, but the National Prosecutor then gave orders to them to devote all their time to other cases.

⁶ Because computer programs were not protected under Paraguay's old copyright law, it was impossible to bring copyright infringement actions. Since the copyright law passed in October 1998, BSA stepped up its enforcement activities in 1999.

BSA Conducted Its First Civil End User Action In 2000.

On the positive news side of the issue, a September 4, 2000 raid against an Asunción-area reseller resulted in the first-ever conviction for software piracy under the new, oral trial system. The accused in that case, Mr. Milton Camacho, was sentenced to a suspended sentence of two years of incarceration, payment of costs, compensation to the copyright holders for the damages caused, and the publication of newspaper ads in two general circulation newspapers. While certainly a step in the right direction, the fact that the accused received a suspended sentence detracts from the deterrent effect that this news would otherwise have had. The BSA's first foray into end user actions occurred in 1999 in a case against an automobile distributorship. Due to an information leak sourced at the courthouse, the raid was aborted. In February 2000, the BSA carried out its second end-user action of the campaign against a well known, and well connected, Asunción banking institution. Because of the number of personal computers to be inspected, the raid had to be continued a second day. However, after the bank's legal counsel had an *ex parte* meeting with the case judge on the morning of the second day, that judge recused himself for unspecified reasons and halted the inspection. Quick action by the BSA's local counsel achieved the immediate transfer of the case to another judge who authorized the continuation of the raid. That case is still pending before the court. In total, the BSA brought six end-user civil raids during 2000.

Paraguayan Border Measures Are Not Effective.

Because many piracy problems in Paraguay are centered in the border cities, the government should improve its Customs procedures to combat cross-border piracy and corruption of its agents. Pirates are adopting new methods to avoid the border, such as importing smaller shipments. The 200-kilometer border, which has no checkpoints, is also used by smugglers to avoid detection. As presently structured, the Customs system is an ineffective enforcement authority which cannot conduct searches without a court order.

Paraguayan Customs claims it has met the MOU requirement that it maintain its "red channel" system at Asunción Airport and extend this system to Ciudad del Este Airport and all other main Customs checkpoints. However, industries report that this system has not been properly implemented. Customs should maintain a list of products which are commonly infringed, and are supposed to work with rightholders to add suspect products to this list. All shipments of products on this list are to be inspected to determine whether or not they infringe the copyright or trademark laws. However, the fact that the two huge CD manufacturing plants, 34 million CD-Rs and tons of polycarbonate (the raw material used to produce CDs) entered Paraguay strongly suggests the lack of effectiveness of the "red channel."

In the experience of the entertainment software industry, the border authorities have only conducted a few random searches at the Paraguay/Brazil border. However, there is some good news to report. One of the largest single seizures of counterfeit videogame chips in Paraguay took place in Ciudad del Este on June 1, 2000. Private sector counsel working with Customs officials stopped a shipment of almost 215,000 Nintendo® game chips plus related materials for game assembly entering Paraguay. The value of this seizure was placed at \$2.8 million. The shipment originated in China, passed through Frankfurt, Germany, Sao Paulo, Brazil, and Foz de Iguacu, Brazil, before seizure in Ciudad del Este. These materials were destroyed on July 18. Also in June, Customs agents seized more than 5,000 disassembled counterfeit Nintendo videogame cartridges at the Silvio Pettrossi airport customs house in Luque, Paraguay. This shipment also originated in China.

Judges Slowly Start To Issue Sentences In Copyright Piracy Cases.

Over the last year, there has been some small improvement in the judicial system. In 2000, the courts, for the first time, issued nine judgments against pirates of sound recordings. Three decisions were issued. Sentences included imprisonment of 13 months and fines up to \$36,900 were imposed. The recording industry initiated 77 actions, and 39 remain pending.

A September 4, 2000 raid against an Asunción-area reseller resulted in the first-ever conviction for software piracy under the new, oral trial system. The accused in that case, Mr. Milton Camacho, was sentenced to a suspended sentence of two years of incarceration, payment of costs, compensation to the copyright holders for the damages caused, and the publication of newspaper ads in two general circulation newspapers. While certainly a step in the right direction, the fact that the accused received a suspended sentence detracts from the deterrent effect that this news would otherwise have had.

COPYRIGHT LAW IN PARAGUAY

WIPO Treaties

The one major legislative success in the past year has been Paraguay's ratification and deposit of its instruments of ratification to both the WIPO treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These instruments were deposited with WIPO on November 29, 2000. IIPA applauds Paraguay for taking this action, which will raise the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Copyright Law of 1998

For much of the 1990s, IIPA's primary legislative goal was the passage of a new copyright law to replace the old and inadequate 1951 copyright law. The new copyright law entered into effect on October 21, 1998 (Law No. 1.328/98). This 1998 law represents a much-needed improvement over the old 1951 copyright law. For the first time, computer programs are protected as literary works. Compilations of facts and databases are now protected subject matter. Audiovisual works also are protected, regardless of the medium in which they are fixed. The scope of exclusive rights was expanded, and includes distribution (including rental), a broad right of communication to the public (for authors only), and importation. After some delay, implementing regulations for this law were signed by the President on September 13, 1999 (Decree No. 5.159).

This report would be incomplete, if it did not continue to summarize the disappointments contained in the 1998 Copyright Law of Paraguay, despite concerted efforts by IIPA members and companies and the U.S. government to achieve a different legislative result. A brief summary of the major deficiencies in the 1998 copyright law follows:

- The final law contains a shorter term of two to three years' imprisonment (with levels of fines remaining unchanged). Earlier drafts of the bill had contained significant levels of criminal penalties, including a term of two to five years of imprisonment.

- The law does not include an express provision to make copyright infringement a “public action,” in which police and prosecutors can take action on their own initiative (as is found in the new trademark law). Amendments to the Paraguayan criminal code to make copyright infringement a public crime were needed to correct this gaping deficiency in the enforcement regime (this problem was corrected by legislation in mid-1999; see below).
- Neither the public communication right (for authors) nor the digital communication right (for producers) track the WIPO treaties’ concept of “making available.” In a digital age, it is critical that producers of sound recordings are provided with the exclusive right to control digital services, including on-demand or subscription services, consistent with WIPO treaties.
- A hierarchy established between authors and neighboring rights is contrary to international norms (including the WIPO treaties) and should have been deleted.
- The TRIPS element on the machine-readability of databases is missing from the final law.
- A Berne/TRIPS-incompatible provision permitting third parties to edit or translate works 20 years after the author’s death is still in the law.
- The general term of protection is life of the author plus 70 years, a term consistent with international trends. However, duration issues for other works varied wildly during the bill’s debate. Terms of protection, which had been proposed to be as high as 90 years, were lowered. Currently, the law affords a term of protection for producers of sound recordings of 50 years after first publication; this is consistent with TRIPS, but disparate from other copyrighted works under this law. The term of protection for collective works, computer programs, and audiovisual works is now 60 years after publication in the law. In recognition of the growing global marketplace and the need for harmonization of duration in order to ensure smooth functioning of the marketplace, industry had argued for longer terms for these works, such as 95 years from first publication.
- Onerous provisions which interfere with music publishers’ ability to negotiate freely over the allocation of rights and other issues related to the exploitation of a work must be deleted. One provision allows that the author/composer has the “irrevocable right to terminate” the agreement if the publisher fails to publish or print the work. This statutory requirement interferes with the right to contract and should have been deleted. Another provision provides a statutory payment formula for the author’s assigning profits and remuneration for certain uses of the work to the publisher, which interferes with the right to contract as well, and should have been removed.
- Administrative authority for the National Copyright Office to carry out surprise inspections and seizures was removed, and there does not appear to be any guidance on which a government entity actually does have such authority. This lack of investigative authority by Paraguayan government officials has been a major enforcement problem over the years.

Criminal Code Revisions

Paraguay approved reform of its criminal code, and the revised law entered into effect in October 1998. This reform, however, has caused more problems. First, Article 184 of the Criminal Code identifies cases involving acts infringing the author’s right. But it does not contain any

provisions regarding the infringement of neighboring rights, the rights which protect producers of sound recordings (*fonogramas*). The Criminal Code therefore does not protect against acts of piracy involving sound recordings. This new law in fact abrogated the penalties provided under an 1985 law (Law No. 1.174 of 1985) which established relatively strong criminal prohibitions for piracy of sound recordings, and also clearly provided that the State could proceed *ex officio* against infringers. The recording industry has been using the copyright law as its basis for enforcement efforts. The problem there is that the sanction is an alternative one: fines or imprisonment.

Second, the new criminal code provides a penalty of up to three years or a fine. Unfortunately, this allows judges to impose either a fine or a prison sentence. This kind of choice will likely limit the deterrent effect of the law because convicted defendants could buy out, or convert, their jail time into fines.

Third, the criminal code continued to state that copyright infringement cases are “private” actions, and can only be brought by complaint of the right holder; the State cannot take action *ex officio*. Under the MOU, the Supreme Court was to present to the Congress by November 30, 1998, amendments to the Criminal Code and the Criminal Procedures Code which will make copyright piracy a “public” offense. The Paraguayan government was to make maximum efforts to achieve enactment of this legislation by December 20, 1998, but sadly, that deadline was not met. Six months passed before there was good news to report on this issue. In June 1999, the President signed into law an amendment to the criminal code which made copyright crimes public actions, and therefore prosecutors can pursue these cases on their own initiative. This law (Law No. 1.44 of June 10, 1999) was signed on June 25, and entered into effect on July 9, 1999. This bill deleted language in the Criminal Procedures Act of 1998, which required that private parties had to initiate and bring prosecutions.

Government Software Management

In compliance with the MOU, the Executive Branch issued Decree No. 1524 of December 31, 1998, which includes provisions regarding the use and acquisition of legitimate software, and the taking of regular software inventories. This decree provides that all software in use by Executive Branch institutions must be legalized by December 31, 1999. A software inventory of programs on all executive agencies’ computers is to be completed annually in March. Importantly, all unauthorized programs must be legalized or removed from government computers by December 31, 1999. The Paraguayan government missed this end-of-the-year deadline and also failed to do an inventory on installed software.

In August 1998, the City of Asunción and the Business Software Alliance signed a software legalization agreement, in which the city committed to completely legalize its installed base within two years, and to start to purchase legitimate product in 1998. In August 2000, the Ministry of Industry and Commerce executed a legalization agreement that it had independently negotiated with a BSA member company. The agreement provides for the legalization of that member company’s software in use at the Ministry and at each of the four administrative agencies that report the Ministry.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

PEOPLE'S REPUBLIC OF CHINA

EXECUTIVE SUMMARY

Once again this year, IIPA recommends that China remain subject to Section 306 monitoring. Despite efforts made by the Chinese government to crack down on massive domestic piracy of all types of copyrighted products earlier in 2000, including raids netting hundreds of thousands of pirate optical media products, piracy rates in China continue to hover at the 90% level. Most alarming are reports of an increase in the production of pirate optical media products including DVDs by *licensed* as well as underground CD plants. The Chinese enforcement system continues to be plagued by a lack of coordination and transparency, making it almost impossible for Chinese authorities to launch and maintain an effective anti-piracy program. This is fueled by the ongoing problem of lack of real deterrence due to low administrative penalties and virtually nonexistent criminal prosecutions for major acts of piracy. China has, however, committed in writing to bring its copyright law and other enforcement remedies into compliance with TRIPS prior to accession, expected some time in 2001. In the run-up to China's WTO adherence, IIPA looks to China to undertake a coordinated and sustained campaign to reduce these high levels of piracy, by placing this task directly under a Vice-Premier and setting out clear lines of authority throughout the enforcement system. It is only by taking drastic, deliberate and creative action that China can bring its enforcement regime into compliance with its new TRIPS obligations – and with its obligations in the 1995 bilateral copyright enforcement agreement.

While some aspects of the enforcement system are working well (such as the NCAC title verification program for audiovisual works) and enforcement is better in certain regions than in others, growing domestic demand for copyrighted products of all kinds has resulted in a surge in domestic piracy, including continuing importation of optical media product from countries in Southeast Asia, like Taiwan, Malaysia, Macau, Hong Kong and others. Also of great concern is the increasing sophistication in the pirate market, including growing production of high-end DVDs, growing Internet piracy, and the growing production of higher quality counterfeit products, all indicating a maturing of the pirate market. Also of continuing concern is the still rampant piracy of computer software by business enterprises and the increasing trend in the preloading of computers with unauthorized copies of computer software. There are also reports that some CD production facilities are being smuggled back into China as other countries crack down and as domestic demand grows. While raiding activity continues, the copyright industries have seen little movement to increase administrative penalties or to move bigger cases to the courts for criminal prosecution. While the Chinese government has reportedly committed to looking at the problem of high monetary thresholds for criminal liability, there has been no sign of significant movement yet. Without deterrent penalties applied to larger pirate operations following criminal prosecutions, it is unlikely that China can significantly reduce its existing 90% piracy levels.

In last year's submission, we noted that the reorganized Office of Anti-Piracy and Pornography (NAPP), under the aegis of Vice Premier Li Lanqing, could possibly make a large dent

in the piracy problem. However, despite a number of successful crackdowns and seizures and despite much good will, the piracy levels have not gone down in the last year.

While problems in the enforcement system persist, China has begun attacking inadequacies and loopholes in its statutory and regulatory structure, after a long hiatus from the time it passed its initial copyright law and joined the international copyright conventions in the early '90s. A new draft copyright law, approved by the State Council on November 22, 2000, is now before the Standing Committee of the National People's Congress and also in late November, the Supreme People's Court issued a new "interpretation" of the existing copyright law that dealt forthrightly with the scope of legal protection on the Internet. This interpretation is quite helpful and cements some of the early favorable decisions rendered by the Chinese judiciary in the first set of on-line piracy cases in 1999 and 2000. IIPA commends the Chinese authorities for clarifying the application of its copyright law and procedures to the Internet. With Internet use growing exponentially in China (from 10 million in 1999 to 22 million in 2000), it was essential that the Chinese government act promptly and decisively in this area. However, another "interpretation" has not proved positive; the State Council and the People's Supreme Court must now review and significantly revise its existing "interpretation," issued in December 1998, with respect to criminal copyright infringements by eliminating the high liability thresholds, and making it easier for prosecutors to bring criminal cases and for courts to impose deterrent criminal penalties.

IIPA and its members are very pleased to see that the recent draft of the copyright law amendments do now contain provisions seeking to implement the provisions of the all-important WIPO "Internet" treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). While, as described in the copyright law section below, the draft IIPA has been able to review does not fully and correctly implement the treaties, this is a good start. We hope the National People's Congress will make the necessary amendments to implement correctly, adopt the amendments (including fixes to any TRIPS deficiencies as well) and ratify both treaties as soon as possible. The world waits expectantly for China to take this bold step and join the many other developed and developing countries that have recognized the importance of these treaties to creating a proper climate for e-commerce investment.

China has fallen behind in implementing the State Council's software legalization decree it issued in 1999 (followed in June 2000 by Document No. 18 reasserting such order) with respect to uses of unauthorized copies of software in government enterprises and ministries. This is key to building the software industry in China and demands clear rules and financial resources from the central government.

It is not difficult to sum up China's principal problem with its overall intellectual property regime: It is the absence of effective and deterrent *enforcement* that will drive the local copyright industries into the ground and continue to cause the international community to refer to China ignominiously - based on piracy levels of 90% and above – as the "piracy capital of the world."¹

¹ For a history of China's involvement in the Special 301 process, see Appendix E.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	90%	120.0	90%	120.0	90%	120.0	75%	120.0	85%	124.0	100%
Sound Recordings / Musical Compositions	70.0	85%	70.0	90%	80.0	56%	150.0	56%	176.8	53%	300.0	54%
Business Software Applications ²	658.7	93%	437.2	91%	808.4	95%	987.9	96%	507.5	95%	488.0	96%
Entertainment Software ³	NA	99%	1,382.5	95%	1,420.1	95%	1,409.4	96%	1,380.0	97%	1,286.0	99%
Books	130.0	NA	128.0	NA	125.0	NA	125.0	NA	125.0	NA	125.0	NA
TOTALS	978.7		2137.7		2,553.5		2,792.3		2,309.3		2,323.0	

COPYRIGHT PIRACY IN CHINA

Optical Media and Internet Piracy

The levels of optical media piracy in China across all lines of copyright business continue to remain high despite periodic raiding at all levels in the production and distribution chain. The Office of National Anti-Piracy and Pornography (NAPP) has reported that as of January 2001, 113 optical disk replication lines have been closed since the 1995 U.S.-China bilateral IPR agreement. Industry estimates are that as of January 2001, there are 72 factories operating 156 replication and mastering lines in China, with 14 lines producing DVDs. Overall capacity, not including underground plants that continue to spring up around China, is estimated at close to 550 million units annually.

Through 1999 there were virtually no reports of licensed plants producing more than negligible pirate product. This has changed in 2000 with reports that even licensed plants are now producing measurable amounts of pirate product for domestic consumption. This means there has been a marked fall-off in the monitoring of licensed plants by the appropriate authorities which must resume and a weakening of political will to raid licensed plants, as was done in 1996-97. In addition, there is continuing production from underground plants, including plants that are reported to have been smuggled back into China as other countries in the region, particularly Hong Kong, have adopted or are considering optical media regulations or are cracking down on their own plants. All this is being caused by significant increases in local demand for optical media products of all kinds in China, and what appears to be a fall-off in the aggressiveness of enforcement. That demand has also led to continuing imports of pirate optical media products from other territories in Southeast Asia, including Hong Kong, Macau, Taiwan, Malaysia and even Burma. Even though the general conclusion has been that Chinese authorities have indeed tried, through raiding and administrative proceedings, to fight piracy within China, that fight has not

²BSA loss numbers for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

significantly reduced the quantity of pirate product available in the marketplace; indeed, some industries report that amounts are increasing.

The recording industry confirms this analysis. Last year IIPA reported that official government estimates of the piracy rate for music and sound recordings in China now exceed that of the industry itself and RIAA/IFPI and IIPA used the Chinese government estimate of a 90% piracy rate. In 2000, RIAA/IFPI estimates sound recording piracy at 85%, a small drop due to significant improvements in the market in Shanghai (which is seeking to become a “model city” for copyright protection). The local industry continues to press its own government hard to do more, as they watch their own sales decline due to piracy. The international industry is very concerned that, despite the extensive controls within China on CD production (which controls are, however, not being fully implemented), the new optical media legislation in Hong Kong and Macau is likely to result in the reduction of imports of pirate product, leading to huge pressure to expand domestic production within China.

The crisis in the local industry is continuing but, in response to the onset of WTO membership, some cities have taken some positive actions. For example, Shanghai announced a series of policies in 2000 to try to clean up the market in a bid to become the culture center of China and the “modern city on copyright protection.” Shanghai is seeking the cooperation of international record companies. This is reflected in the Shanghai Music Festival, which took place in November 2000.

Reports continue that pirates purchase publishing numbers from legitimate audiovisual publishing houses, many of whom have to sell these numbers merely to survive.

Internet piracy, in particular Websites offering videogames and MP-3 files of sound recordings for downloading without authorization, remains a growing threat. There are now an estimated 22 million Internet users in China and that number is growing exponentially every year. While it is difficult to estimate the number of pirate sites, RIAA/IFPI report that there are at least 100 active Websites offering Chinese, U.S. and other international repertoire, down from last year’s figure of 200 sites. The reduction may be due to the MyWeb.com case which likely has succeeded in deterring some Web pirates. The IDSA reports very high levels of Internet piracy of videogames in China.

As discussed further below in the enforcement section, the Chinese courts should be praised for taking on Internet piracy even when some scholars within China believed that the copyright law was somehow unclear on on-line infringement liability. The Supreme People’s Court has now taken the positive step of issuing their “interpretation” which follows, indeed expands upon, liability for infringements decided in individual cases. However, Chinese administrative enforcement officials have not taken meaningful action against internet piracy despite requests to do so.

Piracy of audiovisual product in digital format also remains a serious problem, with continuing huge seizures of VCDs throughout China. Now new DVD plants are coming on line, with reports that a total of 14 exist, but with some not yet operational. It is clear that piracy in DVD format is increasing with many raids and large seizures in 2000. Already close to 700 titles of MPA product are being released in pirate form in China, which threatens further investment by U.S. motion picture companies in the DVD business in China. In Guangzhou, for example, it is reported that pirate DVDs are plentiful and sell for less than \$1! MPA also believes that in 2001 the

increase in the smuggling into China of illegal DVD production lines will continue without sustained vigilance by Chinese authorities. In January 2000, NAPP, the Ministry of Finance, PPA and the NCAC announced a reward scheme for information on pirate optical media production. This scheme assisted in the successful raiding of many CD plants in 2000 and led to the first seizure of DVD lines being used to pirate U.S. motion pictures. NAPP has reported that in early February 2001, another two underground DVD lines were seized in Guangdong Province.

While MPA reports some progress in fighting piracy, the scope of the problem remains immense. A December report in The NY Times related the story of one of the largest Chinese distributors of U.S. product who sold 300,000 legitimate copies of Titanic while pirates sold an estimated 20 million to 25 million. The owner of this business reported that pirates generally outsell the legitimate distributors by 35 to 1! That story also reported that within a week after the November 17 release of How the Grinch Stole Christmas, VCD copies were on sale in the major cities for \$1.20 each! The LA Times reported in August 2000 that pirate DVDs containing Three Kings on one side and Stuart Little on the other side were selling in a Beijing retail shop for around \$3. The article reported that prerelease copies of films like Gladiator, shot by camcorder in the theater and called "cinema versions" were also available shortly after U.S. theatrical release for less than \$2. MPA reports that on January 17, 2001, Hong Kong Customs seized 2.2 million CD-ROMs from a vessel bound for China containing pirate movies (approximately 33,000 were MPA member company titles) in compressed format with the films covered by JPEG image files to hide them. As a result, the Hong Kong manufacturers were raided and five replication lines were seized plus molds and stampers. This illustrates both the current sophistication of pirate operations in Hong Kong and is but another example of how much product is being imported into China to satisfy the booming domestic market.

Pirate VCDs, CDs and CD-ROMs are sold in distribution networks consisting of large wholesalers and distributors, retail shops, street markets and individual vendors. On a positive note, MPA reports that the Chinese authorities plan to close down two-thirds of the over 40 audiovisual marketplaces that have become havens for pirate distributors.

In the area of computer software, a nationwide survey of over 80 Chinese software enterprises, conducted in mid-2000 by a research entity under the Ministry of Information Industries, found that the number one barrier to their development was the widespread piracy of their products. The most damaging type of piracy is the unauthorized use of software by companies (discussed below), but counterfeiting and hard disk loading are also major concerns. Some governments have sent helpful orders to the marketplace not to sell unauthorized copies of software or preload illegal software on computers before they are sold. These are model public education efforts that should be replicated throughout China. However, they will not be taken seriously without vigorous and sustained enforcement coupled with meaningful penalties. Unlike with other pirate products, there was no concerted crackdown on the illegal sale of pirated software in 2000 despite its widespread availability and open sale in many markets. The government is encouraged to initiate a crackdown on the open sale of pirate software, or at the very least include pirate software in the government's nationwide crackdowns on pirate audiovisual and musical products and counterfeit products. Increased attention should also be given, particularly by the AIC and PSB, to the increased production and availability of high-quality counterfeit software products in the marketplace. Finally, there is a growing trend on the part of computer manufacturers, distributors and retailers, to load illegal software onto computers before they are sold. In many cases this takes place when the computer manufacturers either sell empty machines or sell machines loaded with one type of software, knowing that it will be replaced at some point in the

distribution channel with illegal software. Government officials have taken limited action against this hard disk loading piracy. The penalties are minimal (less than 5,000 RMB, or \$600) and are seen as a mere cost of doing business by the pirates. Far more raids and stiffer penalties are necessary to address this problem.

Other than via seizures of other pirate product (like VCDs) where pirate console and PC-based games show up, China has made no concerted effort to get at the piracy of videogames in China, which remains at among the highest levels of all copyright industry products. It is estimated that pirate console-based videogames constitute 99% of that market in China (though piracy of PC-based games is reported to be significantly less). It is reported that close to 50% of console-based games are imported from Malaysia, Taiwan and Macau (compared to almost 100% in 1999), whereas there has been a marked reduction in the import of pirate PC-based games (from 70% in 1999 to under 10% in 2000. It is suspected that this is due to the reemergence of domestic pirate production to satisfy an increasing local demand.

Government Use and Corporate End-User Piracy of Business Applications Software

As in other countries, unauthorized use of software in enterprises in China causes well over half the piracy losses faced by the software industry. In February 1999, the State Council reissued a "Notice" released by the National Copyright Administration of China in August 1995 ordering all government ministries at all levels to use only legal software. This welcome announcement (the so-called "Red Top Decree") put the highest levels of the Chinese government behind software legalization throughout government ministries, and sent a message to the private sector that it should not be using software without authorization. On June 27, 2000, the State Council again spoke on this issue with the release of Document No. 18, which made clear that no entity (public or private and regardless of level) might make unauthorized use of software. In 2000, the Business Software Alliance cooperated with the National Copyright Administration to carry out a series of software asset management training seminars for government officials and some companies in four markets, and looks forward to expanding that program to another four to six markets in 2001. BSA is also encouraged by the steps the Shanghai government plans to take to implement Document No. 18, including setting up a special fund for the legal licensing of software by government entities, and by the apparent movement in the same direction by the Beijing government. However, far more needs to be done to make the orders contained in the State Council Decree and Document No. 18 a reality, including programs initiated by the central government. The most urgent need is for detailed software management guidelines governing the procurement and use of software; ensuring that government entities have the funding to comply with these guidelines; and ensuring that government officials receive adequate training on the management of software assets.

APEC leaders decided last year to make it a priority to promote the legal use of software in their markets, in particular in all government entities. As the 2001 host of APEC, China has an opportunity to show leadership in this area, but this will require taking some early, concrete steps towards government legalization.

End-user piracy in the private sector remains the greatest barrier to the development of the software industry in China, domestic and foreign companies alike. Unless steps are taken to establish an effective administrative and judicial enforcement regime against this type of piracy, it

will continue to retard the growth of this critical industry. As noted below, enforcement in this area has been very difficult.

Other Types of Piracy

Piracy of music CDs is, of course, very high but pirate audiocassettes still have a major share of the market in China. On the other hand, videocassette piracy has shrunk significantly in favor of VCD and DVD piracy, the latter growing at an alarming rate.

The unauthorized public performance of U.S. motion picture product continues mostly unchecked in hotels, clubs, minitheaters and even government facilities. These public performances compete directly with plans to release popular titles in Chinese theaters and threatens the development of the legitimate theatrical market in China. Although the Chinese authorities have taken a number of actions against these facilities, the thrust of these actions has been against pornography, not copyright protection.

Television piracy continues to be a concern in 2000. There are 38 provincial broadcast television stations and 752 local stations, all run by the government, which reach over 300 million households. These stations commonly make unauthorized broadcasts, increasingly including popular MPA member company titles. These stations commonly rely on counterfeit "letters of authorization" or "licenses" from companies in Hong Kong, Thailand or Taiwan, which purport to have rights to the title. Some stations also try to hide behind the "fair use" exception, broadcasting heavily edited versions of MPA member company films under the guise of "introduction to film."

There are approximately 2,100 registered cable systems in China, serving 70 million cable households, plus 1,000 cable systems in remote areas, all of which routinely include pirated product in their programs. Since 1999, only enforcement actions against Hanzhou Cable TV (October 1999) and Qsintao Cable TV (June 2000) have been taken.

Cartridge-based games suffer high rates of piracy as well. Retail pirate sales activity is rampant and China Customs has been unable to adequately restrict the import of pirate integrated circuits and components manufactured in Taiwan and then assembled in China for domestic consumption and export.

AAP has found no noticeable improvement in the market for books and journals in China in 2000, with piracy still hampering development of the legitimate market. Though there are some licenses in China, and though some illegal reprints of legitimate editions result in administrative actions and small fines, on the whole piracy of U.S. works continues unabated. The vast majority of illegal copying is in educational institutions. Scientific and professional journal subscriptions are virtually nonexistent, while the number of students and researchers in institutions of higher learning, and professionals in state institutions, grows. It is estimated that pirated journals make up between 50% and 90% of the journal holdings of nearly all of China's approximately 1,000 universities. For example, IIPA reported that only nine subscriptions to Chemical Abstracts — the most important journal and database in the field of chemistry — were bought in 1999 by the entire Chinese government. In negotiating a higher education loan with the World Bank, an offer for funds to update journal collections was apparently refused. The reason given was that: "journals are purchased domestically"!

Traditional reprint piracy is also prevalent. *China Daily* reported In June 2000 that piracy of the most popular English textbook in China, *College English*, caused losses of \$2.4 million just to the Chinese distributor of that text, the Shanghai Foreign Language Education Press.

No one is allowed to publish without getting a publishing license and being assigned an ISBN number. It has been reported that some local publishers sell ISBN numbers to would-be publishers, which then publish illegal translations. The recent huge worldwide success of the Harry Potter books created its own anecdote. A legitimate Chinese publisher paid an advance of \$17,000 for the first three books, a *de minimis* figure for these titles. The publisher's argument was that the books would be pirated immediately and he could not expect significant sales. The publisher was of course correct; immediately there were huge pirate print runs, and apparently in several editions! Losses to the U.S. publishing industry are estimated to have increased to \$130 million in 2000.

COPYRIGHT ENFORCEMENT

Administrative and Criminal Enforcement

In 2000, the enforcement problems that have plagued China continued, despite significant raiding activities in some cities and a number of successful campaigns in early 2000 against pirate optical media factories. These problems include virtually no criminal prosecutions and attendant deterrent penalties that would help cut down on pirate optical media production by owners of these factories and generally ineffective and nondeterrent administrative enforcement against distributors and retailers, with low fines.

MPA, acting in concert with NAPP and other national and local agencies, cooperated in a number of major raids in which at least 200,000 DVDs were seized. NAPP coordinated an additional raid in July where two DVD lines were seized (a first in China), as well as 200,000 more VCDs and DVDs with an estimated total worth of \$12 million. More than 35 people were arrested in these various raids, which were part of a general anti-piracy campaign during the first two-thirds of 2000. While this kind of activity is welcome, the industry has no report on what happened with the persons arrested, whether they were merely fined, prosecuted criminally or let go altogether. More transparency in this part of the enforcement process is desperately needed. *The LA Times* reported that during the campaign in the early part of 2000, 1.72 million pirate optical media products were seized. While this is positive, it also illustrates the massive dimension of the problem.

It is hoped that a new atmosphere will develop as China gets closer to WTO membership. China has, in a number of documents and protocols, promised major enforcement reforms which it agreed to have in place by the date of its accession. That date appears to be approaching and while China has put itself on the road of legislative and regulatory reform, actual sentencing with deterrent penalties has yet to emerge. The government is now freely acknowledging that enforcement efforts remain insufficient and more needs to be done to deter piracy. In part this is due to the near completion of the bilateral agreement on China's joining the WTO, but it is also due to greater pressure from local industries (often in combination with the U.S. and international industries) increasingly damaged by the high levels of piracy in China and now willing to press openly for change.

As noted above, the copyright industries uniformly experience high rates of piracy and find it difficult to measure progress because of the lack of transparency in the enforcement system, particularly the lack of industry access to levels of fines and other penalties for infringement. While the Chinese government claims huge successes through statistics purporting to summarize results from enforcement actions, Alliance members have no way to verify these accounts. For example, as we reported last year, NAPP has claimed that over the last five years through 1999, 6,536 pirate “dealers” have been subjected to jail terms and 12,179 “copyright violators” have been fined. These statistics came as a surprise to our industries, which have, according to the latest reports, rarely seen a jail term ever imposed for piracy of a U.S. work. (IIPA suspects that these so-called “jail terms” involve convictions for pornography, not copyright infringement.) In 2000, however, the Chinese press in Shanghai reported a criminal conviction of a Chinese citizen that infringed Chinese works, in that case, copyrighted maps. The court found that the two defendants printed 170,000 counterfeited maps, sold 112,000 of these and earned roughly \$13,250. This was enough to meet the minimum thresholds under Article 217 of the Criminal Code and the court sentenced the two defendants to two years and one-and-one-half years in prison. U.S. copyright owners would be most pleased to see this kind of result in the cases involving the 34 arrests in the optical media factory raids described above. So far, this has been rare, at best.

There are myriad deficiencies in the administrative enforcement system in China, but as discussed below, some of these appear to be the target of legislative and administrative changes now pending:

- The NCAC has continued to require clearance in Beijing of copyright enforcement actions taken locally by copyright bureaus involving foreign rightholders. This has slowed down and bureaucratized enforcement at the local level and in many cases effectively stopped any action from taking place. Requiring this procedure only of foreign rightholders (the procedure is enshrined in the copyright law regulations) is a clear violation of the “national treatment” principle in TRIPS. In the IPR protocol agreed to between the U.S. and China in connection with WTO accession, China promised to eliminate this practice before adherence.
- Copyright officials do not have the clear authority to take action against key types of piracy, or the resources and political mandate to do so. For example, it is unclear to many officials what authority and powers they have to address the problem of rampant corporate end user piracy. Even if they did have this authority, they have few resources to take this problem on, and perhaps most importantly do not have the clear political mandate to take action in this area. These problems must be addressed if meaningful administrative enforcement is to be taken against this type of piracy.
- Fines are too low, both as written and as imposed; these need to be increased significantly, imposed in practice and widely publicized throughout China, and the results provided to the U.S.G. as promised in the bilateral IPR agreement. China has only promised to recommend changes to the Supreme Court interpretations setting the high threshold for criminal liability and it has indicated that administrative fines will be increased, but no specific actions have yet been taken. In a very promising development, the State Council has proposed instituting statutory damages in civil cases (see below).

- Markets and retail shops selling pirate CDs, VCDs and CD-ROMs are not being closed even after subsequent administrative “convictions” for copyright piracy or trademark violations. The IPR protocol promises that this will change, but the new draft copyright law does not appear to include this as an additional remedy for infringement. Enforcement against this type of piracy by other authorities, in particular the AIC and PSB, is also critically important and these entities should be directed to impose deterrent penalties.
- The system is almost entirely nontransparent; it is often impossible to ascertain what penalties are imposed in particular cases. Rightholders cannot, for example, obtain documents from the government on the activities of CD plants (even though every order the plant accepts must be recorded and reported to the authorities). Foreign rightholders are usually told that these are “national confidential documents.” IIPA members have no evidence that these practices will change.
- There is a lack of time limits for investigations, leading to long delays and resulting failure to deter pirates. Prior drafts of the copyright amendments would have required executing civil provisional remedies within 48 hours of the request by the right holder. Unfortunately this provision has been deleted.
- There is still “local protectionism” by administrative agencies involving politically or financially powerful people engaged in pirate activities.
- Administrative enforcement for copyright infringement against public performance piracy has been nonexistent; the same is true for cable piracy.

In contrast with the above, however, MPA continues to report positively on the title verification program run by NCAC. At the end of August 2000, a total of 6,089 title verification requests have been submitted to NCAC by MPA, and 2,594 titles have been challenged as unauthorized.

**ADMINISTRATIVE COPYRIGHT
ENFORCEMENT STATISTICS
2000**

ACTIONS	2000 MPA
Number of raids/searches conducted	636
Number of administrative cases brought by agency	631
Number of defendants found liable (including admissions/pleas of guilt)	631
Ratio of convictions to the number of raids conducted	99%
Ratio of convictions to the number of cases brought	99%
Number of cases resulting in administrative fines	440
Total amount of fines levied	N/A
US\$0-\$1,000	401
\$1,001-\$5,000	37
\$5,001-\$10,000	2
\$10,000 and above	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	

With respect to criminal enforcement, IIPA provided, in its last three annual submissions, a detailed analysis of the new criminal law provisions and the Supreme People's Court's "interpretation" of those criminal provisions. Because these actions by the Chinese government and Judiciary made it even more difficult to meet the threshold of criminal liability, there have been virtually no criminal actions commenced involving U.S. copyrights, further diminishing the deterrent impact of the enforcement system.

We urge the U.S.G. to press the Chinese government to redeem its commitment at least to "recommend" to the Supreme People's Court that its "interpretations" be significantly amended to make criminal prosecutions more available. Indeed, as discussed below the State Council has ultimate authority merely to order those amendments.

CIVIL ENFORCEMENT

One positive development is the increasing sophistication and effectiveness of the IPR courts throughout China. One fallout from this positive development is the increase in the number of civil cases for damages being brought by Chinese right holders and increasingly by U.S. right holders. The recording industry has increasingly turned to civil remedies, including in the Internet piracy area, since criminal enforcement is simply unavailable as a practical matter. The results have been generally positive with the previous problem of woefully inadequate damages being turned around slowly as the judges become more aware of the economic harm being done by infringements throughout Chinese society and the economy. Hopefully, this trend will accelerate when the new copyright amendments, spelling out the measurement of damages and improving civil procedures, including improved provisional remedies and for the first time establishing statutory damages, are adopted.

One recent case of note, filed in December 2000, involves a civil suit by the Educational Testing Service (ETS) seeking damages against the Beijing New Oriental School, which has for years administered the TOEFL and GRE tests to Chinese students seeking entrance into U.S. universities. ETS alleges that the school has been stealing ETS's highly secure test questions and test forms and selling them to its students at a significant profit. The school also distributed these highly secret test questions widely in China. ETS claims that the security and integrity of the tests have been compromised to the extent that it has led some U.S. universities to doubt the authenticity of all test scores from China, harming the entrance prospects of Chinese students. The school had been sued by ETS before but that suit failed to stop the conduct. The case is pending in the Beijing People's Court.

Civil Cases Involving Internet Piracy

Last year we reported on a number of Internet cases decided in favor of rightholders, in spite of arguments by some Chinese academics that the copyright law could not be applied to on-line activities. These cases included the *Beijing On-Line* case, the international recording industry's case against MyWeb.com, the latter having been settled favorably by the record companies. Since then, other rightholders have received judgments against on-line infringements.

With the recent issuance of the Supreme People's Court's "interpretations" of the copyright law and on-line infringements, many of the purported ambiguities have been settled in favor of right holders, including liability for linking activities. These interpretations are discussed further below.

DEFICIENCIES IN STATUTORY LAW AND REGULATIONS

New Copyright Law Amendments

In IIPA's 1999 Special 301 submission, we reviewed the latest draft of the new copyright amendments that were at that time pending before the Standing Committee of the National People's Congress. IIPA noted the large number of problems with that draft and its incompatibilities (and those of the 1990 law) with TRIPS and Berne. That draft was then withdrawn and a new draft was approved by the State Council on November 22, 2000 and transmitted to the National People's Congress to begin its review process. The draft analyzed here may not be the latest draft pending in the NPC, since it is reported that the draft is a work in progress. Nevertheless, we here provide the main outlines of the draft and IIPA's comments.

This new draft makes a number of positive amendments, many of which move into the law provisions that are currently contained in the implementing regulations issued in June 1991. It also includes, as noted above, provisions seek to implement the WIPO treaties. Below is a brief and preliminary discussion of the most important of these changes.

1. The new draft amends Article 3 of the current law (which lays out protected subject matter) and which now reads "cinematographic, television and video-graphic works" to read "cinematographic works and other works created by similar means." This is an odd amendment which comes close to incorporating the archaic and outmoded phraseology of the 1971 text of the Berne Convention, e.g., "...and works created by a process analogous to cinematography." The motivation is unclear and the previous description is highly preferable. The modern trend is to be technologically neutral and therefore refer to an "audiovisual work" which would include a cinematographic film, a motion picture embodied in any medium, a television program (regardless of medium) etc. This problem is compounded since "videographic works" receive treatment under neighboring rights, creating possible confusion. All audiovisual works, regardless of format must be protected as works under Berne and TRIPS. We suggest that this formulation be further amended.
2. A revised new Article 8 authorizes the creation of collecting societies which can sue in the names of their members. But it is left unclear whether this provision extends to the creation of anti-piracy organizations which can "enforce" the rights of their members in the association name. This change is sorely needed in China, particularly for the benefit of foreign rightholders, and other laws or regulations which inhibit the formation of such organizations should also be amended or repealed. In the draft provision, the State Council retains the right to develop specifics in this area and the drafters have expressly declined to define the issue further. It is also not clear whether and how this provision will apply to allow collecting societies to represent only foreign works or sound recordings, or foreign collecting societies seeking to represent Chinese works or sound recordings.

3. Article 10 is significantly revised to spell out the moral and economic rights of authors and other rightholders. Article 10(3) dealing with moral rights includes a broad right of alteration, which is not part of the moral rights provided in the Berne Convention's Article 6*bis* and, if unwaivable, would conflict with the economic right of adaptation which is fully transferable. This provision should be deleted. Moreover, the right of integrity does not limit that right to acts which would be "prejudicial to his [the author's] honor or reputation."
4. Article 10 now spells out specific economic rights and eliminates the prior formulation of the "right of exploitation" and the words "and the like" which permitted the right to be interpreted very broadly. The rights as stated appear complete from a TRIPS standpoint, but the provision implementing the WCT public communication/making available right is unnecessarily limited to transmissions "through the Internet." The drafters must avoid tying these exclusive rights to particular technologies. Limiting the right to this particular means of transmission would be incompatible with the technologically neutral provision in the WCT. The "through the Internet" language should be deleted. The spelling out of a specific right of reproduction also does not take advantage of the opportunity to clarify that temporary and transient reproductions are covered as required by Berne, TRIPS and the new treaties. This clarification is of primary importance to establishing a baseline of protection for works, particularly in the digital, networked environment. A right of importation should be included.
5. A new Article 23 lists various exceptions to exclusive rights which, expressly subject to the tripartite test in TRIPS Article 13 are nevertheless overbroad. Examples include Article 23(7) which would allow a State organ to make "use" of a work "for the purpose of fulfilling its official duties." This can be interpreted to permit, for example, reproduction of textbooks without compensation in State educational institutions – a clear TRIPS violation. Article 23(9) providing an exemption for free live performances of any work should be limited to nondramatic works. Other provisions also need to be expressly narrowed, including the broad private copying right which must be subject to exclusive rights in many circumstances occurring in the digital and Internet environment.
6. A new Article 24 is included which sets up a compulsory license for anthologizing for purpose of creating textbooks. The provision is somewhat unclear in IIPA's translation and would appear to be limited to the first nine years of the Chinese educational system. If applied to higher level foreign textbooks, this provision would blatantly violate the Berne Convention and TRIPS. However, since the bilateral international treaty regulations and Berne and TRIPS govern and supercede inconsistent domestic law on all subjects relating to copyright and foreign works, it would appear that this provision may have been intended to apply only to Chinese works. Unfortunately, however, this provision, if interpreted broadly, would dash all hopes of eliminating the current two-tier system of protection under which Chinese citizens and works enjoy a lower level of protection than their foreign counterparts.
7. A new Article 36 creates a publisher's right in the layout of a literary work (including newspapers and magazines) and its "decorative design" is added with a term of 50 years.
8. The draft does not take advantage of the opportunity to extend terms of protection to life plus 70 years and 70 or 95 years from publication. This is the modern trend.

9. A new Article 41 spells out the rights of producers of sound recordings. The draft should include exclusive public performance and broadcasting rights (rather than the right of remuneration in Article 45) and the exclusive public communication/making available right should not be limited to transmissions “through the Internet.” Even if an exclusive broadcast/public performance right is not included, provisions should be added to ensure that certain uses of sound recordings that are the equivalent of interactive transmissions in economic effect should be given an exclusive right. An exclusive importation right should also be added.
10. The amendments also do not clarify that Article 18 of Berne applies fully to the objects of neighboring rights, particularly to sound recordings owned by foreigners. However, this right is granted in the international treaty regulations and, as noted, treaty provisions prevail over inconsistent statutory law. It is unclear, however, why this change was not made directly in the law.
11. There is a new Article 47 to provide for the equivalent of a temporary restraining order or preliminary injunction in a civil case. One TRIPS deficiency in the Chinese law has been the absence of a specific provision granting *ex parte* search authority to stop infringement and to preserve evidence as required under TRIPS Article 50. While IIPA commends the addition of this important remedy, two matters must be clarified. The amendment makes no mention that the remedy applies “without notice to the defendant,” namely the critical *ex parte* element of Article 50, nor is it clear that the remedy extends this provisional remedy to cases where it is used to preserve evidence, so important to the software industry in particular. IIPA’s translation does read that the plaintiff may also apply for the “adoption of property preservation measures,” but this could apply only to the infringing articles themselves and not to all other documents and other material that would be evidence in a subsequent civil proceeding. If necessary, this must be clarified or modified further in order for China to meet its TRIPS obligations.
12. The old Article 46 (new Article 49) has been amended to add specific TRIPS–required remedies such as confiscation etc. (These remedies were included in the 1991 implementing regulations but not in the Law itself). The provision permits the NCAC not only to assess damages but also an administrative fine. The current law says damages “or” a fine. Liability is extended to the new “making available” right, but, as noted above, only when that act is committed “through the Internet.” This phrase should be deleted.
13. A new subarticle (6) has been added to the new Article 49 making illegal intentionally circumventing technological protection measures (TPMs) and removing or altering rights management information (RMI) – both WCT and WPPT obligations. However, the TPM provision extends only to the act of circumvention and not to devices (or components) and services used to circumvent when they meet the three tests included in the DMCA and the proposed EU Copyright Directive. The NPC must extend protection to such circumventing devices and services in order to meet the “adequate and effective protection” obligation of both treaties. Without such addition, this protection will be rendered meaningless as a practical matter. Moreover, the provisions on TPMs and RMI, since they are not copyright violations, should be dealt with in a separate article to ensure that these “violations” are not subject to all the rules which might apply to copyright infringements.

14. A new Article 50 is added spelling out measurement of damages. This is a welcome provision. It includes reference to actual losses or to unlawful income where actual loss is difficult to calculate. It also includes specific language allowing the court to impose statutory damages where it is difficult to prove actual damages. It sets a ceiling amount of 500,000 Yuan or about \$60,500. While this amount is too low if very large infringements are involved, it is nevertheless a welcome development which will assist in deterring certain types of piracy. Unfortunately, the amendment is unclear whether these new statutory damages apply per work, per copy, or per act. The provision would be far more useful and effective if it was clarified to apply to each copy infringed, and for the determination as to whether to rely on statutory damages lies with the right holder rather than the court to ensure that the difficult and sometimes impossible process of determining actual damages can be avoided entirely where appropriate. At present, the provision seems to leave this question to the discretion of the judge. The explanatory material accompanying the transmittal of the Bill to the NPC states that this provision provides "for heavier administrative penalties." It is true that the draft spells out specific new clarified remedies of confiscation and requires restitution "and" a fine, but it is hoped that new regulations will be issued also increasing the administrative fine maximum to an amount larger than the current 100,000 Yuan or \$12,100.
15. A new Article 51 is very useful and shifts to the defendant the requirement to prove that the acts involved were not authorized and that the copies being distributed "have a lawful source." Essentially this imposes a standard of strict liability on the defendant including shifting the burden of proof. This provision could be most useful as an anti-piracy tool.
16. While the copyright law does not deal with criminal remedies, it nevertheless is critical that knowing corporate end user piracy is criminalized, as required by Article 61 of the TRIPS Agreement. This should be clarified in the Criminal Law or in appropriate software regulations or Court "interpretations" and finally put beyond question.

While this is only a preliminary analysis, it is clear that while there remain some TRIPS deficiencies, the amendments contain a number of very positive changes, particularly in the area of civil enforcement. It is hoped that the amendments will be further modified to deal with these remaining deficiencies, that the onerous two-tier system will be fully eliminated, and that administrative remedies will be further enhanced. And now given the issuance of the Supreme People's Court's "Interpretations" (discussed below) on the scope of the existing Copyright Law and liability in the on-line environment, it is even more important that the NPC fix the provisions, particularly the provision on technological protection measures, intended to implement the WCT and WPPT to bring them in line with the developing international standard for implementing these obligations. We urge the Chinese government to take these small but critical additional steps.

Criminal Code "Interpretations"

As noted above and in our prior submissions, the 1997 formalization of the provisions on copyright in the Criminal Code plus the Supreme People's Court "interpretations" given to those provisions has resulted in a worsening of the situation with respect to subjecting pirates to criminal sanctions. While ultimately the Criminal Code should be amended, many of the problems that infect the criminal system can be corrected, at least at the statutory/regulatory level, by the Supreme

Court itself and/or by the State Council agreeing to revisit these “interpretations” and make criminal cases much more available to both Chinese and foreign rightholders. This is a very high priority for U.S. industry. Such a commitment is contained in the U.S.-China IPR Working Party “protocol” but in a manner committing the State Council only to “recommend” such change. The State Council has ultimate authority to make these changes directly.

In particular, the \$6,000 threshold of income to the defendant, has, as a practical matter, made criminal remedies unavailable. Moreover, prosecutors have been reading these “interpretations” to relate to income at pirate prices and have counted income only on the basis of what is found to have actually been distributed not what pirate product may be sitting in a warehouse waiting to be distributed. All these provisions should go to the issue of the amount of the penalty to be imposed, not to the basis of liability in the first place. In this respect, China is far out of the mainstream of thinking within the international community and has prolonged and made virtual impossible its ability to reduce piracy rates. These interpretations should be immediately amended.

Application of the Copyright Law to Internet Disputes: “Interpretations”

At the same time as the State Council released its new draft Copyright Law amendments, the Supreme People’s Court issued its “Interpretations of Laws on Solving Online Copyright Disputes,” with effect from December 20, 2000. Again, IIPA will cover only the highlights of these interpretations which are generally very positive (with one possible exception) with respect to protecting the on-line environment from rampant piracy.

1. Basically, the “Interpretations” apply the existing provisions of the copyright law to all digital forms of works, particularly the reproduction right and other exploitation rights including covering unauthorized Internet transmissions as infringing “disseminations.”
2. Article 3, however, is unclear in that it appears to provide a loophole for dissemination of works “published on the Internet in newspapers and magazines or [works] disseminated on the Internet,” unless the rightholder clearly states that those works may not be “carried or extracted.” The provision then says that the works must be paid for by the particular Website. It is unclear whether this provision applies to works “first” published on the Internet (when a rightholder might be able to add a prohibition against further carriage without permission), or whether it is limited purely to works published in newspapers and magazines.⁴ In any of these cases, however, this would amount to a TRIPS-incompatible compulsory license. We assume this is not what is meant by this ambiguous and potentially very dangerous provision. For example, the final sentence of Article 3 reads that “however, a Web site that recarries and extracts works beyond the scope as prescribed for reprinting in newspaper and magazine articles shall be considered copyright infringement.”

⁴ One legal commentator described this provision as follows: “If a work has been published in newspapers, magazines or disseminated through computer networks and does not bear a ‘copying or editing is forbidden’ statement, a website holder may use that work on its website without the author’s approval, but it must quote the source and pay a remuneration to the copyright holder.” If this is the correct interpretation, the provision blatantly violates TRIPS and the Berne Convention as a prohibited compulsory license. How would any copyright owner of a motion picture, sound recording videogame, book be able to put such a notice on every work it has created? This provision would permit a pirate to upload any of these works, or sound recordings, with impunity, since none would carry such a notice unless, perhaps, it were produced specifically for initial publication over the Internet in China. Under China’s international obligations, this provision, if so interpreted cannot apply to foreign works or sound recordings.

This sentence could be read to refer to “beyond” the scope of the right holder’s license. The provision is unclear.

3. Article 4 establishes the contributory liability of ISPs under Article 130 of the Civil law. While further analysis is needed, this provision appears to be quite positive.
4. Article 5 makes ISPs fully liable where they have knowledge of the infringement, either before notice from the rightholder or after receiving notice and failing to take down the infringing site. The ISP must have “adequate evidence” of infringement. What constitutes “adequate evidence” of infringement, and the proper communication of this information to the ISP, must be defined. The speed with which the ISP moves to take down infringing material must also be defined.
5. Article 6 requires the ISP to provide the rightholder with “online registered data” about the infringer, or they otherwise violate Article 106 of the Civil Code (IIIPA does not have a copy of this provision at this writing).
6. Article 7 appears to establish what is needed to provide adequate notice of the infringement to the ISP, including “proof of identity, a certificate of copyright ownership and proof of infringement.” Depending on how these are interpreted, they could be unnecessarily onerous requirements. While past experience indicates that these may not be applied literally and that proof of infringement will be taken to mean “evidence of infringement,” such as a screen shot, this is far from clear and should be further defined. It is also unclear what is meant by a certificate of ownership. It is assumed this does not mean a Chinese copyright registration certificate since this would violate the formalities prohibition of Berne and TRIPS. Perhaps it refers to an affidavit. This needs to be clarified. If the ISP does not take the site down at this point, it will be subject to suit in the People’s Court to order them to do so. It would appear from Article 5 that damages could also be awarded.
7. Article 8 insulates the ISP from liability to its customer when it takes down allegedly infringing material following the right holder’s providing adequate evidence. This is very positive. On the other side, right holders providing a “false accusation of infringement” where the alleged infringer suffers losses can be held liable.
8. Article 9 lays out the specific parts of the Copyright law that apply to online infringements and includes reference to Clause 8 of Article 45 which refers to the catch-all “other acts of infringement.” This could prove very positive, allowing the courts to take an expansive approach to exclusive rights on the Internet.
9. Article 10 adopts essentially the damage and statutory damages provisions in the copyright law amendments discussed above. This is also very positive, though again the ceiling amount of \$60,500 is too low where large infringements are concerned.

PRIORITY WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

ARGENTINA

EXECUTIVE SUMMARY

IIPA recommends that Argentina remain on the Priority Watch List. Pirate optical media products continue to overrun the Argentine market. This phenomenon, compounded by the growing illegal use of CD-Rs and pirated cartridge-based software, seriously undermines the ability of all the copyright industries to compete with legitimate product. As a result of growing digital piracy and ineffective enforcement, estimated trade losses due to copyright piracy in Argentina jumped to \$409.6 million in 2000.

Ineffective copyright enforcement remains at the top of the copyright industries' agenda in Argentina. Many elements of Argentina's enforcement regime are incompatible with its WTO TRIPS obligations, including: nondeterrent criminal penalties applied in commercial piracy cases, lengthy delays in bringing and completing both criminal and civil infringement cases, and ineffective border measures. The Argentine court system is hampered by inadequate resources, a large volume of cases, and a formalistic procedural code. Concerted efforts by the Argentine authorities to improve enforcement, particularly at the borders and within its judiciary, are critical. Long-term outstanding customs duties issues must also be resolved.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	32.0	45%	32.0	45%	30.0	45%	30.0	43%	35.0	43%	49.0	50%
Sound Recordings / Musical Compositions	76.0	46%	50.0	33%	50.7	35%	25.0	35%	20.0	30%	15.0	17%
Business Software Applications* ¹	151.7	60%	156.7	58%	100.8	62%	84.7	65%	107.9	73%	112.4	80%
Entertainment Software* ²	141.4	94%	90.3	92%	87.1	94%	83.4	90%	86.0	86%	64.7	84%
Books	8.5	NA	8.0	NA	7.5	NA	7.0	NA	7.0	NA	7.0	NA
TOTALS	409.6		337.0		276.1		230.1		255.9		248.1	

¹ BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 piracy level of 57% was reported as preliminary. The BSA numbers were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

COPYRIGHT PIRACY IN ARGENTINA

Optical Media Piracy is Growing.

Argentina, like many of its neighbors, continues to be invaded by pirate optical media product. One of the primary reasons for this growth involves the international distribution of optical media product, emanating primarily from production facilities in Southeast Asia (as discussed in further detail below). Such optical media distribution networks are under the control of organized criminal enterprises including those of Chinese, Taiwanese, Paraguayan, Panamanian, Uruguayan and Brazilian nationals operating in Argentina and in the other Mercosur countries. CD pirate operations have grown. Traditionally, these pirates operated individually or in small groups. However, there are new organizations with many employees and an average of six to ten CD duplicators.

A second trend is the proliferation in the replication of illegal CD-Rs (recordable CDs). A cottage industry of people duplicating copyrighted materials on CD-Rs has developed. CD-R piracy has worsened throughout the country over the past year. Local videogame representatives estimate that there are more than 1,000 rental outlets which routinely burn CD-Rs to order. The recording industry has conducted raids against small labs. It is very difficult to stop such unlawful reproductions. There are some concerns that, given the domestic scale of this problem, there may be some organized crime elements and/or coordination involved. To compound matters, it is difficult to get the passive Argentine judiciary involved in address this IPR problem. Some progress is reported regarding business software CDs for the City and Province of Buenos Aires, where CD-R piracy has decreased as a result of the intensive legalization campaign conducted by BSA and Software Legal (BSA local software association) during the last quarter of 2000.

Pirate CD duplication centers operate not only in major Argentine cities, but also in small towns. In some cases, the illegal software is reproduced far from the major cities, offered through the Internet, and distributed in the major cities. CD duplicators have learned how to avail themselves of the Internet to increase their sales, and to hide from the authorities behind an anonymous Web page. The use of the Internet to sell pirate CDs is a growing trend among CD duplicators.

Another trend which surfaced within the last two years is VCDs (video compact discs) containing full-length motion pictures. These discs have begun to blanket the Argentine market, with both pirated versions from Asia as well as parallel imported copies.

Copyright Piracy Levels in Argentina Remain High.

Entertainment software piracy in Argentina got worse in 2000, moving up to an estimated 94% piracy level. For example, piracy levels of Playstation® products is at 99%, with PC-based products at 85% piracy. Console piracy has totally saturated the Argentine market, much being controlled by organized crime linked to Asian contacts. Estimated losses due to piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) skyrocketed over the last year to \$141.4 million in 2000.

The major problem in Argentina for the entertainment software industry continues to be the massive importation of CD-ROMs (especially from Malaysia, Hong Kong, the People's Republic of China, Thailand, Taiwan, Paraguay and Chile), often entering Argentina through Iquique, Chile or Colonia, Uruguay. This includes fake OEM (original equipment manufacturer) versions, compilation gold disks, and silver CDs and cartridge-based products such as Nintendo® *Game Boy* software. The infrequent efforts by the Argentine authorities to stop this importation, including judicial intervention and action by administrative authorities, have been unsuccessful. Customs officials do not have the power or the guidelines to stop the import of counterfeit products. If there is knowledge of counterfeit products being imported, a court order is required before products can be stopped. Unfortunately, counterfeit or pirate videogame products usually disappear from customs by the time a court order is obtained. For Nintendo, counterfeit products have been detained by Customs, only to be shipped back to its Asian exporter. Again, Customs officials blamed this procedure on their lack of authority to seized these products. On the other hand, there have been some customs seizures involving products of PlayStation product.

A second source of piracy continues to be reproduction on demand. Numerous shops have CD recorders and provide their customers with a copy of any entertainment software they ask for, copying it while the customers wait. The manufacture and sale of pirated videogames and cartridges at the retail level has increased considerably over the past year. Sometimes counterfeit hardware is bundled with counterfeit games, or pirated software is preinstalled. Pirated videogames, on all platforms, are sold openly in the most reputable malls for about \$15 each. Reports indicate that piracy of cartridge- and CD-ROM-based videogames is still very high.

With respect to business software, piracy among end users remains quite high, especially in small and medium-sized organizations, and with home users. Larger organizations may have some licenses to use software, but commonly these licenses only cover a small percentage of the software in use. Distributors are competing against pirate CD duplicators, which makes it very difficult for legitimate software distributors to conduct business on a profitable basis. Distributors are also very affected by computer resellers that load illegal software on computers to increase their sales. Counterfeit activities with respect to business software have been reduced through security devices such as company-specific "certificates of authority," holograms, etc., but remain a problem for entertainment and educational software. Internet use is growing in Argentina, and this has lead to an increase in the use of the Internet as a mean of advertising illegal software to a large audience, and the unauthorized electronic distribution of illegal software. The 2000 estimated business software piracy level in Argentina is 60%, with estimated losses at \$151.7 million. The Argentine Federal Government, which is a major end user, still has to legalize its software. Even though BSA has tried many times to convince the government to take serious steps toward complete software legalization, no positive results were obtained in 2000.

The shift from analog to optical media-based piracy represents an alarming trend in Argentina which is harming the recording and music industry. Argentine pirates are focusing more on CDs, which is a more expensive product (even at pirate prices) than cassettes. More pirate CDs were distributed and fewer legitimate CDs were sold. The estimated piracy level for sound recordings and music in Argentina has grown to 46% for 2000. The estimated losses due to audio piracy in Argentina for 2000 also rose to \$76 million.

Perhaps the most disturbing trend is CD-R technology, which the recording industry expects to worsen in 2001. This technique makes piracy extremely hard to attack. There are hundreds of

small replicators, students, and small pirates that duplicate conservative amounts but the cumulative effect is significant. In most of these cases, domestic pirates use the same source to obtain their raw material (blank CD-Rs) as well as the inlay cards. They also use the same distribution system. The recording industry believes that there may be organized crime coordination behind this apparent domestic-scale problem. The industry has initiated raids against domestic CD-R labs and found the labs to have 50 serial burners duplicating 50 CDs from the same matrix at the same time. This indeed represents a small industrial-sized installed capacity. This form of piracy makes both investigation and enforcement very difficult. There is no specific commitment from the federal or local governments to fight this piracy.

Another problem continues to be the influx of pirate CDs from the Far East. Pirated products enter Argentina daily from Paraguay (at Encarnacion and Foz de Iguazu/Ciudad del Este). Pirate imports also enter from Bolivia (Yacuiba), several points along the Uruguayan border, and at unknown points in Chile. Infringing audio CD products enter Argentina in most cases by the use of false statements on Customs papers.

In addition to music CD piracy, audiocassette piracy continues to be a problem in Argentina. Thousands of pirate audiocassettes from Paraguay, coming mainly from Encarnacion-Posada, Formosa and the Parana river, blanket the northern part of Argentina. Piracy in the border towns is high. The legitimate industry has lost the battle against cassette piracy in northern Argentina, in particular, Formosa, Tucuman, Salta, Jujuy, Santiago del Estero, Chaco, and Corrientes y Misiones, due to a lack of customs enforcement at the borders with Bolivia and Paraguay. To a lesser degree, the western states (like Mendoza) are also threatened by the influx of piracy product from Chile and Bolivia. The source of the pirate product from Bolivia (which enters Argentina primarily via Yacuiba) is illegal bulk imports which appear to originate in Iquique, Chile.

Video piracy in Argentina is on the edge of becoming an integral and perhaps inextricable part of the audiovisual market. Nearly half, 45%, of the total home video market is piracy product. Despite significant industry funding for legal actions over a number of years, the rate of piracy has remained virtually unchanged. The majority of pirate videos comes from back-to-back copies reproduced in small numbers, but in many video stores. Most video clubs illegally reproduce these back-to-back copies, and it is a pervasive practice in greater Buenos Aires. The practice is so prevalent that some of these small businesses have grown dependent on illegal copies. Statistics provided by the Argentina Video Union (UAV) indicate that the use of pirate videos has become a standard business practice. Only a strong commitment by the Argentine government, with exemplary action, can break this trend.

Video optical disc piracy (VCDs) and television signal theft are growing trends. Investigation by MPA's Argentina Program indicates a small increase in Direct-to-Home (DTH) satellite piracy. Parallel imports continue to present a concern, with the increasing appearance in the Argentine market of unauthorized Region 1 DVDs from the U.S. market. Losses to the U.S. motion picture industry due to audiovisual piracy in Argentina are estimated to be \$32 million in 2000.

The book publishing industry continues to report widespread photocopying of English language materials and computer books, and in particular, Spanish language translations of American book titles, in Argentina. Wide-scale photocopying occurs, in part, as a reaction to the high prices of books and university texts, the fact that all imported English titles incur a high mark-up locally on each imported copy, and the general economic effects of last year's recession. Such

photocopying is reported both within universities and by photocopying stores near universities. There is also commercial piracy involving computer book titles. Recently, translations of U.S. best-selling trade books (fiction) have entered the market, with some reports attributing these to be imported from Mexico. Argentina represents one of the worst cases of book piracy in South America. Estimated 2000 trade losses due to book piracy in Argentina are \$8.5 million.³

ENFORCEMENT IN ARGENTINA

The copyright industries have continuously faced enforcement obstacles in Argentina, despite concerted efforts by industry anti-piracy actions. Many elements of Argentina's enforcement regime are incompatible with its current obligations under the WTO TRIPS Agreement, including: the failure to impose deterrent criminal penalties in commercial piracy cases; lengthy delays in bringing and completing both criminal and civil infringement cases; ineffective border measures; and the lack of availability of deterrent civil damages. These deficiencies are simply not working to provide adequate and effective protection to U.S. copyright holders.⁴

Criminal Raids Continue, But Make Hardly a Dent in Piracy Levels.

IDSA commenced an anti-piracy program in Argentina in August 1997, when it launched a series of raids on distributors and retailers of pirated entertainment software, including the largest importers of fake OEM versions and almost a dozen retailers.⁵ The IDSA campaign got off to a good start by striking at three of the largest importers of pirated videogame product. In the summer of 1999, counterfeit Nintendo videogame consoles were found in various supermarkets in Buenos Aires. Working with the local distributor, Nintendo sent cease and desist orders to the supermarkets, which withdrew the infringing products from their shelves. In one case, a raid was conducted and 500 consoles with built-in counterfeit software were recovered. In September 2000, Nintendo raided two prominent retail stores, seizing counterfeit *Game Boy* software. The actions remain pending in the criminal courts, with very little chance the defendants will actually be penalized for their illegal activities. In some cases, several entertainment software companies are teaming up with a local association (known as CASDI) to conduct raids, seize infringing products, support customs actions, and press for criminal prosecutions. The IDSA has also provided anti-piracy training for judges, police and prosecutors. Despite all these enforcement

³ AAP reports that its 1999 estimate of \$10 million in trade losses due to book piracy in Argentina was high. The revised estimate for 1999 is \$8.0 million, and is reflected in the chart at the beginning of this report.

⁴ Argentina participates in the Generalized System of Preferences (GSP) program, and the adequate and effective protection of intellectual property rights is a criterion to participate in that trade program. In 1999, \$182.3 million in Argentine imports to the United States benefited from the GSP program, accounting for nearly 7.1% of its total imports to the U.S. For the first eleven months of 2000, \$199.5 million of goods from Argentina entered the U.S. under the GSP duty-free code, a 19% increase over the same time period last year. For more detail about Argentina's history with Special 301, see Appendices D and E of this filing.

⁵ It is important to note that in November 1998, legislation was passed clarifying that computer software (which includes entertainment software and business applications) and databases are protected subject matter under the copyright law. This reform, years in the making, was extremely important to both the business software and interactive entertainment software industries, which rely on criminal enforcement. After the new law entered into effect, many bootleggers and hard-disk loaders simply closed their businesses or discontinued the sale of illegal products.

activities, very little is done to the counterfeiter for his illegal acts. The pirates believe that the seizure of their fake goods is only a cost of doing business, and continue with their very lucrative ventures.

In 2000, BSA filed 22 private criminal suits against pirate software resellers and end users. All cases filed or reported by BSA resulted in search and seizure actions, which were carried out in accordance with the new copyright law. Only two cases initiated in 1999 (for an annual total of 23), and one case initiated in 2000 (for an annual total of 22), came to trial, due to unacceptable delays in the criminal process caused by lack of resources, the large number of cases pending a hearing, and a lack of understanding of IPR issues by the criminal courts. In December 2000, BSA filed criminal complaints against three federal agencies, the Tourism Secretary (Secretaría de Turismo), the Radio-Broadcast Commission (Comité Federal de Radiodifusión), and the Pension and Retirement Control Office (Superintendencia de AFJP), for alleged use of illegal software. It is very important that the government set an example and take the lead against software piracy.

For the motion picture industry, support from law enforcement agencies for anti-piracy actions, although still far from ideal, has improved. The Gendarmeria Nacional (Police Force) has coordinated anti-piracy actions in the interior of the country with limited, but encouraging, results. Total pirate videos seized over the years has improved from 38,000 in 1997, to over 50,000 in 1998, over 194,000 in 1999, and over 230,000 in 2000. In 2000, MPA and the local anti-piracy association UAV initiated 257 investigations against video stores and labs, and conducted 255 raids in addition to 2,200 inspections. Thirteen reproduction laboratories with a total of 340 VCRs were also shut down last year.

The recording industry has waged its anti-piracy campaign in Argentina since the early 1990s. Until 1998, the level of piracy had been kept at a relatively controllable level, but with the advent of CD piracy, any semblance of control was lost. During 1999, the recording industry was overpowered by the piracy problem as well as (with few exceptions) the lack of commitment from Argentine enforcement authorities and judiciary to take swift action. The industry filed more than 95 criminal complaints in 1999. After much pressure, ten cases were taken in late December 1999. The only significant cases were two seizures, in February and August 1999, of counterfeit CDs bound for Brazil. Not one person was indicted for recording piracy in 1999. Cases got bogged down in the bureaucracy of the Argentine process. During 2000, the recording industry was able to overcome the slowness of the process by being selective, meaning that only the most significant cases were prosecuted in order to get the most from the few agencies and judges that consider cases important. All the other cases are filed but, generally, they have not made progress. Leaks and lack of commitment by the Argentine authorities continues to be a regular problem.

Courts Fail to Impose Deterrent Criminal Penalties.

Unfortunately, this improvement in field actions from law enforcement does not continue in the court system. What is most disturbing is the nondeterrent level of penalties imposed. The Argentine penal code permits a term of one month to six years in jail for commercial piracy. As a result, true enforcement and consequent deterrence continues to fall far short of required levels. The court system is hampered by inadequate resources, a large volume of cases, a lack of qualified experts, and a formal Code of Procedure, which adds to the length of cases. For example, Article 196 of the Criminal Procedural Code allows the courts to delegate the preliminary investigation of

cases to the prosecutors, who are required to seek court authorization each time they make important decisions in a case; this process leads to unacceptable delays.

In 2000, MPA and the local anti-piracy association, UAV, coordinated 255 raids, which resulted in 29 prosecutions. In addition, there were 33 judicial resolutions in 2000 (from cases begun previously), five exculpatory and 28 condemnatory. Two persons received effective jail terms of one year and eight persons received jail terms of four months, the remaining sentences were suspended. No fines were ordered because the IPR law does not specify any type of fine for this crime.

Although in 1998 the recording industry reported that there were some improvements with the judiciary, any improvements in this area stopped in 1999. The excuse given was that 1999 was an election year. In 1998, judgments were issued in 30 cases (compared to none in the prior three years). In 1999, the number of judgments was reduced to four. In 2000, no sentences were issued even though several cases were pending and awaiting sentencing.

The BSA reports that only one of the 22 private criminal cases it initiated in 2000 has yet come to trial. Furthermore, BSA's civil cases have not yet reached judgment, so it is premature to present any evaluation regarding the deterrent level of damages and remedies issued. Similarly, cases brought by the entertainment software industry are moving slowly in the courts. For example, a pirate reseller was sentenced to three months of imprisonment, and a fine of U.S.\$ 500, in the only BSA-related criminal case decided in 2000. Under Argentine criminal law, sentences of up to three years of imprisonment can be commuted, and the defendants never have to serve time. This is certainly not a deterrent penalty as provided by TRIPS.

Border Controls Remain Weak.

Argentine border controls continue to remain weak. Over the last two years, Argentine customs began to cooperate with the copyright industries. However, as discussed above, there is still a large amount of infringing material entering Argentina. Concerted attention by senior customs officials continues to be needed to make improvements in effective border controls.

Lengthy Delays in Civil and Criminal Copyright Infringement Cases.

The Argentine court system is hampered by inadequate resources, a large volume of cases, few qualified experts, and a formal code of procedure, which increases the delay in obtaining resolutions. For example, Article 196 of the Criminal Procedural Code allows the courts to delegate the preliminary investigation of case to the prosecutors, who are required to seek court authorization each time they make important decisions in a case; this process leads to unacceptable delays. This systematic backlog suggests that there is a great need for specialized intellectual property courts to expedite criminal copyright prosecutions. Unfortunately, there has been no movement toward that goal by the legislative or judicial branches.

On average, criminal cases take between three and four years to be decided by the district courts. The trial takes about three years, plus an additional year for the oral procedure. A judge receives an average of 1,500 criminal claims per week. This systematic backlog suggests that there is a great need for specialized intellectual property courts to expedite criminal copyright prosecutions, but there has been no legislative or judicial movement in that direction.

BSA civil cases can be assigned a summary procedure (*procedimiento sumario*) or a more extensive ordinary procedure (*procedimiento ordinario*). It takes at least three years to obtain a final decision in a summary procedure, and four years in an ordinary procedure. Civil cases take approximately three years for the district courts to reach a decision, and another year if these decisions are appealed. As the business software uses civil remedies, BSA reports that in 2000 there was a real lack of qualified software experts in the civil system, which leads to delays and incorrect assumptions in cases. By the end of 2000, the Argentine Supreme Court created a specialized software expert office, but no experts have been appointed so far.

The judicial resolution of criminal cases remains interminably slow. For example, four cases brought by Nintendo in 1993 have been pending in Argentina for over seven years, and there is no end in sight. In January 1997 through June 1997, Nintendo conducted a series of raids against retailers, seizing hundreds of counterfeit video game products. Again, the actions remain pending while the defendants are free to continue their activities. With regard to Nintendo's most recent activities in September 2000, the company is not optimistic that the defendants will finally be punished. Actions were initiated, products destroyed, but defendants basically were released. Arrest warrants were issued later, but the defendants cannot be located to stand trial or the prosecutors fail to pursue further.

COPYRIGHT LAW AND RELATED ISSUES

WIPO Treaties

Argentina was one of the first countries in this hemisphere to deposit its instruments of ratification to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, accomplishing this deposit on November 19, 1999. IIPA applauds Argentina for taking this action which will raise the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Amendments to the 1933 Copyright Act

Amendments to the 1933 copyright act made in late 1998 clarified that computer software and databases are protected subject matter under the copyright law (Law No. 25.036 of November 11, 1998). As a result, criminal penalties are now available for the infringement of computer software and resolved the longstanding problems which developed after the *Roggio* case. In another positive development, Argentina also passed a provision permitting it to ratify the Paris (1971) text of the Berne Convention in the same legislative package which ratified the WIPO treaties. For decades, Argentina had been a member of the Brussels (1948) text of the Berne Convention. Argentina's membership to the Paris text became effective on February 19, 2000.

Even with the 1998 amendments, the current Argentine copyright law continues to contain deficiencies which need to be addressed in order to bring the law up to international standards. For example, the law lacks an express provision affording producers of sound recordings (who are currently treated as authors under the law) with the exclusive right to authorize or prohibit the rental of sound recordings. While these acts are not specifically enumerated in the law as illegal, some courts have held that they are illegal under a general provision in the copyright law; other

courts have held they are not. IIPA recommends that protection against parallel imports of copyrighted materials be provided in Argentina.

For the last two years, the Argentine government has been working, on and off, on a draft bill which would amend the Copyright Act to improve its scope of protection up to the international standards found in Berne, TRIPS and the two new WIPO “digital” treaties. A drafting commission, composed of leading copyright experts and government officials, was tasked with drafting such amendments in early 1998. Its recommendations were submitted to the Minister of Justice in the summer of 1998. Although reports indicate that those proposals would appear to remedy some of the existing problems in the 1933 act and implement some of the provisions in the WIPO treaties, the copyright industries are concerned that certain proposed provisions (such as work-for-hire, the scope of exclusive rights, presumptions, levels of criminal penalties, and the need to provide statutory damages) will require further amendment and/or clarification before final adoption. That draft legislation does not correct the many enforcement obstacles, including ineffective border measures, nondeterrent criminal penalties and lengthy delays in bringing and completing infringement actions. We understand some internal revisions were made to incorporate the provisions of 1998 computer software-related amendments and also to increase penalties. At last report, the proposal remains under study within the Ministry of Justice, which must review the draft with the National Copyright Office.

Because it was proposed during the prior government and was never submitted to Congress, reports indicate that this specific proposal has no legislative future. This draft legislation must be revised substantially to correct these deficiencies before it is forwarded for legislative consideration. It is important that whatever proposals are developed satisfy with the obligations found in the WIPO treaties.

The Performers’ Rights Bill

In 1999, the Association of Argentine Performers (AADI) introduced to the Commission of Culture of the Senate a Bill on Performers’ Rights (S-1206/99). This bill would partially amend the current Argentine copyright law by granting economic and moral rights to audiovisual performers and recognizing AADI as the sole and mandatory collection society for performers in Argentina. If passed in its current form, the bill would be detrimental to the distribution operations of U.S. audiovisual producers because:

- the bill would require authorization from AADI for the commercialization of any and all audiovisual products, and AADI would be granted a legal monopoly to collect new royalties on behalf of national and foreign performers.
- while the bill does grant several new economic rights to audiovisual performers, it excludes public communication as a right that should be transferred automatically to the producer, as is common international practice.
- the bill grants performers the right to obtain an “equitable additional remuneration” for the public communication of audiovisual works, which would be entirely managed by AADI. The concept of “equitable additional remuneration” as proposed in the bill is too vague, and interferes with the ability of both the performer and the producer to negotiate fair compensation, thus introducing unnecessary uncertainty in the contractual process and producers’ determination of the risks and financial rewards of production and distribution.

- the bill grants broad and unwaivable moral rights to audiovisual performers, giving them the authority to control and interfere with the normal commercialization of audiovisual works. These rights do not correspond with international audiovisual industry standards.
- the bill may be used as a model by other rightsholder groups, (e.g., audiovisual directors), thus constituting a negative precedent for similar legislation for other collecting societies in Argentina, in other countries in the region and elsewhere.

Software Legalization Efforts

Some progress on the business software industry's efforts to support legalization of software in government agencies is expected at the municipal level. Unfortunately, it appears that complete legalization of the federal government would appear not to be attainable in 2001. All BSA negotiations with the government regarding this matter failed in 2000, and last December, Software Legal filed criminal complaints against three federal agencies for presumed use of illegal software. It is unlikely that President De La Rúa will issue an executive decree that would require government legalization of current software programs on computers and improve procurement practices.

CUSTOMS VALUATION ISSUES

Customs Duties on Audiovisual Works, Sound Recordings and Software

Since 1995, Argentina has assessed customs duties on audiovisual works and sound recordings based on the value of the authors' rights (for example, the potential royalty generation of a film) and not solely on the value of the physical materials which are being imported (i.e., the film negative, the tape cassette). Argentina's valuation practices are at odds with the international, and favored, practice of valuing intangible intellectual property of this kind solely on the value of the underlying media.⁶ Nothing in this practice has changed in recent years.

Argentina and Brazil fixed a higher extra-Mercosur import duty of 23% on computer software (based on the value of the physical media). However, Argentina levies a total of 31% to 41% in various value-added taxes on the value of the physical media and an additional 3% to 6% prepaid income tax on the entire commercial value of the software, despite the change in valuation method for the imposition of the import duty. Despite the fact that Argentina imposes the standard Mercosur CET for software, the application of this 3% duty on the value of the software, combined with the 30% VAT, significantly increases the cost of importing software into Argentina, and poses a significant barrier to trade. High value-added taxes also burden the filmed entertainment industry in Argentina.

Customs duties should not be based on assessments of potential royalties. Customs duties should be based on specific fees, such as by weight or by foot, or be *ad valorem* based on the value of the physical carrier medium only. Furthermore, customs duties based on royalties or income

⁶ For example, if a 12.5% duty were levied on the value of the film negative, U.S. companies would pay approximately U.S.\$200 in duties per copy. If, however, this duty were levied on the potential revenue generated by the film, the duties could exceed \$800,000.

serve as a form of double taxation, since royalties are generally subject to withholding, income and/or remittance taxes. Such duties are a significant barrier to furthering the growth of the audiovisual market in Argentina. To this end, MPA and RIAA seek a modification of the Argentine Customs Valuation Code and/or an exemption, such as computer software, from the *ad valorem* duty. A Ministerial Resolution clarifying the matter was drafted more than a year ago and was favorably received by the governmental agencies intervening in the respective procedure. Notwithstanding, the Ministerial Resolution is still pending and the import barrier remains in place.

Since 1995, computer software has been exempt from the *ad valorem* tariff (Resolution 856/95) and is being assessed based on the value of the physical support only (diskettes and accompanying literature). With respect to nonsoftware media, the Argentine government has taken to no action to correct this trade barrier.

Retrospective Collection for Duties on Computer Software

This issue regarding the retrospective collection of software duties continues to be a problem in Argentina. More than 300 cases are still pending in the Customs Tribunal (dating from 1993-94) against Argentine distributors of computer programs in which customs officials are seeking a retrospective collection of duties. A significant quantity of computer programs imported prior to March 1995 were imported on a split-invoice basis, despite the official Argentine position taxing the entire invoiced value of the software. Only one case has been resolved; the Customs Tribunal held in favor of the Argentine government, and this case is still on appeal to the federal administrative courts. It is unclear when a resolution of this appeal could be expected. In 1998, there was a resolution in the Customs Service in favor of the Service's position and against importers. This was followed by other resolutions using the same criteria. The software industry appealed every resolution before the Tribunal Fiscal de la Nación. Almost all of the cases have been resolved against the software distributors. Most of the cases appealed to the Fiscal Tribunal have also been decided in favor of the Customs Service's position. Some of these cases are also on appeal.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

BRAZIL

EXECUTIVE SUMMARY

The IIPA recommends that Brazil be elevated to the Special 301 Priority Watch List this year. We also strongly support the U.S. government's initiation of a review of Brazil's intellectual property rights practices under the Generalized System of Preferences (GSP) program, a U.S. trade law. This GSP review was prompted by a petition filed by the IIPA in August 2000.

Brazil occupies a very important and sensitive position with respect to copyright protection and the status of the copyright industries. Brazil is simultaneously one of the largest markets in the world for legitimate copyrighted materials, and home to one of the globe's greatest pirate marketplaces. Moreover, the cultural dimensions of piracy in Brazil are perhaps unequalled given the tremendous stake of Brazilian creators, and would-be creators, in the cultural marketplace. In some areas, such as music for example, Brazilian record companies, performers, songwriters, composers, music publishers and musicians bear the brunt of piracy — more than 70% of the piracy in Brazil is of their creations. In addition, Brazil has a large legitimate computer software/informatics sector, as well as by far the largest and most active internet sector in Latin America, which would also benefit enormously from strong action against piracy (see tax and employment losses in Brazil as a result of software piracy at page 9).

If Brazil were to effectively address the piracy problems outlined in this report, its cultural sector and overall copyright industries would undoubtedly become one of the strongest in the world, and the Government of Brazil would simultaneously increase its tax base. Thus, while U.S. industries believe that Brazil should not expect to enjoy preferential trade status with the U.S. while it is denying effective protection to U.S. copyright owners, we hasten to add that firmly addressing piracy would first and foremost create a platform for Brazilian creativity, and inure to the great benefit of Brazilian society. We are heartened by recent accounts that the Government may be bracing itself to engage in this battle, and we pledge our support in this initiative.

Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, crosses Brazilian borders and devastates the local markets. Organized crime elements, from within and outside Brazil, exercise control over the production and distribution of infringing copyrighted products. While a few Brazilian police units have conducted a substantial number of raids, this is, unfortunately, the exception rather than the rule. Sadly, these raids have resulted in only a miniscule number of criminal prosecutions, and of those few cases, the judgments that have been issued have not been deterrent. To compound matters, legislative efforts to improve processing of criminal cases have resulted in more defendants in copyright infringement cases being released instead of serving their sentences. In civil infringement cases, the business software industry has achieved some success, but Brazilian courts require extremely high expert fees and bond requirements in these cases.

The Brazilian government has made numerous commitments to U.S. government officials to address the core problems of extremely high piracy rates and inadequate enforcement. And yet there has been little concrete action by Brazil to address these issues. In 1999, Brazil proposed plans of action and proposals to both the U.S. government and the copyright private sector. Engagement with the private sector halted abruptly after the industries offered suggestions to improve the Brazilian government's proposal. Again, in 2000, there were very few collaborative initiatives on anti-piracy matters taken by Brazilian authorities. Even though our industries continue to increase their anti-piracy investigations, foster public awareness through educational campaigns, and expand their local presence, piracy continues to grow. Despite impressive strikes by Brazilian industry to legalize their acquisition and use of legitimate business software, the Brazilian government has lagged behind. Estimated trade losses due to copyright piracy of U.S. products in Brazil escalated to \$956 million in 2000.

The IIPA notes that Brazil has apparently recently formed an Inter-Ministerial Committee under the leadership of the Minister of Justice. We look forward to an official statement confirming this understanding, and hope that it signals a new intention by the Government of Brazil to address the many problems affecting Brazilian and U.S. copyright owners. We welcome this development, and look forward to seeing progress made in the near future.

BILATERAL ENGAGEMENT ON COPYRIGHT ISSUES

During the 1990s, Brazil received a significant degree of attention from the U.S. government under the Special 301 bilateral trade tool.¹ On April 30, 1993, the U.S. Trade Representative designated Brazil as a Priority Foreign Country. As a result of the ensuing Section 301 investigation, in a February 1994 diplomatic agreement the Brazilian government committed to take certain concrete steps to improve its IPR regime, including the early implementation of TRIPS, improving protection for computer software, addressing certain tax issues affecting computer software, and improving copyright enforcement in general. Over the next few years, Brazil's placement on the Special 301 lists seesawed between the Special Mention list and the Watch List.

USTR put Brazil back on the Watch List in April 1999, noting that "the lack of effective enforcement is a serious and growing concern. Some efforts have been made to improve copyright enforcement, but these efforts have fallen short given the scale of the piracy problem in Brazil and the absence of a coordinated strategy on the part of the government. Piracy rates have continued to climb over the past year, and the sound recording industry saw its losses double in 1998. We have particular concerns with proposed legal reforms that could reduce criminal penalties for intellectual property crimes and remove police authority to engage in *ex officio* searches and seizures on their own initiative. We look to the Government of Brazil to take decisive action to reduce piracy rates, focusing on the major markets currently being devastated by piracy. We also look to the Brazilian government to ensure full implementation of all TRIPS obligations, including enforcement obligations, no later than January 1, 2000."²

¹ For more details on Brazil's Special 301 history, see Appendices D and E of this filing.

² Press Release, Office of the U.S. Trade Representative, April 30, 1999.

The 2000 deadline came and went, without any meaningful action. Despite IIPA's recommendation in February 2000 that Brazil be elevated to the Priority Watch List, Ambassador Charlene Barshefsky kept Brazil on the Watch List, noting: "... Progress has not been sufficient on Brazil's commitment to increase effective enforcement actions, from raids through judicial decisions, against intellectual property infringement; the rate of CD piracy in Brazil continues to worsen. Failure to address this problem could lead to the collapse of the market for legitimate CDs in Brazil. We look to Brazil to significantly increase its enforcement efforts against video, music CD, video game, as well as other piracy in the coming year, consistent with its WTO obligations. We hope that the newly formed inter-ministerial IPR task force will prove effective in this regard."³

IIPA and its members looked to Brazil to increase its enforcement efforts against copyright piracy. However, the lack of progress being made by Brazil to enforce its copyright law through the first half of 2000 led IIPA to file a petition against Brazil on August 21, 2000, responding to USTR's invitation for interested parties to "submit petitions to have the status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria" in the 2000 Annual GSP Country Eligibility Practices Review. (See 65 Fed. Reg. 41514 [July 5, 2000].) Specifically, Section 502(c)(5) of the Trade Act of 1974, as amended, requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."⁴ IIPA's petition asked the President to (1) review the eligibility of Brazil as a GSP beneficiary developing country, and, if Brazil fails to achieve swift improvements, then (2) the President should suspend or withdraw GSP benefits of Brazil, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners.⁵

Furthermore, Brazil's copyright enforcement deficiencies are not just an issue between the U.S. and Brazil. As a member of the World Trade Organization, Brazil is currently obliged to provide the standards of copyright protection found in the TRIPS Agreement. Given the wide range of deficiencies in its enforcement system, Brazil fails to meet its current TRIPS enforcement obligations in several ways, including: its failure to impose deterrent criminal penalties (TRIPS Articles 41 and 61); to avoid unwarranted delays in criminal and civil cases (TRIPS Articles 41 and 61); to avoid unnecessarily costly procedures (TRIPS Articles 41 and 50.3) and to provide effective border measures (TRIPS Articles 41, 51-60). The WTO TRIPS Council is scheduled to review Brazil's intellectual property regime at its April 2001 meeting in Geneva.

COPYRIGHT PIRACY IN BRAZIL

Because of inadequate and ineffective copyright enforcement in Brazil, both the levels of piracy and the estimated trade losses due to piracy remain very high, causing U.S. copyright owners significant economic loss.

³ Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000.

⁴ See GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

⁵ In 1999, \$1.9 billion of Brazil's imports to the United States benefited from the GSP program, accounting for 16.9% of its total imports to the U.S. For the first eleven months of 2000, \$1.93 billion of goods from Brazil entered the United States under the duty-free GSP code, an 11.5% increase over the same time period last year.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	33%	120.0	35%	125.0	40%	110.0	30%	100.0	35%	90.0	38%
Sound Recordings / Musical Compositions	300.0	MC98% CD34%	300.0	MC95% CD35%	290.0	MC95% CD30%	110.0	80%	80.0	50%	70.0	45%
Business Software Applications ⁶	269.8	57%	319.3	58%	298.8	61%	315.7	62%	366.7	70%	307.6	74%
Entertainment Software ⁷	248.2	94%	116.2	90%	103.2	89%	99.1	87%	92.5	82%	82.5	80%
Books	18.0	NA	18.0	NA	20.0	NA	26.0	NA	27.0	NA	30.0	NA
TOTALS	956.0		873.5		837.0		660.8		666.2		580.1	

Optical Media Piracy Continues to Undermine the Brazilian Market for Legitimate Copyrighted Materials

Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, cross the porous Brazilian borders, devastating the local markets. There is also local manufacture of pirated optical media product within Brazil. Organized crime elements, both within Brazil and outside, exercise control over the production and distribution of infringing copyrighted products.

CD piracy exploded in Brazil in 1998, leading to dramatic increases in losses for U.S. recording companies, music publishers, film companies, book publishers, and publishers of entertainment software and business software. During 1999 and 2000, the CD piracy problem worsened as a result of Brazil's economic recession as the legal market for products fell dramatically and the demand for pirate materials rose.

The recording industry was able to confirm that a significant part of its problem involved the unrestricted, international distribution of optical media product, emanating primarily from production facilities in Southeast Asia, combined with the lack of a national Brazilian enforcement strategy to deter piracy. Such optical media distribution networks are under the control of organized criminal elements.

Yet another problem is the large-scale distribution networks in Brazil, whether these involve thousands of street vendors and established facilities (such as gas stations) which blanket the major highways in Brazil, or the nonestablished facilities in *camelodromos* (flea markets) or on the streets, and finally, the large quantities of blank recordable compact disks (CD-Rs) which are being imported as contraband into Brazil. There are also growing numbers of small duplication facilities

⁶ BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 filing, BSA's 1999 estimates of \$362.9 million at 61% were identified as preliminary. BSA finalized its 1999 numbers in mid-2000, and those revised figures are reflected above.

⁷ IDSA estimates for 2000 are preliminary.

which assemble CD burners; in turn, these facilities can produce a significant amount of pirate CDs each day.

MPA has noted the beginnings of optical disc piracy, previously not present in Brazil. The legitimate DVD market is growing rapidly (more than doubling in each of the past three years) and pirate product is beginning to fill some of the new demand. Although the incidence is still low, MPA has taken action in street markets in São Paulo and Rio de Janeiro and has begun a new investigative effort for pirate optical disc imports along the Paraguay border.

Replication of pirate optical discs sold in Brazil, whether on a large scale such as found in Southeast Asia, or small scale, such as the many CD burner operations scattered throughout Brazil, generally cuts across all the copyright industries. The videogame industry has seen both Asia-source counterfeits as well as locally manufactured disc find their way to Brazilian street markets.

Piracy Continues at Unacceptably High Levels for All Copyright Sectors

Piracy levels in Brazil have remained high for years, with many of the copyright industries estimating levels above 50%, meaning that more than half of each market is composed of pirate products which are generally available at a fraction of the price of legitimate product.

The recording industry is overwhelmed by expanding levels of music piracy in CD format; the audiocassette market was lost to pirates years ago.

In 1999, the recording and music industries reported that the widespread audio piracy problem in Brazil worsened due to several factors including: the growing pirate market, the shift of street vendors from selling pirate audiocassettes to selling pirate CDs, and to a lesser degree, Brazil's economic troubles. Estimated losses due to piracy of sound recordings and music, in both compact disc and audiotape format, amounted to an alarming \$300 million in 2000.

Alarming increases in the levels of CD piracy in Brazil first hit in 1998, when the recording industry began to call attention to the fact that piracy was increasingly threatening to destroy the world's sixth largest market for sound recordings and music. Audio CD piracy blanketed about 34% of the Brazilian market in 2000 (35% in 1999), causing about \$200 million in estimated trade losses each year. The main states which are being attacked by piracy are São Paulo, Paraná, Minas Gerais, Rio de Janeiro, Goiás, the Federal District (Brasília), and the states in the northeast.

The chief reasons for the rapid increase in music CD piracy are: (a) the lack of a strong and coordinated action by the Brazilian government, as well as the lack of a high-ranking Brazilian official accountable for copyright enforcement and empowered to coordinate the efforts of other enforcement agencies, the judiciary, and the local and state police, against unrestricted imports, distribution centers and street vendors; (b) the regional CD problem caused mainly by neighboring Paraguay, and unrestricted imports via airports and seaports in Brazil and its links to Southeast Asia; (c) the lack of proper legislation and judicial guidelines to allow the judiciary to proceed definitively against the suspect infringers; and (d) the lack of convictions and judicial sentences which deter piracy. The CD piracy problem is so sophisticated that it makes investigations and actions very difficult to accomplish without the full intervention and commitment of the federal government using all its enforcement agencies. For example, rising CD piracy caused commercial sales of legitimate product in Brazil to fall 20% in 1998 (compared to 1997) and 15% in 1999

(compared to 1998). When the legal recording market sales dropped 30% in the first four months of 1998, the industry pleaded with the Brazilian government for action, but to no avail. The market fell 47% in 1999 against the prior year. There was a slight recovery in sales figures for recorded music for 2000.

Pirate and bootleg music cassettes and CDs mainly enter Brazil from Paraguay via Foz de Iguazu, Corumba, Cascavel, Londrina, Riberao Preto, Maringa, Campo Grande, Cuiaba, Goiania and Ponta Pora, and also through the ports of Santos, Paranagua, Recife and Salvador, as well as at the airports at Manaus, Rio de Janeiro, São Paulo (Congonhas, Guarulhos and Viracopos) and Foz de Iguazu. Paraguay acts as a bridge to deliver pirate CD product from Taiwan, Korea, Thailand, Singapore, and China, as well as from the emerging CD plants in Paraguay, the U.S. and several European countries (Italy, Germany and France). Brazilians take advantage of the lack of border controls and install manufacturing, assembly and printing facilities on both sides of the border, bringing their products back and forth without any kind of control. During 1999, the recording industry found and dismantled two huge CD plants in Ciudad del Este which were targeting the Brazilian market. Amazingly, the CD plants entered Paraguay from Brazil, with no restrictions at all. In 2000, the pirates seemed to change their strategy by shifting into CD-R replication. Thirty-four million CD-Rs were imported into Paraguay without any restriction; the industry believes that Brazil was the ultimate destination of all these CD-Rs. Also, the industry's efforts in Paraguay located two huge CD-R replication facilities in Ciudad del Este, no doubt conveniently located to serve the illegal Brazilian market. The industry reports that Paraguay has just installed yet another CD-R plant.

For the last four years, Brazil's audiocassette market has been completely lost to pirates. For 2000, cassette piracy accounts for 98% of the cassette market. For years, pervasive audiocassette piracy has simply destroyed the legitimate Brazilian market for cassettes. In the southern cities and in the interior, the pirate cassette market is still strong. Based on the industry's past experience, this market will gradually switch toward selling pirate CDs, which will totally undermine the legitimate music CD market. Almost 75% of this pirate product in Brazil affects Brazilian repertoire. The industry believes that this fact alone would suggest that the Brazilian government would be even more concerned in addressing the piracy problem. In recent years, the pirate market switched very rapidly from audiocassettes to CDs, as street vendors, flea markets, and *sacoleiros* and contrabandists crossing from Paraguay into Brazil increasingly sold CD product. This phenomenon is obvious in major cities like São Paulo, the interior of São Paulo, Salvador, Curitiba, Recife, Fortaleza, Rio de Janeiro, Belo Horizonte, Goiania, and even in Brasilia, where more and more street vendors now sell pirate CDs and cassettes. In northeast Brazil, pirate sales began to take the place of established shops in 1998. Gas stations throughout the country freely distribute pirate CDs. There is an urgent need to attack this problem in a direct and coordinated manner.

In response to piracy, the recording industry introduced a hologram seal of authenticity for placement on all legitimate CDs. In December 1998, the Brazilian government issued a decree to establish an official, numbered stamp, issued and sold exclusively by the government, to be affixed to IPR goods, including sound recordings, videos and books, and grant authenticity to them. The recording and audiovisual industries remain concerned that if this stamp is not properly implemented, it could be used against these industries by spawning an entirely new counterfeit stamp industry. This stamp program was implemented on March 15, 2000. The Brazilian Video Union (UBV) filed a legal action on behalf of all of its member distributors (MPA member companies included) against the stamp. The UBV member companies have agreed to continue to

oppose the stamp implementation legally and politically, not only because it constitutes an additional financial burden, but also because of administrative problems in its supply by the government, and its possible “promotion” of piracy by rerecording pirates. Since this government-issued stamp confers authenticity by the Brazilian government to the VHS physical support bearing it, pirates will be able to rerecord pirate films over the original films contained in a VHS physical support bearing the stamp. The recording industry is also challenging this stamp in a separate legal action. The industries will continue to watch the implementation of this stamp closely. UBV obtained a preliminary injunction, suspending the use of the stamp pending a final court decision. The parties are waiting for a decision of the court. There are concerns that this stamp is nothing more than a tax, with no value as an anti-piracy tool.

The motion picture industry continues to face widespread video piracy and rising problems with VCD and DVD piracy.

According to the Motion Picture Association (MPA), Brazil’s enormous market potential for audiovisual product is extremely hard to develop because video piracy in Brazil has reached a high degree of integration into the video market. Although the overall percentage is lower than other Latin American countries (about 33% of all video product distributed in Brazil is pirate), the overall volume is much higher because of the size of the market. Video clubs carry at least 80% of the total pirate video market (there are 10,000-12,000 video clubs throughout the country, many of which never buy legitimate product and are not registered by any government authority). The remaining 15% of pirate product is sold by street vendors. Approximately half of the pirated material in video clubs is copied back-to-back from legitimate product, while the other half is distributed from numerous small clandestine duplication laboratories. Excellent quality counterfeit videos, sold by clandestine duplication and distribution organizations, are common throughout Brazil. Piracy levels vary between various cities and regions. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Brazil are estimated to be \$120 million in 2000.

The evidence suggests that video piracy in Brazil is changing, just as it has changed in other Latin American countries, as organized reproduction and distribution begin to displace the use of small-scale back-to-back copying. If allowed to grow, this pirate industry will integrate into elements of organized crime and will become even more difficult to attack. Pirate videos distributed through street vendors compose up to 10% of the total pirate video market. This activity is generally located in urban areas. It is supplied by numerous small duplication labs, often in low-income areas. This kind of activity is deeply related to unemployment as a social phenomenon and generally receives a high degree of tolerance from government authorities. This distribution system is also becoming a distribution system for VCD piracy.

The incidence of VCD piracy is increasing, often in conjunction with pirated software or video games. How fast VCD pirate product availability grows is dependent on the player hardware penetration (VCD and DVD players, computers and PlayStation® machines). In 1998, only 89 DVD titles were offered for sale. In June 2000, the number of titles made available to the public jumped to 210. In 1998, 86,720 DVD units were sold in 12 months. In 2000, nearly 10 times that amount of units – over 800,000 – were sold.

This movement in DVD player purchases and increased demand for DVD product indicates the potential demand for optical disc product, and consequently, the potential market for pirate VCD product. Much of the pirate VCD product is entering Brazil from Paraguay, perhaps produced

there, but most likely imported from Asia, with Paraguay as a transshipment point. This product is arriving in the southern Brazil markets and will inevitably move north to the major markets of São Paulo and Rio de Janeiro.

The entertainment software industry suffers from optical media piracy entering Brazil from sources in the Far East as well as locally produced product.

The biggest problems for the interactive entertainment software industry in Brazil remain the lack of border controls and the general tolerance for the high level of videogame piracy. Estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs and multimedia products) in Brazil in 2000 were \$248.2 million, more than doubling the losses estimated for 1999. The estimated level of game piracy in Brazil also rose to 94% in 2000.

A significant portion of illegal software for all entertainment software platforms is made in Asia (Hong Kong, Macau, the People's Republic of China, Taiwan, Thailand, Malaysia or Singapore) and is shipped to Paraguay, or, increasingly, other transshipping countries, and then Brazil. Pirated videogames in cartridge format, produced in Southeast Asia, enter the Brazilian market, often via Paraguay where they are assembled. Pirate CD-ROMs containing entertainment software products are mixed in with other shipments of optical media directly from Southeast Asia. For example, piracy of Sony Playstation products is about 98%, all of which is imported from Thailand, Malaysia, Singapore, Paraguay and Argentina. A large number of these consoles are grey-marketed by tourists returning to the country or products smuggled into Brazil. As a result, a huge videogame counterfeit channel has been established, and this is damaging to all other consoles' game sales. Reports indicate that there is an organized crime element involved in videogame piracy, and this makes it very difficult to engage local authorities in this fight. In addition, parallel imports (which are legitimate products from other markets) from Asia also enter Brazil, thus harming the ability of copyright owners and their licensees to distribute locally.

The retail videogame industry in Brazil continues to experience serious piracy problems, with stores having large quantities of counterfeit cartridges and videogame software for sale. Videogame pirates have gone from imported silver industrial CDs to widespread gold-disc burning operations, run by organized crime. Gold discs are recordable discs, called *tostadas* in Brazil. Piracy levels for some gold-run games for PC (personal computers) comprise a pirate market where 75% of the software is infringing copies. These burning operations are very profitable. Interestingly, almost all the pirate software is copied on erasable media; there does not yet appear to be professional-level CD pressing of game software within Brazil.

There is a variety of pirate fronts which require attention. One is the sale of pirate game software through advertisements offering games placed in newspapers and other sources. The customer calls, orders are taken in a fly-by-night telephone room, and the product is delivered to another location. The disc is then burned (made to order), taken to yet another location where it is given to a delivery person who often makes the delivery on a Moped®. These kinds of *tostada* operations are very difficult to investigate and track back, up the chain of command, to those directing and managing the infringing activities. Reports indicate that police are reluctant to arrest the delivery people, who are often teenagers and children. Another method are the pirate outlets, called *promocenters*. These are small retail booths, renting space in larger markets and galleries, which sell piratical and counterfeit goods. Street vendors are also a point of sale of all types of

piratical game software, including gold CDs, silver CDs and cartridges. Pirate videogames, especially PC-based game products, are frequently found in flea markets. Console pirates products tend to be in the normal retail trade channel. In addition, piracy over the Internet appears to be growing in Brazil. "Warez" is popular source of pirated game software. There are a large number of Internet sites offering pirate game software for sale, in addition to such software being offered on auction sites (such as Ibazar, Arremate, and Lokau).

Business software industry continues to suffer from traditional forms of software piracy, as well as the increasing utilization of the Internet to offer pirate software for sale.

The Business Software Alliance (BSA) reports that its preliminary estimated trade losses due to business software piracy in Brazil reflect a 15% decline over the prior year, with losses placed at \$269.8 million in 2000. The estimated level of business software piracy dropped slightly to 57% last year. Brazil has a very large informatics/software development and distribution industry which contributes to the Brazilian economy. According to a PricewaterhouseCoopers study, the packaged software industry generated 71,535 legitimate jobs in Brazil and paid \$622 million in taxes to the Brazilian government in 1998.⁸ If the piracy rate in Brazil had dropped to 25%, a level more closely approximating that in Western Europe/Canada/U.S. that year, there would have been 107,364 more jobs and \$934 million more in taxes paid by the industry. If this lower level of packaged software piracy had been achieved in Brazil, by the year 2002, with the natural growth of the industry, it is estimated that there would be 265,757 legitimate jobs in the packaged software sector, and that the industry would pay \$3.315 billion in taxes in Brazil.

BSA focuses its anti-piracy activities in the following states: Minas Gerais, Paraná, Rio de Janeiro, Rio Grande do Sul, Santa Catarina, São Paulo and the Federal District of Brasília. Software piracy continues to exist in its traditional forms in Brazil, including illegal reproduction/duplication of software programs both for commercial (i.e., sale) and noncommercial (i.e., use) ends, illegal use by end users, hard-disk loading of illegal software by computer resellers, and the manufacture and/or sale of counterfeit software products. One of the most alarming trends in recent years has been the increasing utilization of the Internet as a means of advertising illegal software to a large audience, and for the unauthorized electronic distribution of illegal software. Although Brazilian Internet pirates have been responsive to cease and desist letters sent by BSA and its member companies, many of these pirates simply close down one Website and open up an identical Website undetected (with a different Universal Resource Locator [URL] or Web address). The Internet may well eclipse other media for advertisement and distribution of illegal software in the near future. With respect to end users, BSA has concentrated most of its efforts on bringing civil enforcement actions against large and medium-sized companies, which has had some impact on the level of piracy. However, there still exists a considerable medium- and small-business segment in Brazil that has far from legalized. In addition, the press, particular in São Paulo, has reacted negatively to certain actions brought by BSA against corporate end users, despite evidence of illegal software in use by these entities.

⁸ PricewaterhouseCoopers, Contribution of the Software Industry to the Latin American Economies, A study commissioned by the Business Software Alliance, September 1999 at Sec. 7.3, page 29. BSA does not have statistical estimates for the Brazilian market for the year 2000.

Books remain vulnerable to widespread unauthorized photocopying.

The book publishing industry reports that there was no improvement in the book piracy situation in Brazil in 2000. Photocopying of English Language study materials and individual lessons and chapters from textbooks, as well as entire books, continues to be the major form of book piracy in Brazil. AAP indicates that photocopying on university campuses remains rampant, despite the combined efforts over the years of local publishers and the Camara Brasileira do Livro (the local publishers association) to address this problem. Many university texts used are *apostilas*, anthologies made up of chapters from various books copied illegally, both in English and in translation. Some of the largest universities are now discussing legitimizing the photocopying that goes on in their libraries. However, there are still only few contracts signed between ABDR (Associação Brasileira de Direitos Reprográficos) and the major universities. More unauthorized photocopying occurs in the northeastern states of Brazil, compared to São Paulo, Rio de Janeiro, Minas Gerais and Porto Alegre. Imported educational materials are commonly photocopied, due in part to their high price. The potential problem in the near future may be unauthorized translations, as U.S. publishers begin to enter that specific market in Brazil. Estimated trade losses due to piracy were \$18 million for 2000.

The Brazilian Criminal Justice System Fails to Address Copyright Piracy Effectively, and Does Not Create Deterrence.

Brazil continues to exhibit a general lack of interest and unacceptable delays in effective enforcement of the copyright law throughout the enforcement system, including police officers, judges, prosecutors and customs officials. While isolated police efforts have been moderately successful at the raiding level, the actions they take rarely reach conclusion in the courts. There is still a lack of clear and direct instructions from the highest levels that would direct the various enforcement authorities (such as Receita Federal, Policia Federal, Policia Civil, Policia Estadual, Policia Fazendaria, Alfandega) to act against instances of copyright infringement.

Police raiding activities against piracy are inconsistent; good in some cities and non-responsive in others.

The level of police attention to piracy varies throughout the country. Certain industries are able to achieve adequate cooperation with police officials, often depending on the region and on personal contacts. Most enforcement efforts in Brazil are commenced by investigations conducted by the copyright industries themselves, and are usually not the result of any major Brazilian government or law enforcement initiatives. Because Brazil has many different police corps, the rivalry among them, with some few exceptions, negatively impacts their ability to conduct effective and efficient raids.

The police, prosecutors and judges have demonstrated a lack of understanding of IPR issues in many instances. Copyright enforcement is simply not a priority. Rightholders may initiate criminal actions with either federal or state police officials to obtain search orders based on proof of copyright infringement. The federal police and judiciary are not considered to be effective in copyright enforcement. Federal police officials have jurisdiction over the types of crimes that are

generally viewed as producing large-scale corruption (such as border controls and drug trafficking). Most industry-led enforcement efforts end up being handled by state and local police officials.

There should be a centralized unit that could work the most important cases, and specific guidelines should be given to the police corps (for example, the Policia Fazendaria, regarding tax evasion cases) to take the lead in executing a centralized plan.

The local recording anti-piracy association, APDIF do Brasil, has been very active for more than four years, working primarily in the states of São Paulo, Paraná, Minas Gerais, Mato Grosso do Sul, Goiás, Bahia and Rio de Janeiro. During 2000, the recording industry brought 724 actions (versus 777 actions in 1999), which resulted in the seizures of 3.2 million CDs and 1.4 million cassettes. While these statistics are impressive, they in fact reflect only a very small portion of the entire pirate market. These 4.6 million seized units are low, compared to a pirate market of some 95 million legal units and 96 million pirate units (50 million illegal CDs and 45 million pirate cassettes).

Although the Brazilian police seemed to start cooperating in actions against street vendors of pirated music during 1998, such cooperation declined in 1999, and this declining trend continued in 2000. This downward spiral is happening because there is a lack of clear guidelines and direction from senior Brazilian officials, in addition to jurisdictional problems between different police corps and different *delegacies*. In those rare cases where the police were helpful and took action, the cases got bogged down with the prosecutors, who with few exceptions are unwilling to bring cases. Evidence of the lack of enforcement can be found in the following areas where music piracy thrives openly: São Paulo City (the surroundings of the 25 De Marco Street, 12 de Outubro Street), the downtown of São Paulo, Camelodromos of Campinas, Riberao Preto, Porto Alegre, as well as throughout the cities of Florianopolis, Curitiba, Goiania, Cuiaba, Feira de Santana, Vitoria de Conquista, Teresina, Natal, Feira de Sulanca in Caruaru. These are just a few examples of the locations where piracy exists with impunity. The recording industry notes that it has been almost impossible to proceed with its more serious piracy cases due to the high incidence of leaks. In other countries, one of the only ways to deter piracy is to affect their revenue stream (by using tax evasion laws) and to impose serious jail terms against convicted pirates.

The motion picture industry also has been very active in Brazil. During 2000, the Motion Picture Association (MPA) conducted 1,535 raids and seized 220,878 pirate videos. MPA investigations uncovered 37 laboratories which were dismantled with police action, and 275 VCRs were seized. In the last four years, MPA has coordinated over 6,000 raids and their local counsel worked with police and prosecutors to file over 5,000 cases. Of all these cases, there have been only two convictions which involved suspended jail terms of 4 and 12 months. While the number of raids may appear impressive, at the end of the day there is no deterrence (see discussion in the next section).

Regarding business software efforts, BSA, in collaboration with the Associação Brasileira Das Empresas de Software (ABES) (the local software association), brought 134 criminal police actions against resellers in Brazil in 2000. Out of these actions, 7 were against small stores where 42,955 CDs were seized, 120 actions were brought against street resellers where 166,432 CDs were seized, and 7 actions were brought against individuals offering pirate software for sale in newspapers where 3,511 CDs were seized. A total of 212,898 illegal CDs have been seized as a result of these actions, of which ABES calculates that a minimum of 72,000 contained business software with a retail value of over U.S.\$19 million. However, despite these statistics, there have

still been no cases to date in which BSA has been involved where an individual has served a jail term for software piracy. In addition, while there have been examples in prior years of the police (particularly the consumer affairs police) bringing actions mostly on their own initiative, there were no such actions in 2000.

After years of effort, the Brazilian software industry, with the support of the U.S. software industry, succeeded in obtaining a “fiscal crime” provision in the Software Law enacted in February 1998. Under the Software Law (Article 12, section 3, paragraph II), tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as an independent public action. With the exception of a limited number of actions by tax authorities in the Federal District of Brasilia and the state of Bahia in 1999, two and one-half years into the new Software Law, it is clear that the Brazilian IRS (Receita Federal) and the respective state tax authorities are dedicating no resources to pursue this kind of tax evasion. The basis of these actions is that the state is suffering great losses due to the sale of illegal software as pirate resellers are not collecting the applicable tax from purchasers upon such sale. BSA was extremely hopeful that this type of tax evasion case would have a big impact on the level of piracy in Brazil, especially by medium-sized and large companies.

Unnecessary requirements for technical analysis cause excessive delays and expose viable cases to unwarranted dismissal.

MPA reports that it has had several cases dismissed because of improper technical analysis by police experts. Some police experts still insist on physically examining the suspected pirate tape, looking for physical evidence of piracy (lack of a proper label, etc.). This type of exam is based on a trademark paradigm where the essential element is falsification, but in copyright the essential element is lack of authorization. MPA does not argue that a technical analysis is improper but asserts that has been improperly applied in copyright cases. As a result, MPA has developed a series of training seminars for police experts to increase the proper application of copyright analysis. These courses have reduced the problem to some degree, although it continues to be an important operational obstacle.

Brazilian prosecutors pursue very few criminal copyright cases, despite the high numbers of complaints filed and raids conducted. In those few cases which reach judgment, non-deterrent sentences are issued.

Prosecutions are ineffective; few cases reach the courts, and those few that do fail to impose deterrent penalties. Sadly, this pattern has continued for years, without improvement.

Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. Case backlogs constitute a serious enforcement problem, caused by burdensome substantive and procedural formalities in the law and a general lack of resources. Enforcement efforts sometimes fail due to the lack of sufficient skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence. A major problem has been the low penalties imposed in the few criminal copyright infringement cases which have been decided by the courts. This problem may be alleviated if the penal code is reformed to index penalties for inflation and if the courts actually impose deterrent levels of penalties in copyright cases. Regulations aimed at reducing the backlog of court cases further undermine and weaken

deterrence. Courts usually suspend jail terms for first offenses, thus returning defendants to the streets to return to their illicit activities.

In 2000, the recording industry filed 724 complaints with the police, and this resulted in actions against 724 targets (the Industry filed only in those cases that were secured previously; 560 were street raids that do not attack the core of the problem). Out of these 724 cases, 131 were suspended and only nine people out from the 1,348 arrested persons were indicted. In these nine cases, the fines were minimal and the defendants were never charged by the police

With respect to audiovisual cases, MPA reports that the pattern of no deterrence at the prosecutorial and judicial levels continues. In 2000, MPA filed 1,957 complaints with the police, which resulted in 1,535 raids. 146 of their cases were suspended or dismissed and there were only two convictions in 2000, both with jail sentences which were converted to community service.

To sum up, the last four years, MPA coordinated over 6,000 raids and their local counsel worked with police and prosecutors to file over 5,000 cases. Of all these cases, there have been only two convictions which involved suspended jail terms of 4 and 12 months. Both of the 2000 sentences were then converted to community service, hardly a deterrent. (Note that at the time of this writing, MPA reports three additional convictions in 2001, although none resulted in jail time or collected fines: All were converted to community service). Not one video pirate has sentenced to serve, and actually did serve, a single day in jail. The percentage of MPA cases through 2000 in Brazil resulting in convictions was 0.09%, with a zero percentage chance of being jailed. In addition, MPA has had 219 cases suspended in Brazil under Law No. 9099-95, but no fines or damages – as required by that law for such suspensions – have ever been collected. During 1999 and 2000, 381 of MPA's cases were suspended or dismissed. This means that 9.6% of MPA's cases were suspended, 6.5% were dismissed, and only 0.09% resulted in conviction.

As for business software actions, BSA's criminal campaign against resellers is focused on seizures and publicity, conducting actions with the state police. As stated above, in 2000 there were 134 criminal business software complaints filed in Brazil. These actions were brought in collaboration with ABES, the local Brazilian software association. No criminal verdicts have been issued as a result of these actions.

**CRIMINAL COPYRIGHT ENFORCEMENT
STATISTICS IN BRAZIL FOR 1998, 1999 and 2000**

ACTIONS	Recording Industry 1998 (1999) [2000]	Motion Picture Industry 1998 (1999) [2000]	Business Software Industry 1998 (1999) [2000]
Number of complaints filed with police	530 (409) [724]	1,320 (832) [1,957]	34 (118) [134]
Number of raids conducted	680 (777) [724]	2,381 (1,671) [1,535]	34 (118) [134]
Number of pirate copies seized	2.85 million (2.86 million) [4.63 million]	243,581 (212,063) [220,878]	NA (NA) [212,898]
Number of cases suspended or dismissed	NA (18) [131]	148 (235) [146]	(0) (0) [0]
Number of defendants convicted (including guilty pleas)	5 (3) [9]	1 (0) [2]	0 (1) [0]
Criminal sentence issued	Minimal fines (1-year jail term, commuted to small minimal fines) [sentences commuted to small fines - \$260]	Community service (None) [Community service]	None (2 years' probation plus fine < \$600) [None]
Ratio of convictions to the number of raids conducted	0.7% (0.8%) [1.2%]	0.04% (0%) [0.09%]	0% (0.8%) [0%]

Notes

- Statistics in this chart are provided by IFPI Latin America, the Motion Picture Association (MPA) and the Business Software Alliance (BSA).
- The suspensions or dismissals cited above are the result of judicial decisions. See discussion below regarding Law 9099-95, which permits judges to sentence first-time offenders with up to two years' probation and monetary damages.
- NA = Not available.

Unwarranted Delays By The Police, Prosecutors And Judges, Are Common.

For those rare criminal cases that do make their way to court, the time to complete a case takes a very long time. Delays in criminal copyright infringement cases can take as long as two to three years in the courts of first instance. Not surprisingly, there is a tremendous backlog of cases in the Brazilian courts. The police often keep the case files in their offices for seven or eight months before sending them to the prosecutor's office to file the criminal case.

MPA has a case backlog of 4,934 cases in Brazil (1,066 in São Paulo and 1,247 in Rio de Janeiro, among the total). Nearly half of the cases are from 1998 and 1999, 345 are still pending from 1997. There is no attempt by Brazilian authorities to expedite priority cases. For example,

MPA has 328 recidivist cases and 22 high-priority cases (involving organized distribution, probably related to organized crime), yet these cases are treated with the same general lack of enthusiasm that all cases meet.

It is important to show the proper authorities that there are certain priority cases that deserve a special focus and that there are thousands of cases susceptible to a proper application of the suspension procedures under Law 9099-95.

One solution often proposed to address the problem of delays has been the creation of a specialized court for copyright matters. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts. The copyright industries and other interested parties are working with appropriate judicial officials to prepare for the formation of these courts, which should significantly improve intellectual property rights enforcement. Our reports indicate that these courts are restricted to industrial property matters. IIPA and our members continue to recommend that courts also be established to handle copyright infringement cases. Although no specific action has been taken to create these courts, our last report indicated that the Brazilian Judicial Commission has assigned the issue as a specific agenda item (Number 15) in its list of pending actions.

Brazilian Border Measures are Ineffective.

In 1999, the copyright industries requested that the Brazilian government focus on improving border enforcement. There seemed to be little progress made on this problem. Because of the lack of coordination of the actions of Brazilian Customs and federal police, border controls are lax and must be tightened to stop the massive amounts of pirated and counterfeit product (including piratical CDs, audiocassettes, videocassettes and videogames) entering Brazil from Paraguay, particularly at the cities mentioned above, among these being Foz do Iguazu, Corumba, Campo Grande and Maringa. Bolivia and Uruguay are also potential sources of counterfeit production for the Brazilian market.

Brazil promised the U.S. years ago that it would work with the Paraguayan government on border issues, but only recently have a few enforcement efforts been observed at the Brazilian border. Brazilian airports are also a significant source for pirate shipments around the country. While coordination efforts may be underway, they have resulted in only limited tangible improvement on the ground. According to the Brazilian government, they do implement a "red traffic light" system in the major seaports with Paraguay. However, in 1999 the recording industry found that two large CD plants made their way to Paraguay via Brazil (via the ports of Santos and Paranaqua).

Unwarranted Delays are Prevalent in Civil Cases.

The civil court system in Brazil is notoriously overloaded, inefficient, and slow. In São Paulo, judges may be responsible for 3,000 or more cases in a year. Cases usually take from eighteen months to two years to come to trial. Moreover, defendants have many grounds for appeal, and this process regularly takes three years before a judgment is issued by the relevant superior court. Incredibly, BSA has cases in São Paulo dating back to 1991 and 1992 that have still not received a judgment from the relevant superior court.

The business software industry also uses civil actions in its anti-piracy campaign in Brazil. BSA continues to bring civil search and seizure actions, followed up in most part (unless the defendant settles within thirty days of the search and seizure) with the filing of civil damages suits. BSA members acting through BSA brought 53 civil actions against software pirates in 2000, and 36 in 1999. The BSA anti-piracy hotline received 23,624 calls in 2000 (20,797 calls in 1999), which produced 1,337 leads of suspected piracy.

Nonetheless, in two civil cases in 2000 and one case in January 2001, BSA has received extremely favorable judgments for multimillion-dollar sums. The judges in these cases applied Article 301 of the Copyright Act of 1998 (Law No. 9.160/98) ordering the defendants to pay damages of 3000 times the retail value of the illegal software seized. The level of damages awarded in these cases is unprecedented worldwide with respect to software copyright infringement suits.

CRIMINAL CODE AND REGULATIONS

The Brazilian Criminal Code Fails to Provide Effective Deterrence. Proposed Amendments Have Been Pending for Years, Without Progress.

The Brazilian penal code was amended in 1993. Unfortunately, those amendments failed to include procedural provisions which would have permitted the police to seize all infringing copies (instead of just the amount of product necessary for evidentiary purposes) and implements used for reproduction which are found during an anti-piracy raid. The legislation should be amended to provide this seizure authority. In addition, the levels of fines in the 1993 amendments have been overwhelmed by inflation, and should be tied to the indexing system in the general provisions of the Brazilian penal code. The Brazilian government promised to make best efforts by June 1994 to pass legislation to ensure that the range of higher penalties available under the indexing system in the general provisions of the penal code applied to copyright infringement. This has not been achieved.

Two amendments to the current Brazilian penal code have been pending for years. The first is Bill No. 2.681/96, which has strong copyright industry support. This bill would amend Article 184 of the penal code to include unauthorized rental of a work or sound recording for profit and add provisions permitting the destruction of seized materials by Brazilian authorities. This bill has been waiting to be included in the agenda of the Plenary of the lower house (the Chamber of Deputies). If approved by the Plenary, it will be sent to the committees in the Senate for analysis and approval.

The second proposal, Portaria 232/98 proposed by the Ministry of Justice, reflects a substantial revision of the entire penal code. The concern here is that this proposal would lower the level of criminal penalties and remove the authority of the police to initiate searches and seizures on their own initiative (*ex officio*), and instead would make them available only upon judicial warrants. The copyright industries oppose this proposal. Our industries' experience around the world has been that the only way to deter piracy effectively is to increase the criminal penalties for copyright infringement and impose these deterrent sentences on the defendants.

It is important to know that a criminal procedure regulation was issued in 1995 to alleviate serious court overcrowding. Law No. 9099-95 provides for the suspension of proceedings with a two-year probation for first-time offenders, requiring the defendant to redress monetary damages as a condition to granting the suspension. When the regulation first went into effect, the copyright industries were hopeful that it could have a positive impact on piracy, because it requires the defendant to pay damages as a condition to granting the suspension, and the accused remains on probation for a period of two years. As the courts have begun issuing these suspensions, there is growing concern that these regulations are not supporting the creation of a system which has expeditious and deterrent penalties. As detailed above, most copyright cases are cycled through this system. Many offenders receive suspended sentences or very low fines, community service, or no sentences at all. This leniency clearly does not deter piracy. As reported above, MPA had 219 cases in 1999 and 2000 suspended under this law, but no fines or damages were ever collected.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Law and the Software Law

Under its 1994 agreement with the U.S., Brazil promised to enact legislation on computer software and to pass amendments to its copyright law by making “best efforts” to accomplish this by January 1, 1995. These bills were finally enacted by February 1998. The software bill (PL 200/96) passed both Houses, and was signed in its entirety, without amendment, by President Cardoso, and entered into effect on February 20, 1998. On February 19, 1998, President Cardoso signed into law amendments to the 1973 Copyright Law (Law No. 9.610) which entered into effect on June 20, 1998. Although these laws provide goods levels of substantive protection, they are not enforced in-practice (see discussion, above). The copyright law even includes some provisions of the WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Specialized IPR Courts With Copyright Jurisdiction Should be Created.

The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts. The copyright industries and other interested parties are working with appropriate judicial officials to prepare for the formation of these courts, which would significantly improve intellectual property rights enforcement. Our reports indicate that these courts are restricted to industrial property matters. IIPA and our members continue to recommend that courts also be established to handle copyright infringement cases. Although no specific action has been taken to create these courts, the Brazilian Judicial Commission has assigned the issue as a specific agenda item (Number 15) in its list of pending actions.

The Brazilian Government Must Take Action to Reduce Piracy of Business Software Programs Within Its Ministries and Agencies.

The Brazilian government should consider stronger efforts to support government software management in its public ministries and agencies. The Brazilian government has done less to reduce government software theft (piracy) than perhaps any other major Latin American

government. The President has never enacted a decree ordering federal agencies to buy legitimate software. Moreover, public entities are required by law to appeal any decisions against them to the end of the appeals process, with the result that software piracy actions against government agencies involve costly legal battles that last for many years.

NON-TARIFF BARRIERS

Local Printing Obligations for Films and TV Programming

MPA member companies continue to be negatively affected by various taxes aimed at collecting funds to promote the local film industry. Restrictions on color prints imported into Brazil remain in effect in 2000. Article 21 of Brazilian Law 8.401/92 establishes a 100% local printing obligation for films and television programming. Importation of color prints for the theatrical and television markets is prohibited. All such prints (with the exception of up to six prints for films of recognized culture/artistic value) must be produced locally, regardless of price or quality of work. There are only two printing laboratories in Brazil, which cannot supply the growing demand for prints in Brazil due to the increasing construction of multiplex theaters. Based upon the number of member company releases in Brazil (approximately 90 features annually), and an average of 80 prints per feature, it is estimated that MPA member companies lost \$8.6 million in 2000 due to this obligatory local printing restriction.

This provision violates Article XI of the General Agreement on Tariffs and Trade, which prohibits quantitative restrictions on imports. It also is inconsistent with Brazil's obligations under the treaty of Asunción, which created Mercosur and establishes the free circulation of goods and services within the member countries of Mercosur. Brazil should take immediate steps to bring its practices into conformity with its international trade obligations. In order to supply the Brazilian market with the number of prints required and to increase competition and promote modernization of printing labs in Brazil, Brazil should allow the importation of prints manufactured abroad.

Remittances and Computer Software

Pursuant to the last modification of the Central Bank's regulation on overseas remittances relating to software purchases/licenses, per Circular number 2682 of September 1996, the financial institution conducting the currency exchange operation still requires all documentation listed in Circular number 2682 of May 1996, which are: (i) the agreement signed with the exporter of the software (import license); (ii) a certificate from the Government Bureau of Computer and Automation Policy (part of the Ministry of Science and Technology), approving the software license agreement or the assignment of rights in any software sales/distribution agreement; (iii) copies of the invoices reflecting the sale of software and (iv) a declaration of liability.

Brazil has eliminated most of the nontariff barriers that afflicted the computer software industry. At last report, the Central Bank is still requiring (per Circular No. 2685 of May 1996) that an agreement duly registered with the Ministry of Science and Technology (including the registration certificate) be presented to the financial institution conducting the currency exchange operation as a prerequisite to remitting overseas payments. In addition, the Brazilian entity seeking

to make the remittance must also present an import license, an invoice from the (foreign) supplier, and an invoice that the Brazilian entity has issued to the purchaser of the program.

Onerous Duties for Entertainment Software

Import duties for entertainment software are quite high in Brazil, and the entire tax and duty structure is rather complex. The bottom line is that all these taxes significantly increase the cost of importing entertainment software into Brazil, and pose a significant barrier to trade. These duties prevent local distributors from importing some videogame titles.

Cartridge-based videogames incur higher taxes than PC-based CD videogame titles. For example, cartridge-based games pay 22.5% federal import duties (calculated on the CIF value of the good), 40% federal tax on industrialized products (calculated on the CIF value of the good) plus 18% state tax on the transaction related to the circulation of goods (calculated over the CIF value plus the two federal taxes; this state taxes varies between states). In comparison, imported PC-based videogame software is subject to 18.5% federal import duties, 15% federal tax on industrialized products, and 18% state tax. In both cases, these duties are extremely high. In addition, the inequitable tax structure has created a controversy over whether CD-based videogames should be characterized as the lower-dutied PC software or the higher-dutied videogames.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

COSTA RICA

EXECUTIVE SUMMARY

Criminal copyright enforcement efforts by Costa Rican authorities continue to decline. Prosecutorial and judicial delays have stymied the hopes of any tangible progress, especially in San José. Delays in judicial proceedings, lack of official investigators and public prosecutors specialized in intellectual property crimes, as well as the drastic budget cuts imposed on the judiciary caused serious enforcement problems in 2000 which will likely continue in 2001. Estimated trade losses due to copyright piracy in Costa Rica are \$14.2 million for 2000.

On the legislative front, efforts to raise the level of criminal sanctions for copyright piracy took a step backward. Over the objection of the copyright industries, Costa Rica passed intellectual property legislation in October 2000 which amended certain procedures and sanctions in intellectual property rights cases. As a result, some industries already report difficulties in bringing criminal cases to prosecutors under this amended code.

Because of this deteriorating situation, IIPA recommends that Costa Rica be elevated to the Priority Watch List.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1998 - 2000

INDUSTRY	2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ¹	9.0	68%	9.4	71%	6.8	72%
Sound Recordings / Musical Compositions	3.0	40%	3.0	40%	3.0	90%
Motion Pictures	2.0	40%	2.0	95%	3.0	95%
Entertainment Software ²	0.2	50%	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA
TOTALS	14.2		14.4		12.8	

¹BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss figure of \$9.1 million was also reported as preliminary. BSA's 1999 statistics were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

In order to highlight the copyright industries' dissatisfaction with both the legislative and enforcement situation in Costa Rica, IIPA filed a petition on August 21, 2000 with the U.S. Trade Representative, requesting President to review the eligibility of Costa Rica as a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs for Costa Rica's failure to provide adequate and effective copyright protection for U.S. copyright owners.³ IIPA also noted that the time that it would be inconsistent for the U.S. government to grant new, additional benefits to Costa Rica under the U.S.-Caribbean Basin Trade Partnership Act (CBTPA) while conducting an investigation under GSP and CBI for Costa Rica's failure to afford adequate and effective IPR protection to U.S. copyrights.⁴ Despite our requests, CBTPA eligibility to Costa Rica was granted⁵ and our GSP/CBERA IPR petition was not accepted. The problems IIPA highlighted last fall remain the same in early 2001.

COPYRIGHT PIRACY IN COSTA RICA

The number of local pirate resellers and CD burners remains very high because of the lack of deterrent legislation, and an inefficient judicial system. Under-licensing cases were detected in corporate end users and in municipalities in 2000. The business software piracy rate was 68% in 2000, and represented estimated losses of \$9.0 million last year.

The motion picture industry continues to be concerned with video piracy in Costa Rica. MPA reports that organized video piracy regained its presence in 1998 and 1999 after MPA successfully dismantled the Sempero network that controlled organized distribution out of Panama. Currently, locals control organized illegal reproduction and distribution. Recent investigations have uncovered three independent rings. One surrendered to MPA's satisfaction, the other two continue and are openly recognized as pirates by video store operators (who also buy from them). These two rings are MPA targets, and MPA is currently in discussions with police regarding proper action. Effective action against these pirates would substantially reduce video piracy in Costa Rica. There is also some back-to-back copying in individual video stores, although MPA is of the belief that such activity is not currently significant and can be addressed through commercial activity. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Costa Rica are estimated to be \$2 million in 2000. Estimated levels of piracy for 2000 were 40%, a major drop from previous

³ In 1999, \$24.9 million of Costa Rica's imports to the United States benefited from the GSP program, accounting for 0.6% of its total imports to the U.S. For the first eleven months of 2000, \$50.6 million of Costa Rican goods entered the United States under the duty-free GSP code, representing a 117% increase over the same time period last year. Under the Caribbean Basin Initiative (CBI, also known as CBERA) program, which contains similar IPR criteria, Costa Rica had \$683 million worth of goods enter the U.S. in 1999, accounting for 17.2% of its total imports into the United States. For the first 11 months of 2000, \$552.7 million of Costa Rican goods entered the U.S. under the CBI. For further background on Costa Rica's appearance on the Special 301 lists, see Appendices D and E of this submission.

⁴ See International Intellectual Property Alliance, Request for Review of the intellectual Property Rights Practices of Costa Rica in the 2000 Annual GSP Country Eligibility Practices Review, August 21, 2000, available on IIPA's Website at <http://www.iipa.com> and in USTR's Reading Room in Washington, D.C.

⁵ The CBTPA is found in the Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000). USTR subsequently determined that Costa Rica has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. This determination made Costa Rica fully eligible for the CBTPA trade benefits. See Press Release 00-68, Office of the U.S. Trade Representative, "Caribbean Basin Trade Partnership Act: Customs Procedure Designation," October 5, 2000.

years. This decline was due primarily to industry efforts, which included organizing a new video association, shutting down two distributors of pirate product, and encouraging new market entry, all of which resulted enhanced promotion of legitimate product and reduction of pirated product.

Piracy of sound recordings, especially in audiocassette format, is widespread in Costa Rica. In addition to domestic piracy, Nicaragua and Mexico are reported to be sources of imported pirate product. Estimated losses for the music and sound recording industries in Costa Rica were \$3.0 million in 2000. The estimated level of piracy last year was placed at 40%. The industry believes that the drop in piracy levels between 1998 (90%) and 1999 (40%) may be attributed to an increase in legitimate sales, especially of compact discs (CD) in 1999. The loss estimate has remained constant because the level of audiocassette piracy continues to remain high, and this impacts negatively on legitimate sales. Currently, the Costa Rican recording market has not been blanketed with pirate CDs, a phenomenon which has adversely affected several other markets in Latin America. The recording industry reports that it is becoming more and more difficult to enforce criminal cases. Fewer police raids have taken place in recent months.

AAP reports that there is some photocopying of publications at the universities, but this has not worsened in the last year. There are no significant losses to report.

IDSA estimates the piracy level of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Costa Rica to be 50%, causing an estimated \$200,000 in trade losses due to piracy in 2000.

COPYRIGHT ENFORCEMENT

IIPA and its members have made several suggestions, in prior Special 301 filings, our 2000 GSP/CBERA petition, as well as through its members and colleagues doing business in San José, to reduce prosecutorial and judicial delays to improve the on-the-ground situation. Here are a few illustrative suggestions:

(1) *Improve coordination of activities with public prosecutors and investigators.* The General Prosecutor's Office of Costa Rica has not implemented any appropriate policies to coordinate the activities of the Judicial Investigation Office (OIJ) and the public prosecutors. Such a coordinated effort would aid in improving the efficacy of investigatory actions and follow-up.

(2) *Appoint specialized IPR prosecutors.* The initiative to appoint public prosecutors specializing in intellectual property crimes has been completely abandoned. This initiative was originally included as a recommendation by the Special Commission on IP Matters which was working on omnibus IPR reform in 1999, but was dropped from the omnibus legislative bill which passed in late December 1999. The General Prosecutor's Office of Costa Rica recommended rejection of this initiative, among other reasons, because of their lack of resources. Local copyright industries, including the local publishing industry and the National Museum of Costa Rica, among others, have lobbied hard for creation of this unit. The Attorney General's office is in favor of the specialized unit, which would open the door to agreements on training and technical assistance for enforcing copyright. The proposal for a new IP unit has been reintroduced to the Special Commission and should be adopted with the hope of achieving a dedicated unit of at least three

prosecutors with nationwide jurisdiction, three or four trained investigators from the OIJ, and four technical experts.

(3) *Create a coordinated and national plan.* There is no institution, office, or national program exclusively dedicated to defending intellectual property rights and coordinating intellectual property activities, the only exception being the copyright, patent, and trademark registries. Even though the President of Costa Rica and certain ministries have expressed support for the protection of intellectual property rights, they have not taken concrete steps. In addition, the illegal use of copyright works is very common in the public sector.

(4) *Improve copyright training (legal and enforcement) at all levels.* Training in copyright matters needs to be provided for all levels of enforcement, police, customs, administrative police, prosecutors and judges.

There is No Official Program Dedicated to Defend Intellectual Property Rights.

There is no institution, office, or national program exclusively dedicated to defending intellectual property rights and coordinating intellectual property activities, with the exception of the copyright, patent, and trademark registries. Even though the President of Costa Rica and certain ministries have expressed support for the protection of intellectual property rights, they have not taken concrete steps to strengthen such protection. In addition, the illegal use of copyright works is very common in the public sector itself. The administrative police are not trained in intellectual property crimes, which presents an obstacle to proper enforcement.

The Ministry of Foreign Affairs and the Ministry of Justice expressed little support for intellectual property bills when treated by Congress. It appears that the Costa Rican government was more interested in showing the WTO that Costa Rica had complied with the provisions of TRIPS by the deadline (December 31, 1999), than with the actual substantive content of the provisions contained in the legislation. Passage of the Ley de Observancia was also compounded by local efforts to pass legislation in order to obtain preferential benefits under the CBTPA.

Delays in Criminal Investigations and Proceedings and Lack of Judicial Resources Represented Important Obstacles to Anti-Piracy Enforcement.

(1) Public Prosecutors

There is serious concern on the part of all copyright industries regarding the interpretation and application of the procedural and criminal provisions of the law, and the delays in the criminal cases caused by the prosecutors. Public prosecutors argue that the cause of the delays in judicial proceedings is the huge number of cases assigned to them, but BSA believes this is not the only reason. In a software piracy case brought by the BSA against Duarco SA (Exp. 99-12908-042-PE C/.Empresa Duarco SA en D/Carlos Corrales Solano, Infracción Ley de Derechos de Autor), the criminal complaint was submitted on June 10, 1999, and although no inspection of the company was conducted, without any precise investigation, the prosecutor decided to reject the complaint. This decision was appealed and the court decided that the prosecutor should continue the process.

In another criminal case filed by the BSA against a company on June 11, 1999, the prosecutor of Tres Ríos delayed more than a year before conducting a raid at BSA's request.

One source of these problems is the refusal of the General Prosecutor's Office to appoint a prosecutor specializing in Intellectual Property crimes due to an alleged lack of resources. Another serious enforcement problem facing BSA in Costa Rica is the level of proof required by prosecutors before they request authorization from judges for search and seizure orders. Public prosecutors of San José and Tres Ríos were reluctant in 2000 to request search and seizure orders from judges unless there was conclusive evidence that a crime had been committed. Even though the Costa Rican Criminal Procedural Code only requires "sufficient cause" (*motivos suficientes*) to approve the preliminary inspection of suspected pirates, public prosecutors in many cases have transformed this standard into a standard of "complete certainty" by requiring excessive proof of illegality before conducting the inspection, such as certified statements of the number of computers and the number and type of pirate software to be found within the premises. BSA believes that the difficulty in obtaining preliminary injunctions in criminal cases to protect intellectual property rights is a violation of articles 41 and 50 of TRIPS.

In addition to these problems, public prosecutors have requested proof of registration of protected works in order to consider them legally protected. This requirement for the formality of registration violates Costa Rican intellectual property legislation, as well as the Berne Convention.

For the above reasons, since June 1999, all BSA criminal cases initiated in San Jose and Tres Ríos have been seriously delayed. The first two new BSA inspections were finally conducted in October 2000. This resulted in five indictments.

(2) The Judicial Investigation Office (OIJ)

The General Criminal Unit of the OIJ is in charge of the investigation of intellectual property crimes. Even though this unit has made efforts to conduct the investigations properly, it does not have adequate resources, and BSA cases have been delayed. The unit only has four software investigators, yet has jurisdiction over the whole country. Other problems are lack of appropriate computers and transportation.

The prosecutors are empowered by law to oversee and control OIJ investigations, but the General Prosecutor's Office has not implemented any policies to coordinate the activities of the prosecutors and the OIJ. Many conflicts between the prosecutors and the OIJ have occurred, causing further delays to the BSA criminal cases.

In addition to all these problems, the government substantially cut the budget of the judiciary, which means that the lack of resources in certain sectors will undoubtedly worsen. The Director of OIJ, Ms. Linette Saborio, declared that the informática (technology) department of the OIJ will have only an annual budget of Colones 30 million, which is approximately U.S.\$98,039. This budget limitation will certainly cause additional enforcement problems for BSA.

(3) Judges

Judicial training programs and seminars are necessary to increase understanding of Costa Rica's intellectual property legislation and the international treaties signed by their country, and

improve application of intellectual property law to copyright infringement cases. Indeed, there has been criticism in the press on this regard: A report submitted to the Supreme Court in late 1999 addressed the need to train judges in the application of injunctive relief. The BSA organized a training seminar in 1999, but the judiciary has not organized any training on its own initiative.

COPYRIGHT LAW AND RELATED LEGAL ISSUES

Copyright Law Amendments and WIPO Treaties

In order to comply with TRIPS by January 2000, Costa Rica amended its 1982 copyright law (and several other intellectual property rights laws) on December 31, 1999. The revised copyright law was published in Law No. 7979 of January 31, 2000. Several positive improvements to the copyright law were made, including: revising the right of reproduction; extending the basic term of protection for works to life of the author plus 70 years, and for audiovisual works to 70 years after first exhibition and for sound recordings to 70 years after fixation; recognizing the rightholder's exclusive right to make a work or sound recording available to the public. The copyright law still failed to protect against parallel importation. Costa Rica's decision to deprive copyright owners of control over parallel importation leaves its borders open to importation of illegitimate copies.

The one positive legislative success in the past year has been Costa Rica's ratification and deposit of its instruments of ratification to both the WIPO treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These instruments were deposited with WIPO on May 23, 2000. Costa Rica should once again amend its 1982 copyright law to fully respond to the challenges of the rapidly evolving marketplace for copyrighted materials by implementing the substantive obligations found in these treaties.

However, the administrative procedures for border measures and all civil sanctions and criminal penalties were dropped from the 1999 copyright amendments and are now pending in the *Ley de Observancia* bill (discussed below). The civil and criminal procedures are governed by the Civil Procedural Code and the Criminal Procedural Code, respectively.

Ley de Observancia

A bill, "Proyecto de Ley No. 13642, *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*" (known as the *Ley de Observancia*), represented an attempt to improve procedures and penalties for copyright infringement in Costa Rica. The copyright industries in Costa Rica worked diligently to craft a satisfactory bill which would provide both the government and rightsholders with the ability to take specific actions to fight copyright infringements. As originally drafted in January 2000, this bill would combine all penalty provisions for violations of intellectual property rights, including patent, trademark, copyright and the like, into a single new law. The basic purpose of the bill was to provide more adequate penalties and procedures in accordance with TRIPS.

Publicly, the Intellectual Property Special Committee supported the protection of intellectual property rights, but during committee meetings, the committee members proposed a reduction in civil sanctions and criminal penalties, and increased requirements to obtain injunctive

relief. For example, the Intellectual Property Special Committee proposed maximum criminal penalties of between two- to three-year jail terms for intellectual property infringements, no civil sanctions or criminal penalties when the illegal use is for nonbusiness or noncommercial purposes, restrictions on the type of products that can be seized by the courts, and the removal of other important provisions from the original bill.

In response, the intellectual property associations of Costa Rica (Asociación de Autores y Compositores Musicales, Cámara del Libro, Asociación Productores Fonográficos, MPA, Asociación para la Protección de Programas Informáticos, Productores Audiovisuales, and Asociación de Inventores) united to defend the provisions of the original bill under attack and to inform the Intellectual Property Special Committee and the deputies about their concerns regarding the revised bill.

Once the bill was returned to the Plenario Legislativo by the Committee, and after the bill was preliminarily approved by the Plenario Legislativo, ten deputies, among them the President of the Intellectual Property Special Committee, requested the opinion of the Constitutional Chamber of the Supreme Court of Costa Rica on the constitutionality of some provisions in the bill. The requested court review delayed the approval process.

On May 31, 2000, the Constitutional Chamber declared that the proposed criminal sanctions in the bill were unconstitutional because there was no private or public interest involved (*bien jurídicamente protegido*), and because the descriptions of the crimes were inaccurate. The BSA does not agree with this opinion because: (a) the Court ignored the fact that the interests protected by the bill are intellectual property rights, which are protected by the National Constitution of Costa Rica; and (b) the bill used precise language (i.e., reproduce, distribute, transfer, communicate) which is the same language found in the 1982 copyright law, which was ratified by the same Court on at least six occasions.

Unfortunately, the Costa Rican Congress did not listen to the recommendations and warnings of the local intellectual property associations, and on October 2, 2000, passed the "Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual," which differs greatly from the requirements to which Costa Rica must adhere under TRIPS and the Berne Convention.

Three of the most harmful provisions of the new Ley de Observancia are:

- Article 43: Provides that criminal actions against intellectual property violations are considered public actions but can be initiated only by private individuals or corporations (*publica de instancia privada*). This means that in the event that a public officer detects any intellectual property violations, he will not be allowed to initiate legal action. Only the injured parties can initiate legal action. This is a serious disadvantage in comparison to the original text of the bill that established that criminal actions for intellectual property rights infringements could be initiated by public authorities (*accion publica de instancia publica*). The "instancia privada" action, which limits the enforcement capability of public authorities, does not satisfy Costa Rica's TRIPS Article 41 obligation to ensure that its enforcement procedures permit "effective action" against infringements.
- Articles 54 and 59: Provide a maximum penalty of three (3) years of imprisonment for copyright violations. In the original text of the bill, the maximum penalty was four years of

imprisonment. These articles provide the same maximum penalty for those who fix a work without authorization and sell infringing materials. Under other provisions of Costa Rican criminal law, sentences for crimes having a maximum penalty of three years of imprisonment can be commuted, and the defendants never have to serve time.⁶

- Article 70: Provides that the "minor" (*insignificante*) and "without profit" (*gratuito*) use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the new law. There is no definition of minor use and reproduction, and it is not clear when the use and reproduction of illegal products is considered to be without profit. For example, if public authorities inspect a bank and find that it has 100 illegal copies of BSA member products installed in its computers, the bank could avoid liability, arguing that it does not profit by using the software, because it only provides banking and financial services. It will be very easy for pirate resellers to avoid liability by simply reproducing and selling illegal software in small amounts, using many CD burners and retail outlets. The BSA will be forced to prove the illegal connection among the many CD reproduction centers to overturn the qualification of minor use and reproduction. This provision violates the Berne Convention as well as various provisions of TRIPS.

When the Ley de Observancia bill was passed by Congress, only a presidential veto could have defeated it. A written petition was submitted to the President, expressing the concerns of the copyright associations about the bill and recommending that the President veto the above-mentioned articles. Unfortunately, the deputies who favored the revisions belonged to the same political party as the President, and the President promulgated the bill without vetoing the troubling articles.

Soon after the President promulgated the Observancia Law, enforcement problems ensued. A prosecutor petitioned to dismiss a software piracy complaint filed by BSA against a university (La Universidad Iberoamericana), on the grounds that the denounced piracy crimes were not within the scope of the new Observancia Law. Because the new law penalizes those who illegally fix or reproduce copyright works, the prosecutor argued that demonstrated use by the university of illegal software was not proof that the university violated the law by illegally fixing or reproducing software products. Article 54 of the Observancia Law does not say anything about "use" of illegal copyright works. This case remains open, and BSA is awaiting the judge's decision on the prosecution's motion to dismiss.

Criminal Procedure Code and a Statutory Time Limit

Article 33 of the Criminal Procedural Code provides that there must be a final decision by a court before the expiration of half of the maximum penalty period for the relevant crime measured from the date the defendant is charged with the crime; if there is no such decision during this period, the case will be dismissed. Considering that copyright crimes have a maximum penalty of three years of imprisonment, copyright cases will be dismissed unless final decisions are made within one-and-one-half years from the date a defendant is charged. While seemingly intended to eliminate judicial backlog, this requirement creates a great risk that defendants will take advantage

⁶ By comparison, Article 212 of the Costa Rican Criminal Code states a maximum penalty of six years of imprisonment for larceny, a kind of theft of physical property. Since intellectual property crimes are a form of theft of intangible property, the lesser sentence applied to them as compared to larceny indicates an inconsistency between the norms of the Observancia Law and the rest of Costa Rican law.

of prosecutorial delays and pretrial maneuvering to wait out the clock and seek dismissal of infringement cases after only a year and a half. This short time period creates great uncertainty as whether copyright cases will ever be heard.

If this “rocket docket” approach is maintained, the copyright industries argued that it should be balanced by increasing penalties for copyright infringement to create effective deterrents to piracy, in the range of 4 or 5 years as a maximum sentence. Not only would this change permit cases a reasonable time to go forward given the slow realities of the Costa Rican court system (affording perhaps 2 or 2½ years to dispose of a case rather than the 1½ year now available), it would also allow for detention of defendants for the first time. Currently, detention is not available where the maximum sanction is 3 years imprisonment or less; raising the maximum penalty to 4 or 5 years would permit detention, thus providing an important tool to deterring infringing behavior. However, the *Ley de Observancia* did not extend jail terms for copyright infringement beyond 3 years, so the industries are left with the original problem of this tight statutory time limit.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

The Dominican Republic adopted a new copyright law in October 2000, fulfilling many years of effort to replace its inadequate 1986 copyright law. This legislative achievement represents success in advancing higher levels of substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement in the Dominican Republic. The effective implementation and enforcement of the new copyright law is critical to the copyright industries, which have struggled against widespread and endemic copyright piracy in the Dominican Republic for more than a decade. A lack of effective legal mechanisms – such as low criminal penalties, very few criminal cases prosecuted, no civil *ex parte* remedy, high judicial bonds -- proved to be significant barriers to effective copyright enforcement. Starting in late 1999, some improvement in anti-piracy actions began to be made by criminal and administrative authorities and several civil cases were commenced as well. The copyright industries expect that the new enforcement tools and remedies provided in the 2000 copyright law will bolster anti-piracy efforts, which will result in lowering the high piracy levels.

Many elements of the IIPA's GSP 1999 petition against the Dominican Republic were related directly to longstanding enforcement problems (see below). In order to support continued progress on effective implementation and enforcement of the new copyright law, IIPA recommends that the Dominican Republic remain on the Priority Watch List at this time.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2000

INDUSTRY	2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	60%	2.0	80%	2.0	90%	2.0	100%	2.0	100%
Sound Recordings / Musical Compositions	2.0	80%	2.0	80%	2.0	80%	NA	NA	NA	NA
Business Software Applications ¹	12.3	70%	7.4	69%	7.3	73%	NA	NA	NA	NA
Entertainment Software ²	6.0	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS	23.3		17.5		12.4		3.0		3.0	

¹ BSA estimates for 2000 are preliminary.

² IDSA estimates for 2000 are preliminary.

The U.S. copyright-based industries in the IIPA have supported high-level, bilateral engagement between the U.S. and the Dominican Republic.³ As a result of lack of progress in both legislative reform and effective enforcement, IIPA filed a June 1999 petition with the U.S. government to initiate a review under two trade programs, the Generalized System of Preferences (GSP) and the Caribbean Basic Economic Recovery Act (CBERA, or CBI), of the eligibility of the Dominican Republic to participate in these programs due to its failures to provide adequate and effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. The Office of the U.S. Trade Representative accepted this petition on February 14, 2000, and hearings were held on May 12, 2000; this GSP review is ongoing.⁴ Bilateral talks to evaluate progress on intellectual property rights matters were held in Santo Domingo in November 2000.

Recently, the Dominican Republic also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), found in Title II of the Trade and Development Act of 2000.⁵ To maintain these CBTPA benefits, the Dominican Republic must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater criteria. As a WTO member, the Dominican Republic is obligated to meet both its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement. In fact, the intellectual property rights system of the Dominican Republic will be on the agenda of the April 2001 TRIPS review in Geneva.

COPYRIGHT LAW AND MARKET ACCESS

New Copyright Law of 2000

The Dominican Government succeeded in its years-long effort to pass new copyright legislation which contained high levels of copyright protection.⁶ The bill was finally passed by the Chamber of Deputies on July 24, 2000 and by the Senate on July 26, and signed by new President Hipolito Mejia Dominguez on August 21, 2000 as Law No. 65-00. Although the official date of publication of this law is August 24, 2000, it was published in the Official Gazette on October 24,

³ For a full discussion on the copyright industries' and U.S. government's lengthy bilateral engagement with the Dominican Republic on IPR issues, see Appendices D and E of IIPA's 2001 Special 301 report.

⁴ In 1999, \$31.2 million of Dominican imports to the United States benefited from the GSP program, accounting for 0.8% of its total imports to the U.S., and \$820.3 million of goods under the CBI program, accounting for 19.2% of its imports to the U.S. For the first 11 months of 1999, \$42.5 million of Dominican goods entered the U.S. under the duty-free GSP code, representing a 40.5% increase over the same time period last year, and \$738.2 million entered under the CBI.

⁵ Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000). USTR subsequently determined that the Dominican Republic has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. This determination made the Dominican Republic fully eligible for the CBTPA trade benefits. See Press Release 00-68, Office of the U.S. Trade Representative, "Caribbean Basin Trade Partnership Act: Customs Procedure Designation," Oct. 5, 2000.

⁶ A comprehensive intellectual property rights bill, called the Market Order Code, was submitted to the Congress in October 1998, and included bills on copyright, industrial property, antitrust, and consumer protection. In the Fall of 1999, Dominican legislators split up this large package so that the individual bills could be considered separately. In October 1999, IIPA and several other IIPA members submitted detailed comments on how to improve that legislation. The detailed list of IIPA's October 2000 recommendations and concerns with certain provisions and requests for clarification about the then-pending copyright bill are not discussed in this country report. IIPA understands that very few amendments were made to the copyright bill between late 1999 and its final promulgation in August 2000.

2000, entering into effect that same day. President Mejia has spoken in support of enforcing IPR laws in his country, even mentioning intellectual property piracy in his inaugural address.

IIPA once again acknowledges the positive features of this new copyright law. This law is a vast improvement over the 1986 Copyright Law.⁷ For example, the 2000 law corrects many of the key TRIPS substantive points, including protection for computer programs, databases, and the minimum term of protection. The lack of civil *ex parte* orders under the 1986 law has been remedied, thus providing a critical TRIPS-consistent enforcement tool. Also, the level of criminal fines has been increased in the new law. The 1986 law provided for low penalties of only RD\$1,000 to \$10,000 (US\$60 to \$600). However, the new law bases fines on the statutory minimum wage, which is RD\$3,000 (US\$180) per month. The new law creates fines of 50 to 1,000 times the minimum wage, which at the current exchange rate creates potential fines of US\$9,000 to US\$180,000. We understand that the Dominican Congress is considering increasing the minimum wage, which would only increase the possible penalties for copyright violation. The new law (like the old one) provides a term of three months to three years in jail for most criminal infringements. Importantly, the scope of exclusive economic rights for authors and producers of phonograms has been expanded, and comes close to meeting the obligations found in both of the WIPO treaties.

IIPA understands that regulations are being drafted to implement the new copyright law. ONDA (the National Copyright Office) has indicated that it will be receptive to comments on the draft regulations. It appears that drafting these regulations may be a challenging task to ONDA, due to budgetary constraints. IIPA and its member associates welcome the opportunity to work with ONDA on these important implementing regulations.

The Dominican Republic should be encouraged to ratify the two 1996 WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Ratification is the natural next step for the Dominican Republic. In fact, the prior ONDA administration supported ratification of these treaties, and the Ministry of Foreign Affairs is reviewing this matter.

COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

Computer software piracy in the Dominican Republic is comprised primarily of hard-disk loading and end-user piracy. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to an end user. In some cases, the software is represented as legitimate and the purchasers may be unaware that they are buying illegal software. In other cases, the purchasers are complicit in the piracy. End-user piracy rates remain high among Dominican businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. In addition, investigations by the Business Software Alliance

⁷ The 1986 copyright law contained several major deficiencies. For example, computer programs should be expressly protected as "literary works." Terms of protection (particularly for cinematographic works and photographs) were only 30 years, far less than TRIPS standards. Rental rights for producers of sound recordings were not explicitly found. Overbroad exceptions to protection needed to be significantly narrowed to meet the TRIPS Article 13 test, especially for computer programs. Translation and reproduction licenses for foreign works did not meet the terms of the Berne Appendix (and therefore were also TRIPS-incompatible). Full protection for pre-existing works, sound recordings and performances needed to be clearly ensured, in accordance with TRIPS. Also missing from the Dominican law were explicit procedures for copyright owners to obtain and conduct civil *ex parte* searches, also required by TRIPS. Finally, the statutory level of criminal penalties was far too low to serve as a deterrent.

(BSA) have revealed some instances of counterfeiting in the Dominican Republic. Working with Dominican prosecutors in the *Fiscalía* offices, BSA has achieved two convictions of pirates for counterfeiting software. Other prosecutions for counterfeiting are working their way through the Dominican courts. BSA is watching this trend closely, but it does not appear to be the focus of Dominican piracy at this time. Preliminary estimated losses due to business software piracy in 2000 are \$12.3 million, with a 70% piracy level.

Piracy of sound recordings and music in the Dominican Republic remains rampant, with the estimated piracy rate for audiocassettes at 80%. While counterfeit audiocassette piracy continues to dominate the market, there has been a marked increase in CD piracy, which is now estimated at 25% and higher piracy rates reported in the tourist areas of Puerto Plata and Sosua. The piracy format of choice is CD-R (recordable CDs) and there has been a noticeable increase in the number of smaller "domestic" CD-R factories. There are still large quantities of counterfeit cassettes openly sold by street vendors or available in kiosks throughout the commercial areas of major cities in the DR. It remains government policy that street vendor sweeps in Santo Domingo, Santiago, and Puerto Plata are a low priority. Pirate audiocassettes cost between US\$1.00-2.00 per unit and counterfeit CDs/CD-Rs can range in price from US \$8.00-12.00. Approximately 25% of unauthorized CD/CD-R product can be traced back to "off-shore" sources, including pirate CD-R product manufactured in New York and molded CDs (with the SID Code) replicated in Europe. Known U.S. sources of molded CDs has been, for all practical purposes, eliminated through recent RIAA demand litigation against Wings, Media Group, and Eva Tone CD plants facilities. Estimated trade losses due to audio piracy are \$2 million in 2000

The audiovisual industry reports that cable and broadcast piracy continue to be its primary copyright piracy problems in the Dominican Republic during 2000. In fact, the incidence of television piracy has apparently increased since the new administration took office. This increase may be directly related to the apparent disregard of copyright by a large television station related to an important member of the political party currently in power. Obviously, the conduct set by those in power will be copied by others in the television industry. It is disappointing that the political party in power does not care to set higher standards of respect for Dominican copyright law.

It is encouraging, however, to note the action taken at the end of 2000 by ONDA and INDOTEL against television piracy. A joint public announcement requesting compliance with copyright law was followed up by at least three inspections of television stations. One of those stations was cited and agreed in writing to begin a program of compliance with copyright requirements. In addition, INDOTEL has begun the long-ignored need for licensing television transmission and has included copyright compliance as an element to be examined in granting licenses. Nevertheless, the increased incidence of television piracy, apparently due to the conduct of a major station related to a member of the political party in power, threatens to dilute the new attitude of ONDA and INDOTEL towards compliance in the television industry as television stations begin to see an uneven application of the law and a tolerated model of conduct that goes against Dominican law. As a result, the audiovisual industry is forced to reserve judgment about the ultimate effectiveness of the ONDA-INDOTEL compliance effort.

Unfortunately, the continued high incidence of television piracy continues to distort the entire audiovisual market, adversely affecting legitimate business opportunities from theatrical exhibition, through home video, to broadcast television. This adverse impact affects even the positive effort made against piracy. For example, ONDA and MPA have made continued efforts against video piracy with a measurable degree of success in reducing the incidence of video piracy.

As a result, the overall rate in audiovisual piracy has actually gone down. But, because of the continued incidence of television piracy, there has been no real market improvement in the video market, which suffers from television stations transmitting, without authorization, movies that have yet to reach video stores. Thus, the Dominican Republic market remains weakened by a rate of video piracy of approximately 60%. Annual losses to the U.S. motion picture industry due to audiovisual piracy in the Dominican Republic are estimated to be over \$2 million in 2000.

For the book publishing industry, problems in the Dominican Republic primarily involve illegal photocopying of English as a Second Language (ESL) textbooks. Commercial piracy is diminishing as legitimate distributors increase. Estimated trade losses to the publishing industry remain at approximately \$1 million in 2000.

IDSA reports that its preliminary estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) in the Dominican Republic are \$6.0 million for 2000.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

Despite Enforcement Efforts by ONDA and Others in the Second Half of 2000, the Dominican Government Still Needs to Develop a Consistent, Comprehensive Response to Piracy in Order to Make Tangible Progress in Anti-Piracy Efforts During 2001.

The U.S. copyright industries have been concerned, over the years and throughout the course of the GSP review to date, that there has not been a comprehensive, sustained government response to copyright enforcement in the Dominican Republic. A new government took charge in August 2000, and new officials have been placed throughout the government. The good news is that the 2000 Copyright Law now provides more tools for Dominican Republic agencies and rightholders to take more concrete action against piracy. The time is ripe for concrete action.

Since the promulgation of the copyright law, a new interagency commission has been formed to coordinate all the agencies dealing with intellectual property issues, including ONDA, foreign affairs, customs, public health and others.⁸ This commission is awaiting action from the Office of the President for its official creation. While this commission could be an important information-sharing forum for different government agencies, the primary focus must be on supporting the concrete enforcement efforts of ONDA, the *fiscalías*, and others.

⁸ IIPA and its members have seen other blue-ribbon interagency committees before and they did not tackle the piracy problem. For example, a special commission in the Ministry of Industry and Commerce and an interagency anti-piracy group (COPAL) was formed in March 1997 in the public prosecutor's office to process complaints, seize illegal materials and close businesses involved in piratical activity against all forms of piracy. However, COPAL never became operational. Then in September 1999, another commission was created, led by the Ministry of Industry and Commerce and including the legal counsel to the President, the attorney general, the head prosecutor of the federal district, INDOTEL, ONDA, the National Commission of Public Spectacles and Radio, and the director of the Intellectual Property Office of the Ministry of Industry and Commerce. The mission of this group was to intensify efforts by the government to combat piracy. As IIPA has reported before, the copyright industries have acknowledged the good intent behind these agencies but we have been disappointed in the ability of these groups to achieve concrete results in reducing piracy on the ground in the Dominican Republic.

The key to real progress in the Dominican Republic is a consistent, comprehensive government response to piracy. Each branch of government has an important role to play. From the executive branch, ONDA must be given the necessary support and resources to continue its aggressive campaign of investigations and raids against pirates, in an environment that is free from political pressure. The *Fiscalía* must continue to work with ONDA and others to prosecute pirates.

The Office of the President can facilitate coordination between ONDA, the *Fiscalía*, and the police, and can continue to make the fight against piracy a top public priority, as President Mejía did in his inaugural address. The Congress must continue to protect intellectual property rights through legislative action. Dominican judges at the trial and appellate levels must be properly prepared to give the copyright law full effect. In particular, the judges must be willing to move swiftly to grant petitions for civil copyright claims, as provided under the new copyright law.

It is an encouraging sign that ONDA is still located under the Ministry of Culture. While there was discussion in 2000 about moving ONDA to the Ministry of Industry and Commerce, ONDA is operating efficiently now in its present location, in an environment relatively free of political pressure. One concrete step toward improvement of enforcement actions in the Dominican Republic would be to foster closer coordination between ONDA and the police. IIPA understands that ONDA has requested additional support from the police in its investigations of piracy, and also in providing security for ONDA personnel when they perform inspections and raids on suspected pirates. In both of these areas, police support would allow ONDA to operate more effectively. The police could assist ONDA with their inspections of the leads and tips ONDA receives about suspected pirates operating in the DR. In addition, ONDA inspectors have faced difficult situations in some of their inspections of suspected pirates. Police escorts would help ensure that ONDA personnel would be safe at all times while conducting inspections.

ONDA's Administrative Actions in 2000 Reflect Much Improvement Toward Anti-Piracy Enforcement in the Dominican Republic

In late 2000, ONDA reported that it has conducted numerous inspections, some of which have been followed by seizures of pirated products and arrests by police (for example, between August 29 and October 31, 2000, ONDA conducted 82 inspections). In at least one case, an ONDA inspection of a suspected book counterfeiter uncovered a ring of book, currency and passport counterfeiters. ONDA reacted quickly to this situation by carrying out an administrative *ex officio* action that sent the counterfeiters to prison. ONDA reported that its budget resources were exhausted before the end of 2000. ONDA does need adequate resources to enforce its responsibilities under the copyright law. ONDA has also prepared a work plan for its near-term objectives in setting up its offices and tasking.

Despite these challenges, ONDA is the primary success story of the Mejía government's response to piracy in the Dominican Republic. When the government took office in August, President Mejía appointed Mariel Leon as director of ONDA, and ever since then ONDA has carried out an aggressive campaign of inspections, raids and seizures against pirates. In the case of actions against software pirates, ONDA conducts inspections and routinely seizes computers that are found to contain illegal software. These computers become evidence against the pirates in criminal prosecutions. In some cases, ONDA follows up its initial inspection with raids.

In cases where illegal software is found, ONDA refers this evidence to the *Fiscalía* for criminal prosecution (see discussion of criminal enforcement efforts below).

The recording industry also reports that the positive change in enforcement since the new administration took office is due to ONDA and its efforts. Since the passage of the new copyright law, ONDA itself has initiated one inspection and three seizures without filed complaints (*denuncias*). RIAA, at the request of ONDA, provided training to their representatives and hope to expand this training to Customs and the DA's office. RIAA also provided a CD Piracy Plant Awareness seminar to OMAR Systems, the only optical disc replication facility in the country.

In 2000, ONDA took action against 50 video stores and three television stations with good results. However, it became apparent that ONDA did not have the resources to adequately follow through on subsequent inspections and citations. ONDA has moved to new and larger offices within the Ministry of Culture, with the promise of increased resources. It is not clear if those resources will be used for enforcement. The amount of resources needed for inspection, analysis, citation and decision-making action against television piracy is greater than that needed for video store action. The three actions ONDA took against television piracy barely began to address the problem. It is the audiovisual industry's opinion that ONDA, in order to be effective, requires additional enforcement resources, independence of action and increased cooperation from prosecutors for criminal case follow-up to ONDA actions.

Criminal Enforcement in 2000 Was Inconsistent Across the Copyright Sectors. More Work Needs to be Done to Give Full Effect to the New Copyright Law, Including the Application of Deterrent Administrative Penalties, in Order to Improve this Situation in 2001.

The new copyright law contains much higher levels of criminal penalties for copyright infringement. The challenge, however, is for the government officials of the Dominican Republic to apply, in practice, its criminal procedures and remedies at levels sufficient to deter piracy.

Business software industry adopted a new criminal enforcement strategy which has had positive results since the copyright law entered effect

BSA and its member companies continued to undertake criminal actions in 2000. However, while in the past BSA had worked directly with the *fiscalía* to conduct raids and file criminal actions against pirates, BSA has been able to leverage ONDA's new inspection powers to increase the pace of inspections and criminal prosecutions.

Since passage of the new copyright law, which gave new inspection authority to ONDA, BSA has worked with ONDA to provide their inspectors with leads on suspected pirates. After conducting their own investigations, ONDA carries out inspections where appropriate. Where ONDA finds illegal software, ONDA confiscates the software and any computers loaded with illegal software. ONDA then prepares a report and refers the evidence of piracy to the *fiscalía* for prosecution. The new *fiscalía* who took office after the change in government in August has been cooperating with the business software industry representatives on its actions. These referrals have resulted in the *fiscalía* filing between 30 and 40 cases against software pirates in the second half of 2000. BSA has attached pendant civil claims to about 10 of the most egregious cases, and these are

currently working their way through the Dominican courts. BSA understands that despite the large volume of files coming over from ONDA, the *fiscalía* is up to date on filing criminal actions resulting from these ONDA inspections.

The Dominican Republic's old copyright law provided for criminal but not civil *ex parte* inspections (see discussion below). At that time the procedures for criminal *ex parte* inspections were undermined by antiquated procedures, so computer software rightholders were forced to rely on the trademark law to initiate criminal actions. However, with the advent of the new copyright law, these obstacles have become largely a thing of the past. BSA looks forward to the time when these cases reach trial, so that it can fully assess how the courts will give full effect to the new penalty provisions in the copyright law.

In July 1998, the government established a new Intellectual Property Department within the District Attorney's Office for Santo Domingo, but at first it did not perform up to expectations. However, the tide seemed to turn in early 1999 with the hiring of a new assistant district attorney to head this office. After a flurry of *ex officio* actions against software pirates in July and August of 1999, these actions slowed down to a steady pace. During 1999 the D.A. brought more than 30 *ex officio* actions against Dominican software pirates. As discussed above, the new D.A., Aristy Caraballo, and the new head of the IP Department, Carmen Chevalier — both Mejia appointees — have continued to cooperate effectively with ONDA and the BSA. However, the IP Department currently lacks the funds and personnel to run the strongest possible anti-piracy program. The BSA is hopeful that the DA's ongoing commitment to anti-piracy reflects a new long-term policy for copyright protection in Santo Domingo, and that the Dominican Government will continue to support a strong enforcement presence in Santo Domingo.

In September 2000, BSA presented a day-long seminar to Santo Domingo *fiscalía* personnel on the new copyright law, including practical tips for enforcing the law. In particular, the *fiscalía* have been very effective in working with ONDA to leverage ONDA's new inspection powers into criminal prosecutions (as discussed in more detail below). BSA anticipates that this coordination will continue, and hopefully by mid-2001 some of the ONDA cases will begin to reach trial, so that we can more fully assess how effective this approach has been.

Recording industry criminal actions in 2000 resulted in some seizures but no effective prosecutions

The recording industry reports that its principal problem in the Dominican Republic at this time is the lack of criminal prosecution. There are three major adverse effects of no criminal prosecutorial follow-up in the Dominican Republic. The first is many of the manufacturing operations have gone "underground" making investigations more difficult, more complex, and longer. The second involves the lack of prosecution which has removed any deterrent to pirates from continuing their infringing activities. And finally, if the system were working, suspects facing possible jail time might serve as valuable sources of information by providing important information about ongoing piracy operations. Not faced with this possibility, the opportunity to obtain needed information from convicted pirates is lost.

The recording industry reports that there were a total of nine raids in 2000, resulting in the confiscation of 23,434 counterfeit/pirate cassettes and 2,758 pirate/counterfeit CDs/CD-Rs. These actions included raids against two illegal audiocassette manufacturing facilities and one pirate CD-R operation. RIAA surveyed approximately 35 tourist locations in the DR in May 2000 and found

that the majority of the locations were retailing pirate/counterfeit CDs and CD-Rs. RIAA, through its local attorney, sent out two dozen cease and desist letters; there was a compliance rate of approximately 50%. There has been no movement in criminal prosecutions whatsoever, with at least 12 cases pending prosecution dating back to December 1999 in the three jurisdictions in the Dominican Republic. Additionally, local police authorities have exhibited no interest in sound recording piracy referring it, instead, to the local District Attorney's office. In fact, recent investigations by the recording industry have determined that 8 of the 12 companies/entities/individuals previously raided by the criminal authorities remain in the piracy business at the same locations where the original actions took place.

No progress on criminal actions for audiovisual piracy has been made

In 1999, MPA reported that public prosecutors in Santo Domingo and Santiago had increased their cooperation to fight audiovisual piracy and that their main concern was the lack of resources assigned to anti-piracy. However, in 2000 that interest in prosecuting piracy cases has apparently been lost with the new administration and the cases against television piracy being developed by former prosecutors have apparently been dropped. It is not certain what will happen to the under-resourced IP office in the Santo Domingo prosecutor (it was run by a single attorney and was overwhelmed by trademark cases). The Santiago office had no assigned resources for piracy and there appears to be no interest in anti-piracy efforts. Overall, there is a clear step backwards in applying the criminal law against copyright violation, specifically against television piracy. The audiovisual industry has not seen a serious attempt to coordinate copyright enforcement actions beyond the informal, yet effective, cooperation between ONDA and INDOTEL. MPA is particularly concerned with the obvious lack of cooperation from police and prosecutors.

The Lack of a Civil *Ex Parte* Search Remedy in the Dominican Republic Has Been Corrected by the New Copyright Law and Must be Implemented Properly and Promptly. In Addition, Civil Damages Imposed Must Be Adequate to Compensate for the Injury the Rightsholder Has Suffered.

The new 2000 copyright law corrects a major omission in the former copyright law. The 2000 law provides expressly for civil *ex parte* inspections, as required by the TRIPS Agreement (Article 50). The omission of this remedy had severely harmed the ability of business software owners to protect their rights from unauthorized uses. While BSA welcomes the ability to petition the courts for civil *ex parte* actions, thus far the courts have been somewhat slow to grant such a petition. BSA has filed one civil case in November 2000, and as of the date of this report the court has not acted on the request. Clearly, in order to give full effect to this part of the new copyright law, the courts will need to move more swiftly to consider these petitions.

Historically, civil damages awarded under the 1986 copyright law were completely inadequate, both as a statutory matter and as applied in practice, to compensate the copyright owner. Now that the new copyright law has been adopted, the copyright industries look for the courts of the Dominican Republic to apply its laws afford civil remedies, including damages, at levels "adequate to compensation for the injury the rightsholder has suffered," as required by TRIPS Article 45.1.

The Cost of Judicial Bonds Remained High in Business Software Cases Brought Before the New Copyright Law Prohibited Such Onerous and Discriminatory Bonds. This Problem is Expected to Disappear in 2001.

The new 2000 copyright law corrects a major problem in prior Dominican law and practice. The 2000 law expressly prohibits judges from imposing onerous bonds in cases brought by foreign plaintiffs.

Until recently, the imposition of these onerous bonds made judicial enforcement of BSA members' copyrights virtually impossible. Under the Dominican civil code, only non-Dominicans could be required to pay bonds for instituting suits in Dominican courts. In case after case under the old law, BSA claims for alleged software piracy were effectively stalemated by the imposition of unreasonably large bonds, often many times larger than the total monetary damages sought in the case. The magnitude and discriminatory nature of these bonds appeared to violate the Dominican Republic's current TRIPS national treatment obligation, which is not subject to transition (TRIPS Article 3 provides that "Each Member shall accord to the nationals of other Members treatment no less favorable than it accords to its own nationals with regard to the protection of intellectual property. . . ."). Clearly this discriminatory treatment conflicted with the government's current TRIPS Article 41(2) obligation, requiring that procedures concerning the enforcement of intellectual property rights be "fair and equitable," not "unnecessarily complicated or costly."

However, the new law has had the desired impact in this area, and has relieved foreign rightsholders of this burden when protecting their rights in Dominican courts. BSA has successfully argued against the imposition of bonds in four cases since the copyright law was passed. This is a major improvement in the practical ability of copyright rightsholders to defend their ownership rights in Dominican courts.

Judicial Action Has Been a Historical Weak Element, But Signs Appear Positive for Improvement in Both Civil and Criminal Cases.

An effective judicial system is a necessary ingredient in providing adequate and effective copyright protection. Few copyright infringement cases have made it through the Dominican judicial system. However, since July 2000, BSA has received favorable judgments in three cases against pirates that had been filed under the old copyright law. In two cases decided in December 2000, Atlantica and Asfaltos Dominicanos, the judges entered judgments for significant fines and damages plus jail time. The fines and damages totalled U.S.\$12,350 for Atlantica and U.S.\$30,722 for Asfaltos Dominicanos. In both cases, the judge ordered 3 months jail time. Atlantica and Asfaltos Dominicanos were both end-user cases. In a third case, Garibaldi, the judge initially gave Garibaldi fines and damages plus jail time, but in the amended judgment dropped the jail time. Garibaldi was convicted of counterfeiting software. All three cases are on appeal.

As mentioned above, the courts have been somewhat slow to grant petitions for civil *ex parte* actions as provided in the new copyright law. However, BSA is working with the Supreme Court and their judicial continuing legal educational program to present a seminar on the new copyright law to all Dominican judges. BSA has been asked to present this seminar in April 2001.

MARKET ACCESS IN THE DOMINICAN REPUBLIC

Government Procurement Law

Law 146-00 was passed on December 11, 2000, but has not yet been enacted. This law prohibits the Dominican government from acquiring imported goods and services when using funds from the government's budget. This law will limit the capacity of foreign companies to sell to the Dominican government. Apparently, this prohibition will only apply if there is a "Similar National—Local Product." While the impact of this law is hard to predict, given the ease of creating local Dominican versions of software programs, this law may pose a significant for BSA member companies in the future.

Duties and Taxes on Computer Software

In contrast to the protectionist National—Local law passed the same day, the government of the Dominican Republic passed Law 147-00 on December 11, 2000. Article 13-1 of the law states: "There will not be import duties for: the importation of personal computers, and their parts, components, spare parts, programs and other accessories of the exclusive use of the computers ..." This does not appear to include videogames or DVDs, unless a software program came in a DVD format.

Tax and Duties on Recorded Music

RIAA reported in IIPA's 1999 GSP/CBI petition that the Dominican government placed inordinately high import duties and excise taxes on sound recordings, which, in effect, served to shield domestic producers of piratical product by making legitimate imported product disproportionately more expensive. Since the filing of that petition, the recording industry learned in early 2000 that while the import duties and taxes applicable to sound recordings remain fairly high,⁹ the official valuations for prerecorded musical media (e.g., cassettes and compact discs) have been reduced. The import duties and other applicable taxes have consequently diminished to acceptable levels. Because the imposition of these tariffs has in the past resulted in the denial of "equitable and reasonable access to the markets" of the Dominican Republic — one of the discretionary criteria under the GSP and CBI programs — the recording industry will continue to monitor duties and taxes applicable to sound recordings.

⁹ It is the recording industry's understanding that imported sound recordings are subject to a 30% import duty on the CIF value of the goods, plus an excise tax of 15% on the aggregate of the CIF value plus the import duty, plus an 8% tax on the aggregate of the CIF value, plus the import tariff, plus the excise tax. In addition, a 5% currency exchange fee is payable on the amount of U.S. dollars (or other foreign currency) acquired through the exchange system operated by local commercial banks in order to pay for imported items.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

EGYPT

EXECUTIVE SUMMARY¹

IIPA recommends that Egypt remain on the Priority Watch List, but that an out-of-cycle review be conducted later in the year, at which time Egypt could be lowered to the Watch List if the Egyptian government effectively addresses some of the concerns expressed below – in particular, if it modifies its present copyright law amendments to conform to existing international norms, and if it firmly resolves the false licensing issues that have long plagued U.S. copyright holders. IIPA welcomes recent initiatives by the government of Egypt that have begun to address the false licensing issue for the recording industry, but notes that Egypt must implement additional measures necessary to fully resolve this serious problem for that industry, as well as for all the copyright industries.

IIPA registers the copyright industries' concerns with a new draft copyright law that may weaken protection for certain works and would, if passed without many of the proposed changes discussed below, leave Egypt in violation of its international obligations. In addition, because of increased optical media production in Egypt in recent years, the Egyptian government should consider the introduction of tight controls on production of optical media, including on the import of CD equipment and raw materials used in the production of optical media. Another problem involves unreasonably high customs' import valuations of copyrighted goods in Egypt, in variance with generally regarded international practice. Such valuations not only place Egypt in discord with other markets around the world but make it virtually impossible for legitimate copyright owners to compete with pirates illegally trading in Egypt.

One especially serious concern over the past couple of years has been the Egyptian government's issuance of false licenses to pirates. Thankfully, there have been some recent efforts and assurances by the Egyptian government to discontinue this practice as to pirates of sound recordings. IIPA acknowledges recent efforts by the Egyptian government to address this problem for that industry sector but notes that present initiatives have not yet fully resolved the problem, and that Egypt must implement additional measures and then apply the solution fairly across all the copyright industries.

The Egyptian government made some important progress in 2000 in the fight against business software piracy, specifically: several resellers were convicted in criminal cases (although the fines imposed were inadequate); the police conducted the first police raid against a pirate end user (a business engaged in the unauthorized use of software); the Ministry of Culture worked in collaboration with the software industry on a public awareness campaign, including a TV advertisement campaign against software piracy and an effective warning letter campaign (to induce pirate end-users to legalize); and various organs of the Egyptian government (the Ministry of Culture, the Information Decision Support

¹ For more details on Egypt's Special 301 history, see IIPA's "History" Appendix to filing.

Center, which reports to the Prime Minister's office, and the Ministry Of Justice) participated actively in several trainings on intellectual property rights.

Estimated losses to most of the U.S. copyright industries in 2000 were \$71.9 million.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	15.0	35%	15.0	50%	11.0	50%	11.0	50%	11.0	25%	10.8	25%
Sound Recordings / Musical Compositions ²	12.0	48%	12.0	50%	12.0	50%	8.0	40%	5.0	25%	4.8	25%
Business Software Applications ³	NA	NA	26.4	75%	8.7	85%	9.7	85%	16.9	89%	7.0	84%
Entertainment Software ⁴	14.9	94%	6.2	65%	5.5	60%	5.1	55%	5.2	51%	4.0	54%
Books	30.0	NA	30.0	80%	26.0	80%	21.0	NA	20.0	NA	20.0	NA
TOTALS	71.9		89.6⁵		63.2		54.8		58.1		48.6	

² The 2000 losses due to sound recording/music piracy are to U.S. repertoire only. The 2000 level of piracy is that for all repertoire. Egypt's market remains entirely pirate as to international repertoire; the level of piracy for international repertoire in 2000 continues to be a staggering 99%.

³ BSA estimates for 2000 are not available. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not yet available. These numbers were finalized in mid-2000, and are reflected above.

⁴ IDSA estimates for 2000 are preliminary.

⁵ IIPA reported overall losses to the copyright industries at \$65.2 million in 1999. This number was first adjusted downward to reflect an adjusted piracy loss figure for the U.S. publishing industry from \$32 million to \$30 million, and then adjusted upward to reflect the change in the estimated losses due to piracy to the business software industry in its mid-2000 adjustments. The final number after both adjustments is reflected above.

SELECTED COPYRIGHT ENFORCEMENT STATISTICS 2000

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS	
ACTIONS	BUSINESS SOFTWARE APPLICATIONS
Number of Raids conducted	120 ⁶
Number of cases commenced	NA
Number of defendants convicted (including guilty pleas)	7 (known) ⁷
Acquittals and Dismissals	NA
Number of Cases Pending	NA
Total number of cases resulting in jail time	3 ⁸
Suspended Prison Terms	NA
Maximum 6 months	NA
Over 6 months	NA
Over 1 year	NA
Total Suspended Prison Terms	NA
Prison Terms Served (not suspended)	0
Maximum 6 months	0
Over 6 months	0
Over 1 year	0
Total Prison Terms Served (not suspended)	0
Number of cases resulting in criminal fines	5
Up to \$1,000	0
\$1,000 to \$5,000	5
Over \$5,000	0
Total amount of fines levied	\$7,290

COPYRIGHT PIRACY, ENFORCEMENT AND (SELECT) MARKET ACCESS BARRIERS IN EGYPT

False Licenses

IIPA is encouraged that the Egyptian government is taking important initial steps to discontinue its practice of issuing false licenses to pirates – one of the most serious problems facing the copyright industries in Egypt. Since the late 1990s, the copyright industries have urged the Ministry of Culture, including the Central Authority for Art, Audio and Video Works (“Central Authority”), to de-certify fraudulently obtained licenses, a practice that bars legitimate businesses from doing business in Egypt, allowing the holders of fraudulent licenses (who also happen to be key pirates of copyrighted products in Egypt) to monopolize the market. In the case of the recording industry, its efforts to decertify fraudulent licenses obtained by four Egyptian companies for the manufacture and distribution of recordings owned by several U.S. record companies began as far back as 1997. In January 2001, IIPA

⁶ Fifty of these raids were against pirate resellers, while 70 were against pirate end-users.

⁷ Due to lack of transparency with respect to the end-users, it is unknown how many cases of reseller piracy result in convictions, fines, or otherwise result in administrative remedies being meted out.

⁸ All three cases are currently on appeal.

learned that the Central Authority apparently had adopted new processes and regulations designed to address problems connected to false licensing, and more specifically, as to the recording industry's concerns, had terminated at least two of the fraudulent licenses. It is our understanding that the new regulations require that, before the Central Authority may issue any new license pursuant to a contract between an Egyptian company and a foreign company for the manufacture or distribution of copyrighted product, the contract must be authenticated by the foreign government, as well as by the Egyptian Ministry of Foreign Affairs or the Diplomatic Mission in the country concerned.

IIPA is very hopeful that Egypt will adopt new amended procedures that will result in the prevention of new fraudulent licenses, for the recording industry in its ongoing struggle with four known Egyptian pirates, as well as for the entertainment software and motion picture industries that are plagued by this same issue. IIPA remains concerned that the current proposal will not, as drafted, guarantee the adequate and effective protection of intellectual property rights in Egypt. The process of contract authentication by a foreign government, or even by the Egyptian Ministry of Foreign Affairs or the Egyptian foreign consulate, may not accurately inform the Central Authority of the legitimacy of the contract sought to be certified. Indeed, false "contracts" are easily produced from pirate sources in Asia or elsewhere, whereby the pirates claim to be legitimate subsidiaries of the true right holder, as a way to continue to hold and obtain false licenses in Egypt. Copyright frauds can and will be committed on foreign soil that will lead to illegitimate certifications. IIPA encourages the adoption of additional safeguards, such as providing notice and opportunity for comment to copyright industries or their local contacts in Egypt on all applications for licenses related to relevant products. This process would ensure that the Central Authority has all the relevant information regarding the legitimacy or illegitimacy of a contract before granting a license for the manufacture or distribution of copyrighted product. If this process is implemented effectively, and all remaining fraudulent licenses are promptly terminated, IIPA hopes that the fraudulent licensing issues can be resolved fully.

In the entertainment software industry's case, several Egyptian companies have had fraudulent agreements with regard to specific game titles wrongfully recognized by the Censorship Department. To make matters worse, while the Censorship Department decided earlier in 1999 to suspend the practice of recognizing new false licenses, the pirates then filed a complaint with the Censorship Department, and now the Department is accepting these fraudulent licenses once again. Even though the Censorship Department has opined that the complaints of the entertainment software industry are well-founded, the pirates holding the false licenses are reportedly still being listened to, and the Department continues in its failure to resolve the issue, even though it knows who the rightful owners are. The motion picture industry has experienced similar problems (in one case that went to an Administrative Court in December 1998, a false license for 60 films was not de-recognized by the court, on unclear grounds). The Motion Picture Association and company licensees provide the Egyptian Censorship Office with certificates identifying authorized distributors to verify copyright authorization when titles are submitted for censorship, meaning that in theory, censorship certificates are denied to applicants if no copyright authorization is provided. Unfortunately, there have been a number of cases in which Egyptian companies have used fraudulent agreements to acquire censorship authorization, and then the Egyptian Censorship Department has refused to revoke these authorizations once the fraud has been uncovered. This type of problem can be easily solved if the Egyptian government simply ceases to recognize all false and fraudulently obtained licenses.

***Ad Valorem* Import Duties in Egypt Run Counter to Standard International Practice**

The copyright industries regularly face discriminatory *ad valorem* duties in Egypt, namely, Egypt bases the customs' valuation of CD-based goods and videos on the invoice value of the product rather than on the value of the physical medium. The widespread and favored international practice would have the valuation of CD-based goods or videos premised on the value of the physical medium. Such *ad valorem* duties serve as a form of double taxation, since royalties are also subject to withholding, income and remittance taxes. The outcome is that legitimate sellers cannot price to the market, because they must take the additional duty into account when pricing. Pirates circumvent these duties, and thus, can always underprice in the market. For the motion picture industry, duties and additional import taxes represent approximately 87% of the value of a film, whether duties are computed using the invoice value of a film or a specific duty of 120 Egyptian pounds per kilogram plus 5% (Customs authorities use whichever method of calculation results in the highest yield). An additional sales tax (i.e., a tax on goods imported for sale in Egypt) was levied in March 1992, which amounts to 10% of the value of imported films calculated as follows: the cost of the print, including freight charges, customs duties and other import taxes.

IIPA strongly urges Egypt to modify its practice so that the valuation of duties is based on the physical medium or a specific fee, such as by weight or foot, in line with the widespread, and favored, international practice.

Pirate Optical Media Production Arrives in Egypt

IIPA is concerned about the opening in 1998 of three CD plants in Egypt. This situation will need to be monitored very closely to ensure that these plants are not simply contributing to an already epidemic problem: the over-production of pirate compact discs worldwide. The total installed capacity of the three CD plants operating in Egypt is put at 15 million units per annum, with output at 7.5 million units per annum. The Egyptian government should immediately take steps to implement effective measures against CD and CD-ROM piracy. In particular, the Egyptian government should introduce effective optical media plant control measures, including the ability to track the movement of optical media production equipment, as well as the raw materials (including optical grade polycarbonate), and also including the compulsory use of Source Identification (SID) codes, in order successfully to halt the production of pirate CDs and CD-ROMs. In addition, Egyptian authorities should conduct raids on plants if they are producing unauthorized product, should seize any infringing copies and machinery, and should (where warranted) impose criminal penalties to deter the organized manufacturing and distribution of pirate product.

Other Piracy Phenomena

Among the most serious piracy problems remaining in Egypt are the following:

- pirate photocopying and counterfeiting of scientific, technical and medical books as well as commercial titles, most of it being done on university campuses. Egypt is by far the worst country in the Middle East for book publishers. In 2000, publishers reported that piracy levels

for English texts remained at a significantly high level and that the piracy of medical and scientific texts remained high. There is no police cooperation in running raids in and around the universities, due to political uncertainties. Although publishers continue to discount deeply the prices of their books (sometimes by as much as 70-80%), their works continue to be pirated on a commercial scale in Egypt.

- rampant retail piracy of entertainment software (including by those who possess false licenses wrongly recognized by the Egyptian government). Some console-based platforms report 99% piracy in Egypt, while for the personal computer platform, the numbers are equally staggering, at 95%. Most of the pirate CDs, including console-based games, are imported into Egypt (coming in from Malaysia, Thailand, Singapore and Russia, as well as re-imports from the United Arab Emirates and Saudi Arabia). Also, the industry has noted the appearance of cheap compilation "recordable CDs" (CD-Rs) on the streets in Egypt. Internet piracy makes up about 5% of all game piracy in Egypt, including both CD burning and downloading of pirate "WAREZ" software from the Internet.
- audiocassette piracy (accounting for roughly 99% of total unit sales in 2000) at levels of virtually 100% for international repertoire. Piracy of sound recordings and music, which has prevented the Egyptian market from developing over the years, is on the rise in Egypt.
- video piracy (35%). Pirate back-to-back video copies, usually of poor quality, are primarily used to provide greater variety of titles of rental product in video shops. Organized pirates are now packaging and labeling their product to resemble legitimate product, using forged invoices and censorship vouchers, and distributing widely to rental outlets. Pirate copies are made from original cassettes or from imported laser discs and DVDs. Duplication generally is done in apartments that are rented for short periods, rather than directly in video shops. Pirate cassettes are also touted as an added service in banks, large companies and homes.
- continued software piracy by end users and hard-disk loading. Hard-disk loading is a serious problem since the government makes little effort to reduce it. End-user piracy involves the unauthorized copying of software by large, medium and small companies, and government ministries. Hard-disk piracy by resellers involves the loading of a new hard disk on a computer with software, without obtaining the necessary authorization from the copyright owner.

Increased Enforcement Efforts Against Software and Video Piracy, But Few Deterrent Results

As noted above, the Egyptian government made some progress in 2000 in the fight against business software piracy, specifically: several resellers were convicted in criminal cases (although the fines imposed were inadequate); the police conducted the first police raid against a pirate end-user (a business engaged in the unauthorized use of software); the Ministry of Culture raided a large number of end-user targets; the Ministry of Culture worked in collaboration with the software industry on a public awareness campaign, an effective TV advertisement campaign against software piracy, a "Phone Campaign," and perhaps most importantly, a highly effective warning letter campaign (to induce pirate end-users to legalize); and participation by various organs of the Egyptian government (the Ministry of Culture, the Information Decision Support Center, which reports to the Prime Minister's office, and the

Ministry of Justice) in several trainings on intellectual property rights in cooperation with the software industry. Such programs, while they take some training efforts on the part of industry, can be highly effective in increasing legitimate business and raising awareness of copyright. In February 2001, another raid occurred, this time against the largest pirate reseller yet. Thirty computers were seized. Time will only tell if this raid will lead to a deterrent result against the pirate.

Notwithstanding the progress noted above, various structural and on-the-ground enforcement problems remain for the business software industry. For example, in the main, enforcement officials exhibit apathy toward the problem of software piracy in Egypt. Police or Ministry of Culture raids are normally restricted to visits to resellers, warning them not to sell pirated software. Police units continue to have very minimal effect and demonstrate little effort in fighting software piracy. Disturbingly, the authorities often are satisfied by the purchase of legal software after a pirate gets caught; purchase of software following a raid should not be considered a 'settlement' with the copyright holder. Dropping cases because targets purchase software subsequent to an action is completely non-deterrent. Even when cases go forward to judgment, fines imposed are totally inadequate to deter piracy (between 1000 – 5000 Egyptian Pounds, or U.S.\$259 – \$1,924).

For the motion picture industry, increased cooperation between the local antipiracy program, the Anti-Piracy Police and the Censorship Department has contributed to an increase in the number of raids against video piracy. In 2000, the industry conducted 480 raids, seizing 17,991 cassettes and 28 VCRs. Industry launched 480 criminal actions, and obtained 255 decisions. Unfortunately, even when the industry obtains so-called "positive results," the fines that the courts actually apply often run in the range of U.S.\$10 or less, making a mockery of both the existing statutes and any prospect of deterrent penalties. 1,035 criminal cases remain pending. The increased activity of the industry throughout Egypt has encouraged the authorities to take more actions against pirates, not only in major cities and towns, but also in remote areas, where video piracy tends to be greater. The Egyptian authorities should be encouraged to continue and accelerate their own *ex officio* enforcement activities.

Structural Difficulties

Further exacerbating the piracy problem in Egypt are continued structural difficulties, making it difficult for the industries to conduct successful enforcement campaigns. There is little or no communication or cooperation between the Censorship Department under the Ministry of Culture and the Anti-Piracy Police Department under the Ministry of Interior. The inspectors of the Censorship Department do not receive information from the product/companies registration division within the same department that would enable them to more easily identify pirate product. Furthermore, inspectors are not provided with transportation by the Censorship Department and have to use public transport hampering their ability to confiscate the pirated products they find. High staff turnover in the Anti-Piracy Police Department allows insufficient time for officers to gain the experience and knowledge necessary to carry out their functions effectively.

Cases actually brought move through the court system at a snail's pace, leading to frustration for copyright owners who are unable effectively to enforce their rights, and making piracy only a *de facto* added cost of business for the pirates. For cases that have resulted in judgments being awarded to right holders, collections take an unreasonably long time in Egypt. As noted above, the Ministry of Justice participated in trainings sponsored by the software industry in 2000, and it is hoped that these training

sessions will help to make judicial enforcement more efficient in Egypt.

COPYRIGHT LAW AND RELATED ISSUES

Comments on Draft IPR Law Pertaining to Copyright

IIPA understands that Egypt's draft bill overhauling its intellectual property laws, including its 1954 copyright law, will proceed to the People's Assembly for consideration within the next couple of months. IIPA registers its deep concerns and notes numerous deficiencies in the draft that would, if passed without the changes discussed below, leave Egypt in violation of its international obligations. IIPA also notes several other deficiencies which, while not necessarily violations of Egypt's international obligations, either weaken protection already enjoyed under the 1954 Copyright Act, or for which changes should be considered to strengthen the law. IIPA notes some changes below as "NECESSARY CHANGES" and some as "SUGGESTED CHANGES." The following list should be considered non-exhaustive.

NECESSARY CHANGES: SUBSTANTIVE DEFICIENCIES

- **Innovativeness Requirement for Works.** A "work" is defined in draft Article 138(1) as "any literary, scientific or artistic innovative production" The term "innovative" is then defined as "the compositional style that renders originality to the work." It is unclear whether "innovative" is a mistranslation, or whether it might include a "novelty" requirement, which would be misplaced in a copyright law and would violate Berne and TRIPS. The term "innovative" should be replaced by the word "original," thus obviating the need for a definition of "innovative" that includes the word "originality," and bringing Egypt's law into compliance with international norms. At the least, draft Article 138(1) appears to weaken Egyptian law, as the 1954 law apparently requires only originality (i.e., that a work be "distinguished by its original character").
- **Failure to Provide Express Point of Attachment for Owners of Neighboring Rights.** Article 187 of the draft provides express point of attachment for works (including audio works). While we understand that under Egyptian law, the TRIPS Agreement is self-executing, and therefore, point of attachment is provided with respect to the owners of neighboring rights (as required for Egypt to comply with TRIPS Articles 14), it would be highly preferable to provide express point of attachment for the owners of neighboring rights. Egypt needs to clarify through amendments that works, sound recordings, producers of sound recordings, performers and broadcasters are provided with adequate point of attachment (i.e., that Egypt protects works, sound recordings, performers and broadcasters of countries that are members of international treaties to which Egypt is party).
- **Unclear Retroactive Protection.** There is no provision in the draft ensuring that pre-existing works (including sound recordings) and the objects of neighboring rights receive full retroactive protection as required under TRIPS Articles 9.1 and 14, and Berne Article 18. Even though we understand that Egypt takes the position that treaties are self-executing, the absence of a provision for full retroactivity for TRIPS/Berne terms of protection may lead to confusion.

Therefore, it would be highly preferable for Egypt to include an express provision for full (TRIPS and Berne-compatible) retroactivity for all subject matter under the law.

- **Protection for Sound Recordings as Works.** We assume that, as in the 1954 Copyright Act, sound recordings are protected as “audio . . . works” in the draft. Our translation of Article 139(7), however, only contains the word “audio-visual work,” although Article 138(11) defines the producer of an “audio or audio-visual work.” If our translation is correct (but the omission is a mistake), the words “audio or” must be added to Article 139(7) in order to retain the status quo of sound recordings protected as works (although we note that the provision of certain rights to producers of audio works is redundant). We are assuming but seek clarification that Egypt does not plan to weaken protection for “audio works” as it exists under current law.
- **Unclear Panoply of Exclusive Rights for Producers of Audiovisual Works.** Draft Article 175(5) clearly does not apply to audio works (sound recordings) and therefore the word “audio” should be stricken from this article. The panoply of exclusive rights for producers of audiovisual works is unclear. The producer is defined as “the natural or legal entity who produces the . . . audiovisual work, and undertakes the responsibility of such achievement,” (draft Article 138(11)). Draft Article 175(5) provides that the producer “shall be considered as representative of the authors and successors in exploiting this work, without prejudice to the rights of the author of literary or musical works, unless otherwise agreed upon in writing,” and “the producer shall be considered as the publisher, and will have the rights of the publisher . . .” Egypt should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing. Egypt may want to consider vesting all economic rights in the producer. We also seek clarification that the rights of the producer of an audiovisual work as the “rights of the publisher” include all the exploitation rights in Article 146 of the draft. Vesting all economic rights in an audiovisual in the producer significantly enhances the ability to commercialize works in all release windows and improves the economic viability of an industry, which benefits all groups that contribute to the success of an audiovisual work.
- **Berne-Incompatible Compulsory License.** The draft law contains a TRIPS/Berne-incompatible compulsory license for copying and translating works (TRIPS Article 9.1, Berne Appendix, Articles II and III). The compulsory license in draft Article 168 is not limited to literary works in printed form, and extends to computer programs and audiovisual works. Such a compulsory license is completely contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such practices. It must be fixed by amendment at least to bring it into line with the Berne Appendix, or deleted altogether.⁹
- **Overly Broad Exceptions.** The draft law contains overbroad exceptions to protection (TRIPS Article 13). Draft Article 169 (on exceptions to protection) should include chapeau language limiting excepted acts to special cases, provided that such acts do not conflict with a normal exploitation of the work or object of neighboring rights protection and does not unreasonably prejudice the legitimate interests of the author or right holder, in line with TRIPS Article 13.

⁹ The Egyptian government must confirm that it has kept up its renewals of its declaration, under Article I of the Berne Appendix, that it intends to avail itself of Articles II and III of the Berne Appendix. Otherwise, Egypt is no longer entitled to avail itself of these provisions.

Several of the exceptions listed would violate TRIPS unless appropriately narrowed. For example, the single-copy exception in Article 169(2) should be limited to one analog copy for private and personal usage. Article 169(3), allowing for a single copy of a computer program, cannot be reconciled with TRIPS and must be deleted, or if the intent of the drafters was to create a backup-copy exception to apply only to computer programs, then this exception must be amended to limit it appropriately.¹⁰

- **Computer Programs Protected as Separate Works.** Computer programs are not expressly protected as literary works (TRIPS Article 10.1) under the draft. Under the present law, computer programs are protected and are expressly “considered literary works.” This was the correct treatment, and any change could be interpreted as a weakening of protection, and casts doubt on whether there is a continuity of protection from the 1954 law (as amended by decree). Draft Article 139(2) protects computer programs as a separate category of work, not in the category including “books, booklets, articles, publications and other written works.” It remains unclear whether the level of protection for computer programs is equal to that of other “literary works,” as required by TRIPS Article 10.1.
- **Moral Rights Provision Overly Broad, Possibly Impinging on Exclusive Adaptation Right.** The moral rights provisions in the draft impinge on exclusive rights, in violation of TRIPS and Berne (TRIPS Article 9.1, Berne Articles 8 and 12). Draft Article 142(3) provides that the author may reject “any amendment for the work, which the author considers as distortion of his work,” regardless of whether the author has transferred economic rights. In this form, this provision violates Berne Article 12, as it would undermine the exclusive economic right (in this case, the exclusive adaptation right). The standard for rejection must be objective, not subjective, as set forth in the Berne Convention. The draft Article also provides that “amendment in translation shall not be regarded as infringement, unless the translator fails to indicate points of deletion or change, or abuses the reputation and status of the author.” This would appear to violate Berne Article 8, as it would impinge on an author’s exclusive translation right.
- **Protection for Compilations of Data.** It appears that protection for compilations of data (TRIPS Article 10.2) is provided, but this category of works appears to be miscategorized in draft Article 138(6), which defines “quoted works” as including “database whether computerized or not.” Draft Article 140 appears to provide redundant protection, as “data” if it is “arranged in an innovative manner, or by worthy personal effort” is protected (which, subject to the interpretation of the term “innovative,” might be TRIPS-compatible).
- **Inadequate Term of Protection for “Anonymous” Works.** The term of protection for

¹⁰ The following formulation might, for example, be appropriate:

Making a single copy shall be permitted without the authorization of the author or other owner of copyright, provided that the copy or adaptation is necessary for use of the computer program with a computer for the purpose and extent for which the computer program has been obtained, or for archival purposes and for the replacement of the lawfully owned copy of the computer program in the event that the said copy of the computer program is lost, destroyed or rendered unusable. No copy or adaptation of a computer program shall be used for any purpose other than those specified in subsection (1), and any such copy or adaptation shall be destroyed in the event that continued possession of the copy of the computer program ceases to be lawful.

"anonymous" works is too short (TRIPS Article 9.1 and Berne Article 7(3)). Draft Article 161 provides for a term of protection for "anonymous" works of "one year only."

NECESSARY CHANGES: ENFORCEMENT DEFICIENCIES

- **Lack of Express Provision for *Ex Parte* Civil Searches.** The draft does not expressly provide for civil *ex parte* search orders. TRIPS Article 50 requires that Egypt's judicial authorities have the authority "to adopt provisional measure *inaudita altera partes*" (without notice to the defendant).
- **Insufficient Remedy as to "materials and implements," in Violation of TRIPS Articles 46 and 61.** Article 177(3) in the draft is TRIPS deficient, in that it only permits the seizure of "the materials used in [making infringing copies] provided that these materials are not serviceable except for copying," while TRIPS Article 46 requires that judicial authorities shall have the authority to "order that materials and implements the predominant use of which has been in the creation of the infringing goods be" (seized and) disposed of, and Article 61 provides, in appropriate cases, for the seizure, forfeiture and destruction of such materials and implements.
- **Inadequate Criminal Remedies.** The draft contains non-deterrent criminal penalties that are even weaker than those in 1954 law. Draft Article 179 provides a sentence of "not less than one month" imprisonment and a fine (unchanged from the current law, which, after inflation, makes these fines totally inadequate) of 5,000 to 10,000 Egyptian Pounds (U.S.\$1,470 to \$2,940). While a minimum sentence of "one month" imprisonment constitutes a positive development, there is no set maximum sentence (as there is in the current law). In short, the fines are insufficient and non-deterrent and violate TRIPS Article 61, which requires remedies "sufficient to provide a deterrent," and the lack of a maximum jail sentence may or may not be TRIPS-compatible, depending on how it is meted out in practice.
- **Government-Sanctioned Sell-Off of Pirated Products.** Draft Article 178 provides that "the court president may support a sequester with a view to republish the [allegedly infringing] work, sound recording, broadcasting program, as well as, exploiting or offer copies of it," and "the accrued revenue shall be deposited with the court's treasury until the original dispute is settled." This provision diverges completely from accepted practice and totally violates Egypt's TRIPS obligations. Article 46 of TRIPS requires Egypt to give the judicial authorities "the authority to order that goods they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or . . . destroyed." Clearly, sale in public auction would prejudicially harm the right holder. This provision amounts to a government-sanctioned sell-off of pirated products, and must be deleted.
- **Non-Transparent Border Measures.** The draft law contains no provisions on border measures (TRIPS Articles 51-59). We are unaware of whether separate customs measures exist or are being drafted to provide TRIPS-level protection in the area of border measures.
- **Presumptions.** The draft law does not provide expressly for presumptions of subsistence of copyright or for copyright ownership. Such presumptions are crucial to the ability of copyright

owners to effectively exercise their rights, and Egypt's draft law should be amended to include them.¹¹

SUGGESTED CHANGES

There are several other deficiencies in the draft law that, while not necessarily TRIPS violations, are problematic for copyright owners nonetheless. They include the following non-exhaustive items:

- Transfer provisions impose undue burdens on the freedom to contract. Draft Articles 148 and 149 contain transfer provisions that impose undue burdens on the freedom to contract.
- Draft Article 146 would provide greater clarity by explicitly enumerating other exclusive rights, which should include (in addition to other rights necessary to implement the WIPO "Internet" treaties, as discussed below) the retransmission right, distribution right and importation right (which should include the right to authorize or prohibit parallel imports).
- Draft Article 176 appears to create a right of publicity in a person's likeness, and does not belong in a copyright law.

WIPO Treaties

IIPA is pleased to see that the latest draft overhaul of the copyright law in Egypt includes partial attempts to implement the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In fact, on October 14, 1999, while former Secretary of Commerce William Daley was in Egypt, the United States and Egypt issued a "Joint Statement Between The Government of The United States of America and The Arab Republic of Egypt Concerning Electronic Commerce," in which the Egyptian government agreed to the following statement:

Growth of electronic commerce depends on the adequate protection of intellectual property rights including industrial property rights and copyright. Egypt will positively consider signing [and] ratifying the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

In particular, the definition of "copying" in the draft includes "temporary electronic storage of a work or sound recording" (draft Article 138(9)), which implements Article 1(4) and the Agreed

¹¹ The following formulation might, for example, be appropriate:

In civil cases involving copyright or related rights, each Party shall provide that the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work, performance or phonogram in the usual manner shall, in the absence of proof to the contrary, be presumed to be such designated right holder in such work, performance or phonogram. It shall be presumed, in the absence of proof to the contrary, that the copyright or related right subsists in such subject matter. A right holder or authorized person on his behalf may present evidence of the ownership or subsistence of rights by affidavit, which shall be presumed to be conclusive without the need to be present in court, absent specific facts to the contrary put forward by the defendant. Such presumptions shall pertain in criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright or related right.

Statement of the WCT. In addition, the draft attempts to implement protection against circumvention of technological protection measures, as required by Article 11 of the WCT and Article 18 of the WPPT. Draft Article 179(6) provides that it is a crime to delete, delay or distort “with bad faith, any technical protection used by the author or the owner of the neighboring right.” This provision falls short of the WIPO treaties’ requirement in various respects, most notably, 1) it appears to outlaw the act of circumvention but not the business of making or providing circumvention devices, 2) “technical protection” is not defined in the law, so it is unclear whether the term covers both copy and access controls, and whether the prohibition goes to components of devices, 3) the provision appears to ensure that no copyright exceptions would apply to the new crime, but this should be confirmed, and 4) depending on the definition of “technical protection” (left undefined in the draft law), this provision could also be interpreted to include prohibition against tampering with rights management information, but the draft leaves this totally unclear. Finally, a broad right of communication to the public, including a “making available” right, appears to be contemplated under the broad “exploitation” right in the draft, but as noted in a previous comment, it would be helpful if these rights were expressly listed for clarity’s sake. This is the first attempt we have seen in Egypt to adopt any obligations of the WCT and WPPT. Egypt should be encouraged to improve this provision to pave the way for accession to the WCT and WPPT. IIPA hopes that Egypt will now swiftly accede to and deposit its instrument of accession in Geneva.

Generalized System of Preferences

Egypt currently participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Egypt meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” At the same time as Egypt caused increasing losses to the U.S. due to piracy, Egypt imported (during the first eleven months of 2000) \$24.2 million of products into the United States without duty (2.9% of its total imports into the U.S.). Egypt should not continue to expect such favorable treatment at this level if it continues to fail to meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

GREECE

EXECUTIVE SUMMARY¹

In IIPA's 2000 Special 301 submission, it and its Motion Picture Association (MPA) declared victory in the long battle against TV piracy in Greece which for years had the highest rates in all Europe. The filing of a TRIPS case against Greece was clearly the motivating factor for that country's finally adopting a broadcast law (which made copyright protection a condition of a broadcast license) and beginning the task of enforcing it. With the threat of use of the law, and indeed its use in a few cases, the level of TV piracy went down dramatically and continues to hover at its lowest point in years – 5%. Nevertheless, there is concern that this victory may not be a permanent one; over the last year, Greece has not aggressively used the Broadcast Law's Article 17 to enter binding closure orders against those TV stations that continue to pirate. Moreover, Greece and the European Union have failed to sign an agreement terminating the TRIPS case, disputing the right of the U.S. to obligate Greece to continue enforcing its law against the very piracy that gave rise to the TRIPS case in the first place.

While the Greek government should be commended for finally reducing piracy TV piracy levels, the motion picture industry remains concerned over the lack of enforcement of the Broadcast Law. On a positive note, Greece's most notorious TV pirate, Junior's TV, finally ran its course of appeals of at least three convictions and a rare deterrent sentence went into effect. Nevertheless, Greece's overall enforcement system remains weak, allowing high rates of piracy to flourish in all other product areas and placing Greece out of compliance with its TRIPS enforcement obligations. The problem is that the court system remains unable to function to provide quick justice and deterrent sentences.

Over the last year, piracy rates have increased for the motion picture and entertainment software industries, stayed level for the recording industry and decreased for the business software industry. Total piracy losses increased from an estimated \$96.6 million in 1999 to 105.2 million in 2000. The reason is that court processes remain slow, and penalties, while quite substantial in the statute, are not imposed at nearly this level, and deterrence remains insufficient. The Greek judiciary, in particular, has not shown the will to change this continuing situation.

Because of the failure to terminate the TRIPS case, to enforce its broadcast law aggressively to further reduce TV piracy, and to take action to bring more deterrence into the enforcement system generally, IIPA recommends that Greece be placed on the Priority Watch List in 2001.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	10.0	18%	12.0	15%	20.0	20%	50.0	25%	60.0	25%	59.8	25%
Sound Recordings / Musical Compositions	10.0	50%	10.0	50%	8.0	25%	8.0	25%	7.5	25%	6.0	25%
Business Software Applications ¹	40.1	65%	47.5	71%	40.5	74%	30.6	73%	32.7	82%	28.6	86%
Entertainment Software ²	38.1	78%	20.1	68%	22.3	70%	21.3	74%	22.0	75%	20.8	79%
Books	7.0	NA	7.0	NA	7.0	NA	6.5	NA	5.0	NA	6.0	NA
TOTALS	105.2		96.6		97.8		116.4		127.2		121.2	

COPYRIGHT PIRACY IN GREECE

TV Piracy and the TRIPS Case

As late as 1997, the TV piracy rate exceeded 50% – the highest rate in all Europe. After long and frustrating efforts to remedy the problem, the U.S. government commenced a TRIPS case on this issue in May 1998. Criminal enforcement under a modern copyright law proved ineffective and it was the passage of the amendment to the Broadcast Law (Article 17 of Law 2644, adopted in May 1998) which finally set the TV piracy problem on a course of improvement until 1999, when the piracy rate dropped to 5% resulting from the closure of some stations under the law. That law gave the National Radio and Television Council (NRTC) the authority to close down stations that were engaged in piracy. While the TRIPS case proved successful, the motion picture industry is still concerned that the broadcast law is not being adequately enforced. Fraudulent distributors of programming have taken advantage of the new state licensing process by pushing illegal product on many smaller, less sophisticated television stations. Despite these new enforcement provisions and the successful closing of two stations since the broadcast law went into effect, the Greek broadcast authorities have so far been unable or unwilling to shut down two other regional stations with a long-standing history of piracy. While the existence of the Law and the few closures have had their desired effect, this record is too thin a reed to give confidence that the problem is solved and that TV piracy rates will continue to decline. Indeed, they have not declined since 1999.

Earlier efforts to use the Copyright Law had resulted in isolated victories but that strategy did not make any significant dent in TV piracy levels. However, a part of that saga has now come to an end with a landmark decision from the Greek Supreme Court dismissing all appeals of the country's most notorious pirate, Junior's TV. The penalties assessed will reportedly now be imposed and Mr. Halaris, the station's owner, is not entitled to have the penalties assessed suspended. Moreover in a major breakthrough for EPOE, the motion picture industry's local anti-piracy organization, the Court recognized its right as an association to file criminal and civil actions in its own name to

¹BSA loss numbers for 2000 are preliminary.

² IDSA estimates for 2000 are preliminary.

protect its members' interests. The Court also ruled that EPOE's U.S. members should be regarded as authors of their works, applying U.S. law under Article 67 of the Greek Copyright Law. The ruling also finally clarified the right of MPA member companies to prohibit the unauthorized broadcast of their works. EPOE has been seeking legislative amendments to address this issue for over six years. Junior's TV was shut down by ministerial order in November 1999, and the Supreme Court's decision finally brings to an end a long – running story that has been at the center of the industry's efforts to curb television piracy in Greece.

Because of the improvement that occurred in 1999, the U.S. sought to terminate the TRIPS case by opening settlement discussions at the end of 1999. To date, however, the case has not been settled, though there have been a number of false starts and tantalizing rumors. In essence the dispute is over Greece's future conduct in fighting TV piracy, which the EU does not wish to allow its member state to commit.

Retail and Wholesale Piracy of Works and Sound Recordings

Piracy levels in Greece are the highest of any country in Western Europe. Video piracy levels have not come down further and remain at 10% in Athens and 20% elsewhere in Greece. Most of this is back-to-back copying of videos for copy depth in storefronts. The industry is concerned that there may be a resurgence of video piracy if TV piracy rates resume their downward course. On the audio side, piracy has gone up to 35% with approximately 80% of the CD piracy resulting from the local copying of CDs on CD burners, with the product being sold throughout Greece. The remaining piracy is divided 15% through imports from Ukraine, Montenegro and Russia and about 9% audiocassette piracy. Much of the CD-R piracy is under the control of organized crime with transient street vendors used for local distribution throughout Greece. The area where most of this production occurs is called Aghia Varvara (Santa Barbara), known for drug trafficking and difficult to close down due to the powerful criminal elements that control it. However, in the last year the police have been raiding increasingly in this area, with some success. Piracy around the university in Thessaloniki has declined, due to efforts of the local police, who have seized significant numbers of pirate CDs and made arrests.

The piracy rate for entertainment software is 78% in Greece in 2000. Pirate copies of console games are imported from Eastern and Central Europe and copied on CD burners and sold locally. Pirate PC-based games are also imported and represent 90% of the pirate market with the rest locally produced on CD burners.

BSA faces hard – disk loading and sales of counterfeit products throughout Greece. Like the other copyright industries, the business software industry experiences long delays and nondeterrent fines, and the piracy rate is 65% in 2000, still the highest in Western Europe.

The book industry's problems in Greece are unauthorized commercial photocopying around universities, particularly of ELT texts. Losses due to this piracy are estimated at \$7 million in 2000.

COPYRIGHT ENFORCEMENT

Criminal Enforcement

In past years IIPA has reported on criminal convictions and sentences in Greece. However, the instance of pirates actually paying any but minimal fines and actually serving jail sentences is very rare. In the TV broadcast area, the upholding on appeal of the Junior's TV convictions for TV piracy and that the station owner may serve jail time, discussed above, will, it is hoped, send a positive signal to pirates. Other convictions were also finally obtained against a relatively few pirate station owners, though those fines (and, on occasion, accompanying damages) were low by any standard. Nevertheless, these convictions and the possible threat of action under the Greek government's administrative machinery in the Broadcast Law did provide some deterrence.

The criminal enforcement record against TV pirates is likely the worst, but other types of piracy — of videos, sound recordings, videogames and business software, also do not fare well, particularly at the sentencing stage. While the police and customs authorities can be, and often are, cooperative in running raids when requested by rightholders, once these cases reach the judicial system, rightholders are faced with delays and procedural hurdles which make it extremely difficult to get convictions and penalties that deter further piracy. The recording industry, while it has achieved a number of convictions in 2000 (195, including guilty pleas), nevertheless reports small fines and a general reluctance on the part of Greek judges to penalize many of the African immigrants who act as runners for the criminal enterprises that supply the market.

Greece has excellent laws and a statutory penalty structure, among the highest in Western Europe. Jail terms range from a minimum term of 1 year up to 5 years and a minimum fine of 1 million drachmas up to 5 million (\$2,746- \$13,730). If the profits are particularly high, the penalties go up to 2-10 million drachmas (\$5,492—\$27,460) and if the infringer is deemed a professional, the penalties increase to 5-10 years in jail and fines of 5-20 million drachmas (\$13,730- \$54,920). Despite this, however, Greek courts have never levied penalties anywhere close to these levels and regularly ignore the statutory minimums. Moreover, while the copyright law provides that any jail term of less than two years can be "bought out" for 15,000 drachmas per day (\$41), which with interest, stamp duties and costs can be substantial, the recording industry reports that in their cases, the judges look to the existing Penal Code which the judges say supercedes the copyright law and permits buyouts at a mere 1,500 drachmas (\$4.10) per day. Furthermore, Greek law also provides for suspended sentences for jail terms of three years or less. In view of these exceptions, it is very rare that a pirate ever serves a day in jail.

The result is a general lack of deterrence borne of a broken judicial system that tolerates interminable delays. The motion picture industry reports that prosecutors, especially at the local level, are often reluctant to pursue intellectual property cases and have largely ignored the Supreme Court circulars directing them to give intellectual property cases high priority. These deficiencies in copyright enforcement have led EPOE to use the "All-Day Court" system established for urgent criminal matters. EPOE has had some success in these courts in video and television piracy cases, but penalties have continued to be too low to deter piracy. Moreover, this system can be invoked only where the defendant is taken into custody within 24 hours of the issuance of the complaint; otherwise the case is assigned to the normal criminal courts.

The recording industry also experiences a lack of deterrence, due principally to judges not taking copyright violations seriously enough. While the raiding and conviction record is commendable, fines remain low (averaging less than \$1,000 and very often suspended). The industry reported seizing 256,731 CDs and cassettes in 2000.

BSA reports improved cooperation in 2000 from law enforcement. In April 2000, the national police issued a directive committing to fight software piracy. The Copyright Office has promised to send letters to software distributors emphasizing the importance of using legal software. On October 10, 2000, the Greek financial police (SDOE) also issued a circular committing to take action against software piracy. Specifically, it stated that it would include examination of software licenses and all the accompanying purchase and tax documents in the framework of its daily fiscal controls.

The entertainment software industry has been getting good cooperation from the police and Customs, but again has had few convictions. However, EPOE, which operates the enforcement program in Greece for some members of the entertainment software industry, carried out 1,284 investigations, seized 11,172 CDs containing pirate games and initiated 43 legal actions. In one case, arising out of a June raid near Athens, the court imposed a one-year jail term and a small fine of \$3,000. It is not known if the jail term was bought out, which is usually the case.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000

ACTIONS	MPA	IFPI	TOTAL
Number of Raids conducted	43	1027	1,070
Number of indictments filed	43	372	415
Number of defendants convicted (including guilty pleas)	NA	195	195
Ratio of convictions to the number of raids conducted	NA	18,98% ³	
Ratio of convictions to the number of indictments	NA	52,41% ⁴	
Total number of cases resulting in jail time	NA	186	186
1 to 12 months		161	161
13 to 24 months		25	24
25 to 36 months		-	
37 to 60 months		-	
Over 61 months		-	
Number of cases resulting in criminal fines	NA	92	92
Total amount of fines levied	NA	US\$ 86.000	US\$86,000
US\$0-\$1,000		12	12
\$1,001-\$5,000		80	80
\$5,001-\$10,000		-	
\$10,000 and above		-	
Total amount of restitution ordered) in how many cases (e.g. \$XXX in Y cases)	NA	NA	NA

³ Low due to the escapes during the raids.

⁴ Low due to adjournments of the trials and not due to acquittals.

Civil Enforcement

End-user civil cases

Last year, IIPA reported on four civil end-user cases. At present eight cases are pending. BSA received two judgements in 2000, awarding damages equal to two times the retail price of the infringed works. Courts have been getting more efficient at ordering civil *ex parte* searches (although subsequent litigation remains slow).

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2000

ACTIONS	BSA
Number of civil raids/searches conducted	2
Post Search Action	
Cases Dropped	
Cases Settled	4
Cases Adjudicated	
Value of loss as determined by Court (\$USD)	
Judgment Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)	
US\$0-\$1,000	
\$1,001-\$5,000	
\$5,001-\$10,000	
\$10,001-\$20,000	1
\$20,001-\$50,000	
\$50,001-\$100,000	
\$100,000 and above	
Settlement Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)	US\$50,687 in 4 cases

DEFICIENCIES IN STATUTORY LAW AND REGULATIONS

Copyright Law

As noted in previous IIPA submissions, Greece's Copyright Law is modern and, at the theoretical level at least, contains a deterrent penalty structure. However, there remain defects in the law in addition to the enforcement defects noted above. IIPA recommends the following amendments, or regulations as appropriate, to correct some of the key problems in the law:

- eliminating the levy on computer hardware, or at least ensuring that its provisions do not immunize the unauthorized downloading of online databases and other protected works (Article 18);
- eliminating the public performance and broadcasting compulsory license of the neighboring right in a videogram (Article 49);

- clarifying that U.S. performers and record and film producers will receive their share of rental and private copying levies and proceeds under the Article 49 compulsory license. Denial of this right would violate Greece's national treatment obligations under both the Berne Convention and the TRIPS Agreement. It is hoped that the recent Supreme Court opinion in the Junior's TV case (which applied U.S. law to determine authorship and ownership) will help in resolving the national treatment issue.
- clarifying retroactive protection for performers and record producers; and
- restoring or clarifying the mandatory minimum 15,000 drachma amount to buyout a less-than-two-year jail term.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

INDONESIA

EXECUTIVE SUMMARY¹

Indonesia's huge market remains completely dominated by piracy. Its efforts to respond to this challenge have been hampered by pervasive civil unrest and political upheavals; but even taking these factors into account, the record of the past year is disappointing. Optical media piracy in Indonesia, once fueled solely by imports, is becoming largely home-grown: pirate syndicates fleeing less hospitable jurisdictions now make enough product in Indonesia to supply much of the market, and even to export. Indonesia risks being branded as the next new regional hotbed for optical media piracy. In the face of this challenge, enforcement efforts have been allowed to drift. Sporadic raids, and even tough sentencing of pirates in isolated cases, do not make up for an enforcement system that lacks leadership and coordination and that is consistently undermined by the inaction of prosecutors and courts. Indonesia must put a strong leader in charge of enforcement, and must give that leader an effective new tool in the form of a comprehensive law regulating optical media production. Sentencing guidelines and specially trained corps of prosecutors and judges could offer some short-term relief for court system bottlenecks while more fundamental judicial reform is underway. Simultaneously, Indonesia must dismantle the market access barriers that hamper the inflow of legitimate product, especially in the audio-visual sector. Enactment of copyright law amendments should be expedited, and the legislation should include provisions to combat institutional piracy of business software applications, and to enable Indonesia to ratify and implement the WIPO Performances and Phonograms Treaty (WPPT). To signal U.S. concern about the urgent need for Indonesia to mobilize its resources to tackle these formidable problems, Indonesia should be returned to the Special 301 Priority Watch List for 2001.

Indonesia currently participates in the U.S. Generalized System of Preferences (GSP) Program which allows duty-free imports of certain products into the U.S. from developing countries. In the first 11 months of 2000, some \$1.26 billion of imports from Indonesia entered the U.S. duty-free under this program. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection for intellectual property rights." Indonesia's failure to address effectively the endemic problem of copyright piracy creates serious questions about whether it meets this criterion for continuing favorable treatment under the GSP program.

¹ For more details on Indonesia's Special 301 history, see IIPA's "History" appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 – 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	90%	25.0	90%	25.0	90%	19.0	85%	19.0	85%	15.0	98%
Sound Recordings / Musical Compositions	19.6	87%	3.0	20%	3.0	12%	9.0	12%	12.0	15%	2.0	9%
Business Software Applications ²	32.9	87%	33.2	85%	47.3	92%	139.6	93%	170.3	98%	117.3	98%
Entertainment Software ³	NA	99%	80.4	92%	81.7	95%	87.2	89%	86.0	82%	82.6	80%
Books	32.0	NA	32.0	NA	30.0	NA	47.0	NA	47.0	NA	45.0	NA
TOTALS	109.5		173.6		187.0		301.8		334.3		261.9	

OPTICAL MEDIA PIRACY: NEED FOR REVIVED ENFORCEMENT, NEW LEGAL TOOLS, AND JUDICIAL REFORM

Throughout all the political upheavals and sweeping economic changes Indonesia has endured over the past several years, one factor has remained constant: Indonesia is a market awash in copyright piracy, with reported piracy levels for nearly all sectors among the highest of any major market in the world.⁴ Today, that market is dominated almost completely by pirate optical media products: audio CDs, video CDs, and CD-ROMs containing business software applications and/or entertainment software.

Piracy of audio-visual works offers an instructive example. The video compact disc (VCD) is now firmly entrenched as the home video medium of choice in Indonesia, and over nine-tenths of the market consists of pirate product. Price competition among pirates has driven prices down some 20-30% from the very low levels reported last year. Wholesalers of these pirate products openly advertise them in newspapers for prices as low as RP5000 (US\$0.55) apiece; even with a generous mark-up, the retail price of RP7000-12,500 (US\$0.75-1.35) is a small fraction of the price of a legitimate copy. Worse, pirate VCDs appear in Indonesia within days of the theatrical release of the film in the U.S., and long before those titles are available in Indonesian theaters; the more savvy pirates will re-release these titles to coincide with theatrical release in Indonesia and thus maximize sales. VCD piracy thus cripples the theatrical as well as the home video market. The considerable market access barriers faced by U.S. film studios in Indonesia (see discussion below) add costs that pirates evade, and cause delays in legitimate release in both the theatrical and home video markets, thus widening the window of opportunity for pirates. The situation is similarly bleak for other copyright industries.

² BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 level figure of N/A was also reported as preliminary. This number was finalized in mid-2000, and is reflected above.

³ IDSA estimates for 2000 are preliminary.

⁴ The sharp increase over 1999 in estimated piracy levels and losses in the recorded music sector is due to a comprehensive market re-assessment as well as deterioration in the legitimate market.

Optical Media Legal Controls are Needed

During 2000, the optical media piracy problem in Indonesia may have reached a critical and troubling tipping point. While, in the past, the country was clearly a net importer of pirate optical media products, it now appears to have developed enough illegal production capacity within its borders to supply much of its vast pirate market, and even to export pirate optical media products to other countries. This unwelcome development focuses attention on the top anti-piracy priorities for Indonesia: to put in place the legal tools to control and suppress the fast-growing pirate optical media production sector, and to summon the political will to carry out vigorous enforcement efforts against the trade in counterfeit CDs, VCDs, and CD-ROMs.

Evidence mounted during 2000 that most of the pirate optical media product in the Indonesian market is domestically produced. A raid conducted on January 18, 2000 on the island of Batam exposed an underground optical media plant that appears (from production records) to have been in active operation for two years. Over 20,000 pirated discs and twenty stampers (master copies) were seized, including audiovisual titles, business software suites, and musical recordings. A haul of similar size (mostly pirate videogames) was seized in a raid on a factory in Jakarta on March 13. Another underground plant on Batam was raided on April 20, netting 74,000 discs and over 150 stampers. A raid in Surabaya in November revealed two illegal lines that had been operating since August; 32 more stampers were seized in this raid, along with pirate VCDs of U.S. titles in Chinese language versions, clearly destined for export to Chinese speaking markets. A newly installed underground plant near the Jakarta airport was raided in December. Batam alone is suspected to be the site of at least six illegal optical media production lines, and nationwide the optical media production capacity in Indonesia is estimated at 70-100 lines, far in excess of the capacity needed for any legitimate purpose.

Regional conditions are contributing to the growth of the problem in Indonesia. The evidence strongly indicates that, as Malaysia moves toward effective regulation of the optical media production business, the syndicates which currently operate pirate factories there and in other countries are eyeing Indonesia as an attractive new location from which to supply the Asian regional pirate market. This would explain the attractiveness of Batam – located just 45 minutes by boat from Singapore – and is also consistent with the seizure of pirate CD product, manufactured in Indonesia, that has been exported to markets such as Australia, Fiji and Singapore, as well as to Latin America and Europe.

In the face of this threatened influx of pirate production capacity, Indonesia has been unable to organize an effective response. While, as noted above, there have been a few raids on illegal factories, none of them has resulted in the imposition of any significant penalties on their operators. In the case of the January Batam raid, for example, the seized items were disposed of before copyright owner representatives were able to fully examine them, and the only party prosecuted as a result of the raid received a suspended sentence. So did Tandiono, the proprietor of a huge warehouse in Surabaya where over one million pirate discs were seized in October.

To respond to the burgeoning growth of pirate optical media production capacity within its borders, Indonesia urgently needs to enact and implement a comprehensive licensing and reporting regime for the importation and operation of optical media production facilities and the importation and use of optical grade polycarbonate, the chief raw material involved. As IIPA noted last year, a draft decree requiring registration of all optical media production facilities was under consideration

at the Ministry of Information before it was disbanded in 1999. Unfortunately, there was no measurable progress during 2000 toward reviving this initiative, which is now more sorely needed than ever. The Ministry of Trade and Industry should be encouraged to issue this decree without delay. Additional regulations, or if necessary legislation, should be swiftly adopted to complement the basic decree. The needed regime should: (1) cover the importation of equipment and raw materials for the mastering and replication of all optical media products; (2) provide for the licensing of all production facilities, subject to spot inspections of their facilities and records, including production orders; and (3) require the use of the Secure Identification (SID) code or similar unique markings on all masters and copies of optical media products manufactured in the country. Recent enactments in Hong Kong, Malaysia and elsewhere can provide useful models. Of course, aggressive implementation of the new regime is the key to success. In the meantime, enforcement efforts based on the Copyright Act should continue and intensify, and must be complemented by the imposition of deterrent punishments against the operators of pirate production facilities.

While it is understandably difficult to contemplate the launch of new legal and regulatory initiatives such as this in the current unsettled political environment, inaction will only aggravate the problem. There is a serious risk that optical media pirate syndicates, including those fleeing stepped-up enforcement elsewhere in the region, will become firmly ensconced in Indonesia, and that the influx of new pirate plants will accelerate. Indonesia must act as quickly as possible to forestall this scenario.

Enforcement Must be Sustained and Coordinated, with Leadership from the Highest Levels

Indonesia's efforts to enforce its copyright law against pirates during 2000 can best be described as sporadic. A few high profile actions were taken against notorious pirates, particularly in Jakarta. For example, on May 1, Yoel Setiawan Tendianto was arrested in West Jakarta for possession of one million pirate VCDs. On October 17, he was sentenced to four years' imprisonment and fined RP 20 million (US\$2100) for distributing hundreds of thousands of pirated VCDs, CDs, and computer software.⁵ However, Tendianto was released on bail pending appeal; he has not served any of his sentence yet, and may not do so for many years, if ever.

In many sectors, the level of enforcement has declined from the levels observed in 1999, which were themselves not sufficient to respond to the endemic piracy in a market as vast as Indonesia. For example, the number of raids carried out against business software pirates declined from 23 in 1999 to eight in the first 11 months of 2000, while the number of criminal cases initiated held steady at 11 in both years. MPA participated in about 40 raids against VCD piracy during 2000, but only four of these have resulted in criminal prosecutions. In general, enforcement activities have failed to return to the level experienced prior to the October 1999 elections, although precise comparisons are difficult because of the lack of reliable enforcement data nationwide.

It is indisputable that serious problems of coordination have also plagued enforcement efforts. The leadership role in enforcement played by the Ministry of Information remains unfilled more than a year after that ministry was abolished in the aftermath of the elections. As a result, the

⁵ "Police arrest man, seize one million pirated VCDs," Jakarta Post, May 3, 2000; "Court gets strict on software and CD piracy," IP Asia, Dec. 2000/Jan. 2001, at 7.

numerous ministries and agencies with official responsibilities for enforcement against piracy – including Justice, Police, Finance (Customs), Trade, and the Directorate General of IPR – lack any common plan or strategy. For instance, border enforcement is largely ineffective because implementing regulations for a system of detention and seizure of infringing product have never been put into place. Police tend to act on their own against unimportant retail targets, while authorities fail to pursue more significant figures, such as distributors, that have been identified by right holder groups. The inability or unwillingness of enforcement authorities to move against producers or distributors of pirate product has compromised their efforts to crack down on pirate retailers and undercut public support for anti-piracy efforts.⁶ After raids against retail vendors in the Glodok section of Jakarta in May disintegrated into riots, enforcement actions there virtually ceased. As a result, this open and notorious center for the wholesale and retail trade in pirate optical media products continues to thrive in the center of the nation's capital, just two kilometers from the presidential palace.

In a word, during 2000 the Wahid regime simply allowed anti-piracy efforts to drift. It also failed to tackle, in this sphere at least, the now widely discussed legacy of police and judicial corruption that has handicapped anti-piracy efforts in Indonesia for many years. This official paralysis is even more troubling because of signs that Indonesian civil society is beginning to appreciate the costs that rampant piracy imposes on the Indonesian people. A vocal non-governmental organization, the Indonesian Copyright and Pornography Anti-Piracy Society (MAPPI), has denounced law enforcement officials who protect pirates in cities such as Jakarta, Batam, Surabaya, and Semarang, while citing piracy as evidence of "the loss of values of honesty and a declining morality." As a local newspaper editorial noted, "Rampant copyright infringement is blunting the creativity and inventiveness of Indonesians.... The nation's indifference to copyright piracy is killing indigenous talent."⁷ Local songwriters complained to a leading judge about the problem, noting that "many players in the narcotics trade have shifted to the piracy business because, if arrested, they would get light punishment."⁸

To stop this drift, the Indonesian government must put a strong leader in charge of enforcement of the intellectual property laws. A high-level government official should be tasked to chair a national coordinating body, comprised of all relevant enforcement agencies, and should be given the authority to coordinate and to actively direct all enforcement efforts. The agencies involved should include customs officials (both with regard to the continuing flow of pirate imports into Indonesia, and the alarming trend toward pirate exports) and revenue authorities, among others. Such a body, meeting regularly with the private sector, would be responsible for producing a more aggressive and sustained program of enforcement, and for providing the strategic direction for enforcement agencies to move up the chain of distribution and to target the producers and major distributors of pirate product. The national coordinating group could be established quickly, without the need for new legislation, and could, under strong leadership, show quick results in terms of more active and coordinated enforcement activity.

While optical media piracy must be the focus of enforcement efforts, another long-standing problem must also be addressed. Widespread book piracy, especially of English-language textbooks, reference books, and computer-related volumes, remains a serious concern.

⁶ "Pirated VCD Producers Should be Tried. -- Judge," Jakarta Post, May 19, 2000, at 3.

⁷ "A nation of pirates," Jakarta Post, July 19, 2000.

⁸ "Street vendors invited to sell legal products," Jakarta Post, August 10, 2000 at 3.

Commercial pirates operate throughout the country, including some who produce and market unauthorized translations of U.S. books. Copy shops in and around universities are becoming more aggressive and increasing the volume of their unauthorized copying; the authorities rule out enforcement because they fear antagonizing student militants. Systematic or proactive enforcement against book piracy has never been attempted in Indonesia and certainly is not occurring now. It should now be given high priority.

The Judicial Bottleneck Must be Addressed, Especially at the Sentencing Level.

The Indonesian court system has long been a weak link in the nation's copyright enforcement chain. The long-standing problem of judicial corruption, which is now officially acknowledged, combined with a lack of training and insufficient resources, have made the courts the graveyard of many piracy prosecutions. Weaknesses among the corps of prosecutors compound the problem. Most are poorly trained, especially with regard to IPR matters, and their assignments are frequently rotated, virtually foreclosing the possibility of improving the skills base. Evidence is rarely preserved or presented properly, and judicial orders to destroy seized pirate product or production equipment are often ignored. Typically, either extremely light sentences are imposed, even on major commercial pirates, or else the case simply languishes and is never acted upon. As with enforcement generally, the experience of 1998-99 was slightly more positive, with a number of well-publicized convictions of video pirates in particular; but the forward progress has ground to a halt recently, with rare exceptions.

While the problems of Indonesia's judicial system will not be solved easily or quickly, some steps could be taken immediately to help improve the situation. Specialized teams of prosecutors should be dedicated to piracy cases and given the proper training to handle them. Tough sentencing guidelines for IPR cases should be issued to dispel the notion that piracy deserves only nominal punishment. The issuance and implementation of such guidelines should stress the role that the national judiciary must play in fulfilling Indonesia's international obligations, in this case, its TRIPS obligation to impose sentences that are sufficient to deter piracy. In recognition that most Indonesian judges are not well trained to handle cases dealing with intellectual property rights, mechanisms to refer such cases to specialized panels or divisions of existing courts should be explored now.

A longer term solution must look toward the establishment of a specialized IPR court in Indonesia, along the lines of the model that has proven successful in Thailand. The pending copyright legislation, which gives specialized commercial courts jurisdiction over some copyright cases, is a step in the right direction. But it falls far short of a solution, because the commercial courts are only empowered to handle civil litigation (not currently a viable method of enforcement against major piracy in Indonesia), and because no provision has been made for specialized training of the commercial court judges in copyright matters. While creation of a specialized IPR court may require new legislation, an arduous process under current circumstances, planning toward this goal should begin now, without detracting from the steps urgently needed to enable the courts to contribute positively to enforcement efforts in the short run.

MARKET ACCESS BARRIERS FOR U.S. COPYRIGHTED PRODUCTS MUST BE DISMANTLED

For years, Indonesia has enjoyed the dubious distinction as one of the least open markets in the world to U.S. copyrighted products. Despite economic reforms and liberalization in other sectors, the overarching market access barrier affecting the copyright industries remains in place: the blanket prohibition on foreign company participation in, or even investment in, importation, distribution, or retailing in Indonesia.

This restriction is particularly onerous in its impact on the audio-visual industry. Although government-sanctioned oligopolies have been dissolved, allowing Indonesian companies to compete freely for film or video import licenses, this privilege has not been extended to foreign entities. It remains the case today, as it has for many years, that only 100% Indonesian-owned companies may either import or distribute films and videos, and no company may perform both functions. Thus, U.S. audio-visual products can reach Indonesian viewers only after passing through two separate, unnecessary bottlenecks.

The audio-visual sector also suffers under a flat ban on foreign investment in all media businesses, including cinema construction or operation, video distribution, or broadcast services. President Habibie issued a decree in July 1998, reaffirming the ban, but there was some hope that the Wahid regime would moderate this approach. These hopes were dashed by issuance of two presidential decrees in July and August 2000, which retained all sectors of the audio-visual industry on the "Negative List" for foreign investment. (The first decree accorded similar treatment to foreign investment in multimedia ventures, but the second apparently relaxed this ban.)

Indonesian officials point to provisions of the Film Law, adopted in 1992, as justification for maintaining the audio-visual sector on the "Negative List." An amendment to the Film Law that would allow importers to engage in distribution and permit foreign entities to take minority stakes in the film industry has been pending before Parliament since 1999, without any action. Meanwhile, the US audio-visual industries remain largely fenced out of direct participation in this huge market.

The investment ban and the barriers to a foreign role in distribution are wholly inconsistent with the steps the regime has taken to reduce barriers to the Indonesian market generally and to respond to calls from the international community for market liberalization. They also violate Indonesia's bilateral pledge to the United States in 1992 that direct distribution of audio-visual product will be permitted as soon as the market is opened to the direct distribution of any other foreign goods. Today, in a number of sectors, foreign companies have taken advantage of a 1998 presidential decree that allows 100 percent foreign ownership of distribution entities so long as there is a contractual arrangement (which need not include equity participation) with an Indonesian small or medium-sized business. To say that Indonesia's bilateral pledge is not yet operative because direct distribution wholly by foreign entities has not yet been formally approved elevates form over substance. The Indonesian government is bound by its predecessor's promise to the U.S. Now is the time to make good on it.

Onerous import levies also constrict the market for foreign copyrighted materials, and, by unjustifiably increasing their cost to Indonesians, provide an additional incentive for piracy and smuggling. Duties and other tariffs (including a 20% "luxury tax") are assessed against

videocassettes, VCDs and DVDs at an exorbitant aggregate rate of 57%, and range as high as 100% for some videogame products. The aggregate rate of duties and taxes payable upon import for films imported for theatrical exhibition exceeds 23%, averaging about RP4 million (US\$425) per print, with an additional 20% luxury tax charged on certain accessories, such as sound discs. Other levies and “government royalty” charges, including a “National Film Development” charge, add to this already excessive sum. As a participant in the Information Technology Agreement (ITA), Indonesia was required to eliminate tariffs on a range of products, including most computer software, by January 1, 2000. This tariff elimination program should be extended to all products embodying copyrighted materials, both for market access liberalization reasons, and to reduce the competitive advantage now enjoyed by pirates who pay none of these duties.

COPYRIGHT LAW REFORM SHOULD GET BACK ON TRACK

Since a flurry of activity in May 1997, when Indonesia extensively amended its copyright law, joined the Berne Convention, and became the first nation in the world to ratify the WIPO Copyright Treaty (WCT), copyright law reform in Indonesia has been at a standstill. In view of the political turmoil afflicting the country, this hiatus is understandable. It is regrettable, however, that the January 1, 2000 deadline for full Indonesian compliance with its TRIPS obligations was allowed to pass without correction of the significant remaining deficiencies in its copyright law. Most of Indonesia's TRIPS shortcomings relate to enforcement, which the current law deals with in only sketchy terms. Problem areas include:

- The inability of a copyright owner to enforce against a party “not trading in” copyrighted goods could present a major enforcement impediment, especially with regard to end-user piracy of business software. In Indonesia, as in other countries, the most economically damaging form of business software piracy occurs when a company or other institution makes numerous unauthorized copies of a single legitimate copy it has acquired. In order to fulfill its TRIPS Article 61 obligation to provide criminal remedies against all types of copyright piracy on a commercial scale, Indonesia should spell out in its law that the commercial use of unauthorized copies of computer programs is a criminal offense as well. Criminal liability should also be imposed for violations of the neighboring rights of a sound recording producer.
- TRIPS Article 50 requires that provisional measures such as *ex parte* seizures — a crucial enforcement tool in software piracy cases especially — must be available in civil cases; the current Indonesian law does not clearly provide this.
- The requirement to pay compensation in order to obtain a civil seizure of pirate goods must also be clarified in order to comply with TRIPS Article 46.
- Judicial authority to order payment of fully compensatory damages and the right holder's expenses, and to dispose of materials and implements predominantly used to make infringing goods, must be spelled out in order to comply with TRIPS Articles 45 and 46.
- Deterrent criminal penalties must be provided, to fulfill TRIPS Articles 41 and 61. This point is particularly significant in light of the historic inability of the Indonesian courts to impose deterrent sentences even in flagrant cases of massive commercial piracy of computer software and books. Not only should maximum penalty levels be reviewed, but minimum penalties should also be enacted for commercially significant cases.

While draft amendments to the Indonesian copyright law which IIPA reviewed in July 1999 made virtually no progress toward resolving these TRIPS deficiencies, a much improved version was presented to the Parliament in May 2000. An unofficial translation which IIPA reviewed indicated that enactment of the amendment's enforcement provisions would bring Indonesia much closer to full compliance with its obligations under the WTO TRIPS Agreement. For instance, the draft amendment provides more detail on civil enforcement procedures (including interlocutory injunctions), improves remedies for violations of neighboring rights, and gives the courts clear authorization to order the destruction of seized pirate goods. Provisions in the amendment extending the term of copyright protection reflect Indonesia's efforts to modernize its law in line with international trends. Finally, in several ways the amendment would seek to implement the WIPO Copyright Treaty (WCT), which Indonesia ratified in 1997.

However, the draft amendment falls short in some critical respects in the effort to bring Indonesian law into compliance with TRIPS, to implement the WCT, and to update other aspects of the law. These problems include:

1. Business/institutional piracy: To combat commercial piracy of computer programs and other works that take place within the operations of a business, public agency, or other institution, Article 58 of the copyright law should be amended to make it clear that, for instance, a business owner who knowingly uses pirate copies of software in his business operations is an infringer of copyright. Similarly, Article 74 should be amended to make such piracy a criminal offense, as required by TRIPS.

2. Remedies for infringement: To fulfill Indonesia's TRIPS obligations, Articles 57 and 75 must be amended so that the court may order equipment or raw materials used to produce pirate product (in addition to the product itself) to be seized and destroyed. Article 57 should be amended to ensure that monetary damages that infringers are required to pay will be enough to deter further infringements, as TRIPS requires.

3. Protection of phonograms: Producers of phonograms should have the legal right to control "publication" of their recordings over the Internet. This would make it much easier for Indonesia to ratify and implement the WIPO Performances and Phonograms Treaty (WPPT). Phonogram producers should also have the right to control rental of their products, and all their rights should last for at least 70 years.

4. Rights management information and technological protection measures: It is commendable that the draft amendment includes provisions to outlaw tampering with information used to identify the owners of rights in a work or phonogram, and to prohibit pirates from breaking through technologies that right holders use to control who may access or copy their products (for example, by stealing passwords or access codes). However, these provisions need to be more detailed and specific in order to comply fully with the requirements of the WCT and WPPT.

5. Other changes: Indonesia should take this opportunity to clarify and correct other aspects of its current law, and some provisions of the draft amendment. These include: (1) definitions of the "publication right" and of "work"; (2) treatment of moral rights and of employed or commissioned authors; (3) restrictions on licensing; (4) point of attachment for protecting foreign phonograms and works; and (5) protection of pre-existing works and phonograms for a full term. Indonesia should also further narrow, or eliminate, the compulsory licenses for broadcasting, translation, or reprinting of certain works.

Unfortunately, over the past eight months, the legislature has taken little substantive action on these amendments, which were placed in a queue behind a number of other IPR-related measures. Now that most of these other bills have been disposed of, Indonesia should promptly perfect the most recent draft amendments to its copyright law, as outlined above, and enact them.

Finally, while Indonesia's prompt ratification of the WIPO Copyright Treaty (WCT) set an excellent example for its neighbors, its failure to ratify the companion WIPO Performances and Phonograms Treaty (WPPT) is cause for concern. Indonesia should move as quickly as possible during 2001 to cure this anomaly by ratifying the WPPT. This action should no longer be delayed by consideration of the mechanisms for joining the Rome Convention, since Rome adherence is in no way a prerequisite to WPPT ratification.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

ISRAEL

EXECUTIVE SUMMARY¹

IIPA recommends that USTR make no determination on Israel at this time, and therefore, leave Israel on the Priority Watch List.

Until the outbreak of violence in September 2000, IIPA continued to focus its concern on Israel's failure to devote needed police and prosecutorial resources to the fight against pirate production and retail piracy, both for domestic consumption and for export. In addition, Israel has not enacted and implemented comprehensive optical media regulations, notwithstanding that such a set of regulations would be relatively easy to pass and implement (requiring far fewer resources than are now required to chase pirates distributing the product of those plants), and would go a long way to eradicating the chief concern of the copyright industries. Notwithstanding the current crisis, IIPA calls upon Israel to do what other countries and territories have done to defeat their optical media pirate production problems, namely, enact and implement a full slate of optical media regulations, including the ability to track the movement of optical media production equipment, as well as the raw materials (including optical grade polycarbonate), and also including the compulsory use of Source Identification (SID) codes; then, Israeli authorities must, when conditions permit, conduct raids on plants producing unauthorized product, seize infringing copies and machinery, and impose criminal penalties to deter the organized manufacturing and distribution of pirate product. These are not difficult or complicated measures (indeed, they make enforcement easier, by reducing proof burdens associated with copyright infringement); they merely require government will on the part of the Israelis. While IIPA recognizes that the current situation does not make it possible to fairly consider Israel's status, as soon as conditions permit, the situation in Israel should be reevaluated.

Estimated trade losses to the U.S. copyright-based industries (reporting losses for 2000) due to copyright piracy were well over \$113.0 million in Israel in 2000.

¹ For more details on Israel's Special 301 history, see IIPA's "History" Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	15.0	50%	15.0	50%	11.0	40%	10.0	40%	10.0	30%	10.0	30%
Sound Recordings / Musical Compositions	45.0	30% ²	70.0	45%	60.0	40%	67.0	30%	92.0	15%	1.3 ³	13%
Business Software Applications ⁴	NA	NA	54.8	44%	47.8	48%	45.0	54%	58.0	71%	38.9	75%
Entertainment Software ⁵	52.0	NA	30.9	54%	28.5	55%	25.6	52%	NA	NA	21.0	40%
Books	1.0	NA	1.0	NA	0.7	NA	NA	NA	NA	NA	0.7	NA
TOTALS	113.0		171.7		148.0		147.6		160.0		71.9	

COPYRIGHT PIRACY IN ISRAEL

Retail Piracy Threatens Israel's Legitimate Market for Copyrighted Goods

The situation for much of 2000 with respect to retail piracy in the Israeli market can be summed up in a sentence uttered recently by a chief industry representative, who said, "[w]henver a newspaper publicizes the release of a new CD likely to be a hit, it's pirated the next day. It takes 24 hours from release to counterfeit. Every successful recording is a candidate." Retail piracy did wane with the onset of violence in the latter part of 2000, but piracy remains one of IIPA's greatest priorities in 2001, as it continues to threaten the domestic market and cause losses due to exports of pirated products transshipped through Israel's borders. There is a very short window (a few days sometimes) for legitimate product to be sold, and on the day pirate product is launched, the legitimate sales spike downward (the same is true for entertainment software, even the games for which enforcement raids are being carried out). The following piracy problems plague Israel:

- **Internet Piracy:** Dozens of Internet sites based in Israel, including one 'community' site, that list which stores have which titles, will custom burn CD-Rs and deliver them anywhere in the world.

² Piracy levels for music in 2000 were around 25% for CDs and a little over 35% for audiocassettes.

³ For 1995, IIPA did not report an estimate for pirate exports as part of the overall losses, which explains the lower figure for 1995 losses due to sound recording/music piracy.

⁴ BSA piracy loss and level estimates for 2000 are unavailable.

⁵ IDSA estimates for 2000 are preliminary.

- **Russian Language Pirated Goods:** Most pirate retail copies of games in Israel are Russian language (and many of the games copied are ones that IDSA members localize into the Russian language). A transshipment network exists where products (including CDs of all kinds, videocassettes, audiocassettes and the like) are either produced in Israel, or produced elsewhere and brought to Israel, possibly involving Russia, the CIS, Ukraine, Turkey, Thailand, Czech Republic, Poland and Hungary. The result is the flooding of the Israeli market by illegal Russian-language software products. Approximately 270 of the 300 Russian-language video libraries throughout Israel are pirate and sourced primarily from the CIS with Russian dubbing.
- **Government Use of Illegal Software:** Although a limited number of government offices have legalized the software they are using, many have not. Furthermore, government software management in Israeli has been implemented in a haphazard way. Israel needs to put into place a formal process or methodology to ensure future purchases of legal software, including making legal use of software a part of the annual audits of government activities.
- **Illegal Public Performances:** Illegal public screenings have become a growing problem in cafes and pubs since the introduction of DVDs, VCDs and new, sophisticated performance equipment.
- **Book Piracy:** Wholesale copyright piracy by otherwise law-abiding institutions such as schools and universities, and wholesale counterfeiting of published books are proliferating problems in Israel.
- **Cable Piracy:** Cable operators in Israel continue to retransmit signals without the authorization of the copyright owners, although broadcast and cable piracy has been minimal since the entrance of new cable companies in the Israeli market.
- **Video Piracy:** Although obviously affected by the current violent unrest (and the sealing of the Palestinian border), prior to September, 4,000 to 5,000 pirate videocassettes poured into Israel from the areas controlled by the Palestinian Authority each day. The problem in retail piracy has become more serious as the number of legitimate stores and libraries (now 120) has decreased (and it is now known that 10% of the "legitimate" stores contain illegal product, often of new releases not yet available on videocassette). Illegal videocassettes are copied over originals and their bar codes are forged to a point where the difference can only be identified by a professional eye. Earlier in 2000, discussions between the Ministry of Trade and Industry and the Palestinian Territories' commercial representatives occurred, and the motion picture industry made presentations about the problem of imported tapes. The industry also gave information to an Israeli Army coordinator who had been charged with coordinating joint security with the Palestinian Authority, including specific information regarding video duplication labs in Ramallah, Betunia, and Tul Karem. When conditions permit, the situation will need to be revisited in part to reassess the risk from the then existing plants.
- **Videomat Piracy:** There are about 240 Videomat machines in Israel, containing approximately 400 cassettes each. To increase their return, Videomat owners have begun to use pirate cassettes of new and pre-video releases in their machines. It is unknown how the current instability has affected sales in these machines, particularly of pirate product.

Optical Media Piracy Threatens Israel's Domestic Market

There are now five known CD plants in Israel, with a capacity of at least 70 million discs (and a legitimate domestic demand of only 6 million music CDs and 14 million units in other media). Pirate product is available on practically every street corner, in every kiosk and at many small town stores. Increasingly, hundreds of stores in major marketplaces, including in Tel Aviv and Herzlia, engage in "in-store burning" of their own CD-R compilations of music, games and business software, putting possibly hundreds of software titles onto a single CD-R. Customers can regularly enter a store asking for a software program or a music album, at which time retailers retreat to a back room and illegally copy the requested software from their computer onto a CD-R. The price for such "custom-made" pirated CD-Rs is a fraction of the retail price. While importation from the Palestinian Territories has largely ceased during the recent unrest, importation into Israel of pirate CDs and CD-Rs, mainly from Eastern Europe, continues largely unabated.

MARKET ACCESS IN ISRAEL

Proposal to Curtail U.S. Programmers' Freedom to Sell Advertising Violates WTO Services Agreement

Israel's Council for Cable and Satellite Broadcasting has proposed a new amendment to the existing Bezeq Law that regulates the pay-TV industry. The amendment would prohibit foreign television programmers from carrying advertising aimed at the Israeli market. The Chair of the Council has indicated that the purpose of the new regulation is to protect six new Israeli cable and satellite channels to be launched within a year from competition for ad revenue. Prohibiting U.S. programmers from selling advertising time would violate Israel's commitments in the WTO Services Agreement to provide full market access and national treatment for advertising services.

COPYRIGHT ENFORCEMENT PRIORITIES IN ISRAEL

The Israeli Government Should Immediately Enact Comprehensive Optical Media Regulations and Cease Subsidizing Known Pirates

As noted above, Israel now has five optical media plants, with a capacity of at least 70 million discs. Israel must recognize its international obligations to ensure that plants operating within its territory with such over-capacity do not produce pirated product that saturates the Israeli market and provides markets outside of Israel with pirated optical media product. In order to ensure that these and future plants do not engage in commercial piracy, the Israeli government should enact and implement a full slate of optical media regulations, including the ability to track the movement of optical media production equipment, as well as the raw materials (including optical grade polycarbonate), and also including the compulsory use of Source Identification (SID) codes; then, Israeli authorities must, when conditions permit, conduct raids on plants producing unauthorized product, seize infringing copies and machinery, and impose criminal penalties to deter the organized manufacturing and distribution of pirate product. As noted above, these are not difficult or complicated measures; they merely require

government will on the part of the Israelis. Again, when conditions permit, Israeli Customs and, where applicable, the Israeli Army, must take swift actions to stop imports and exports of pirated optical disks, with the aim of addressing the problem of illegal CDs and CD-ROMs being imported from areas under the control of the Palestinian Authority.

Of the five known plants, most seem to be compliant with the use of SID code, but one plant refuses to use the SID code altogether. A SID code requirement (in conjunction with a comprehensive optical media regulation) would assist the government and the industry in identifying where particular CDs were manufactured. While IIPA understands that in mid-1999, the Ministry of Industry and Trade agreed in principle that SID codes should be made compulsory in Israel in order to press CDs, the Ministry is apparently waiting unnecessarily for the copyright law to be amended to cover this point. There need be no delay in enacting and implementing such a requirement.

The Israeli Government Must Provide Necessary Police Resources to Raid, then Prepare Evidence to Prosecute Known Pirates

Several years ago, in the face of growing domestic piracy and a lack of adequate resources and expertise to combat it, the copyright industries began calling for the establishment of a special police force, trained in the ways of piracy and able to build cases for prosecutors to bring against commercial pirates. IIPA is pleased to see that this enforcement unit has been expanded, and we look forward to its further strengthening. Two special police units, each comprised of six officers (one in Haifa in northern Israel and one in Tel Aviv in the central area) were established in July 1999, however, given the piracy situation in Israel, this force of 12 officers had little chance against the growing problem on the ground. By 2000 (and before the outbreak of violence between Israel and the Palestinian territories), four special police units had been established with a total of 26 officers. These units appeared to operate relatively efficiently in the Haifa area in the north and in Tel Aviv, but had trouble providing the kind of support necessary to deter piratical activities in most of Israel. The Israeli government had promised that 60 officers would be assigned to these units by the end of 2000, so the units are still dramatically understaffed.

We call upon the Government of Israel to finish the job that it has commenced. Most of the pirates, whether pirate producers, pirate distributors, or pirate retailers, are well known to the police, such as the stalls in Haifa next to the police station, which were finally raided in January 2000. Anecdotes abound of known pirates selling their wares with police onlookers doing nothing (and there have even been reports of some police purchasing pirated goods from the pirate retailers). Further, because of political and security concerns, the year 2000 witnessed a drop-off in police cooperation with the motion picture industry in enforcement efforts, while for the business software industry, the police routinely have failed to pursue the many targets referred to them by the industry. As a result, prior to the outbreak of violence in September, industry noted a marked increase in the number of peddlers selling pirate product, moving from one market to the next on local market days, keeping their stocks hidden in nearby homes or warehouses. All of this piratical activity requires extensive surveillance and investigation to locate the highly mobile businesses and raid them.

When conditions permit, the special police units must be reinvigorated, with proper funding and organization (e.g., with clear powers to seize infringing copies and equipment). Keys to these special police units' success are: 1) creating deterrence in the market through seizures, closures (where

warranted) and administrative penalties (where authorized); and 2) swift prosecutions leading to jail time and fines, based on evidence gathered by the units. In addition, the coordinators of the effort in Israel must locate and identify deficiencies in resources or training within the special police units, as well as within other departments (like the Fraud Investigation Department, which we understand has been merged into a new Intellectual Property Department), and must be creative in finding ways to best utilize the special police units to catch and stop commercial pirates (e.g., police could assist the Finance Ministry in conducting selected inspections of suspect businesses for unpaid taxes/unreported revenues arising from the use of pirated products, initiating criminal cases against such tax evaders).

Additional training may be needed in the area of Internet piracy. For example, in March 2000, the police, in coordination with industry, conducted the first-ever raid against a website. While many unauthorized copies of software were seized, and the website was taken down, the preparation for this raid required a significant amount of unique investigation; training as to this brand of piracy may decrease the amount of resources needed to attack it.

Finally, the police units and others involved in enforcement must come to understand the nature of the illegal products involved, for example, different copyrighted goods have different shelf lives, so for some industries (like the videogame industry) the main object of the raid is to remove pirate and counterfeit versions from the shelves immediately, while for others the main object might be different. For the business software industry, publicizing an end-user raid against a business would be important to deter others from engaging in pirate end-use of software, and to correct the perception that there is nothing wrong with end-user piracy. This goes for police as well as for government officials, such as those at the Ministry of Justice who have questioned the illegality of end-user infringement.

IIPA is heartened by the rechecking and, in many instances, reopening of criminal files previously closed, and understands based on information reported that of 214 files rechecked, that 6 have led to convictions, 23 have led to charges being filed by the courts, 27 have led to charges being filed by prosecutors, 93 are still under open investigation, 31 were closed for "lack of public interest," 12 involve cases in which the offender remains unknown, and 6 are still awaiting for the decision of the police officer. The Israeli government is to be commended for cooperating in ferreting out worthy cases to bring forward criminally, and industry will continue to assist in this regard. IIPA also wishes to acknowledge cooperation from Israeli Customs in the fight against the pirate trade, which has been exemplary and effective.

The following are partial criminal enforcement statistics illustrating the problems in Israel.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE
Number of Raids conducted	NA	91	76
Number of cases commenced	215	NA	76
Number of defendants convicted (including guilty pleas)	40	3	0
Acquittals and Dismissals	NA	NA	NA
Number of Cases Pending	301	NA	76
Total number of cases resulting in jail time	NA	NA	0
Suspended Prison Terms	NA	NA	
Maximum 6 months	NA	NA	0
Over 6 months	NA	NA	0
Over 1 year	NA	NA	0
Total Suspended Prison Terms	NA	NA	0
Prison Terms Served (not suspended)	NA	NA	
Maximum 6 months	NA	NA	0
Over 6 months	NA	NA	0
Over 1 year	NA	NA	0
Total Prison Terms Served (not suspended)	NA	NA	0
Number of cases resulting in criminal fines	NA	NA	
Up to \$1,000	NA	NA	0
\$1,000 to \$5,000	NA	NA	0
Over \$5,000	NA	NA	0
Total amount of fines levied	NA	NA	0

The Ministry of Justice Needs to Devote Adequate Resources to Prosecution of Piracy Cases

During consultations with Israeli government officials (including the Justice Minister) after the 2000 IIPA filing, many in the government openly made statements about several "test cases". The gist of the statements was that the results of those test cases (expected to be decided in mid-2000) would speak for themselves as to the seriousness with which Israel takes the problem of copyright piracy. The fact that there have been no results from these cases (hand-picked by the government, not by industry) is particularly telling. In addition, no software piracy case has ever been prosecuted against an end-user pirate, and only in the rarest of cases have any cases been pursued against illegal resellers (conducted with inadequate staffing and support). As noted above, the Ministry of Justice does not seem to regard end-user piracy as a crime.

In fact, contrary to bold statements about expected convictions to come from the test cases prosecuted, officials behind the scenes have admitted that there would probably be no imprisonments for copyright infringement during the next several years, as judges tend to sentence lightly in Israel (noting that a recent rape conviction only yielded an eighteen month sentence), except in cases like tax evasion. With this type of attitude toward commercial piracy being expressed at the top echelons of the Israeli government, it is no wonder that pirates do not fear being caught. It should also be noted that the excessive requirements in the field of proof of ownership, chain of title and obligations for rightholder representatives to come and testify in person, as well as the systematic failure to mete out

criminal penalties for at least wilful acts of commercial piracy would place Israel squarely in violation of its TRIPS obligations.

Courts Do Not Mete Out Deterrent Penalties

The lack of understanding of the serious nature of piracy extends to the Israeli courts. A private criminal complaint brought in 2000 by a motion picture company against a known repeat offender is quite telling. The defendant in the case had agreed to serve 10 days in jail, but upon the company's going to the court to get a court ruling and seek to enforce the judgment, the judge in the case refused to grant the ruling, eventually setting a fine instead of 16,000NIS (U.S.\$4,000) in eight monthly installments, which will be converted into four days in jail for every installment not paid. The defendant argued vehemently with the judge to send him to jail instead for ten days (the privately agreed-upon term), as he had no money, but the judge refused, making the points that 'no one had ever gone to jail on such a charge,' that 'if it was an important issue, the public prosecutor would have joined the case, but since he didn't, this case should be settled in more of a civil matter,' that 'ten days in jail will not create deterrence anyway and is just a waste of government resources,' and that 'if this really is a serious issue, the government should deal with it, not private companies.'

The above-mentioned case is symptomatic of the problem, namely, prosecutors have shown almost no inclination to undertake criminal enforcement against commercial pirates, and when private criminal complaints are filed, the courts do not take them seriously. Systematic prosecutions resulting from raids and seizures fail to materialize and do not figure in the list of priorities for prosecutors. Prosecutors are notorious for delays – it takes approximately six months for a case prepared for the prosecutors to even proceed to court for the first time. In 2000, defendants received suspended prison sentences of three to nine months and/or fines usually around 12,000 NIS (approximately \$3,000), a totally non-deterrent penalty that in most cases does not even amount to a significant cost of doing business. The number of cases outstanding is still too large (300, some of which date back to 1993).

For the business software industry, only four resellers have ever received prison sentences for copyright infringement, and all four sentences were suspended. To the best of our knowledge, no person in Israel has ever gone to jail for software piracy, despite the initiation of dozens of private criminal actions each year. In the field of music piracy, criminal prosecutions of pirate salesmen, including repeat offenders that have been caught more than 20 times selling hundreds of illegal cassettes and CDs, and of CD manufacturers, are making virtually no progress.

New Committee to Deal with Copyright Enforcement Shows Promise

One positive development in 2000 was the establishment of a forum to work with companies and associations involved with intellectual property under the Ministry of Trade and Industry, including the Ministry of Justice, Customs, Police and the Ministry of Finance. The staff-level Director General is relatively new to copyright enforcement issues, but is eager to put together initiatives that will be effective in fighting piracy in Israel. IIPA understands that this forum is tasked with 1) appointing ministerial managers to work below them on this committee; 2) starting a public relations campaign, to be paid for by the Israeli government, to educate businesses, government and individual consumers about the need to use legal copyrighted goods; 3) issuing a letter to the rest of the government on use of legitimate business software (which IIPA understands has already been done); 4) carrying out training

initiatives for police officers and prosecutors, and carrying out judicial training on adequate sentencing (which, from the anecdotes above, is apparently sorely needed); and 5) arranging for the addition of more special police unit personnel and funding. Through this forum it is hoped that all of the issues in this filing, including the need for comprehensive optical media regulations, imported pirate videos, and other enforcement-related issues, can be raised. IIPA hopes that this forum will also tackle the problem of unclear sentencing guidelines, by including in new guidelines increased fines and prison sentences (without the possibility of suspension). In addition, the forum should work with the Attorney General to issue a directive to prosecutors on the importance of requesting deterrent levels of sentencing in copyright cases.

Following are partial civil enforcement statistics for 2000:

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2000		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	332	11
Post Search Action	275	
Cases Pending		NA
Cases Dropped		0
Cases Settled/Adjudicated	57	4 / 5
Value of loss as determined by Rightholder (\$USD)		less than settle amt
Settlement/Judgment Amount (\$USD)		\$28,900 / NA

Some Gains in Government Software Management

A couple of positive steps have been taken toward legalizing software usage within the Israeli government during 2000. Ministry of Industry and Trade officials informed IIPA that they assisted the Israeli Defense Force in legalizing software usage in 2000, procuring 50 Million NIS (about U.S.\$12.5 million) for legalized software on thousands of computers. It is our understanding that the government has been working on a decree that will mandate that only legally acquired software can be used in all government offices (including the military). In addition to the decree, we believe that the Israeli government is establishing procedures to institute a government-wide audit to determine the extent of illegal software use (Israeli government officials have admitted that an internal government study has found significant piracy in the government's own ranks) and to ensure that the entire government becomes and remains fully licensed. What is needed is not a short-term fix, but a comprehensive methodology for managing legal software usage within the government, so that this problem can be solved for the long term. IIPA has also recently heard that the Israeli government is now requiring all government contractors or businesses receiving government funds to declare that they are not infringing intellectual property rights. If true, this would be a very positive step and IIPA urges the Israeli government immediately to implement this policy.

Burdensome And Costly Procedures

The Israeli judicial system is marred by procedural hurdles, including high burdens and costs to legitimate right holders trying to assert their rights against blatant pirates. The level and complexity of proof required for an Anton Piller search order (i.e., a civil order to search and seize pirated product that is granted without notice to the search target) remains unduly burdensome, as judges have not given clear guidance. There have been some improvements, in 2000, however, as courts have been setting more reasonable guarantee terms on Anton Piller orders (between \$5,000 and \$7500 per case) since the passage of the 1999 Commercial Torts Law.

For other industries that rely on the seizure of massive amounts of pirated product found in raids, Israel's failure to follow accepted international practice of "sampling" goods (forensic testing on one copy of each work pirated or counterfeited) seized in a raid continues to hinder copyright owners' efforts to effectively exercise their rights. Key Ministry of Justice officials have indicated that the laws in Israel may need to be changed to permit sampling. In cases in which seizure of thousands upon thousands of illegal copies of a single work are common, the copyright industries as a whole cannot live with a rule that goes against international practice by rejecting sampling.

Moreover, the burdensome and excessive requirements in terms of evidence, proof of ownership and chain of title are such that local industry groups have great difficulty in following up considering the number of criminal cases involved.

COPYRIGHT LAW AND RELATED ISSUES

Israeli Copyright Laws Still TRIPS-Deficient

Israel's copyright laws (last amended by the passage in December 1999, effective January 1, 2000, of Bill 2819, "Bills for the amendment of Intellectual Property Laws – Adjustment to the TRIPS Agreement Instructions 1999") include a modified version of the Copyright Act (1911) of the United Kingdom, which was adopted in the Copyright Order (1924), and the Performers and Broadcaster Rights Law (1984) providing neighboring rights to performers and broadcasters (and limited rights to an employer of a performer). The Copyright Order (Berne Convention) (1953) (as amended through 1981) implements the provisions of the Berne Convention (Brussels Act (1948)) in Israel, while the Copyright Order (Universal Copyright Convention) (1955) implements the UCC in Israel.

The 1999 amendments attempted to bring Israel's laws into compliance with the TRIPS Agreement. Though a number of TRIPS deficiencies were corrected by the Amendments, some provisions remain TRIPS-incompatible:

Substantive Deficiencies

- An exception is made to the sound recording rental right if the sound recording is not the “principal object” of the rental. This is at least a technical violation of TRIPS Article 14.4. TRIPS permits the exception with respect to computer programs but there is no analogous exception for sound recordings. It is unclear whether this added provision has any practical impact that would render the provision incompatible with TRIPS.
- There is a “rule of the shorter term” for sound recordings in violation of TRIPS. Nothing in Article 14 of TRIPS covering sound recordings permits the application of this Berne exception to national treatment to sound recordings.
- The amendments also do not appear to provide for an exclusive right in sound recordings against their “direct or indirect reproduction” as required by TRIPS Article 14.2. In these respects, the amendments and Law are TRIPS-incompatible.
- Copies of software acquired prior to January 1, 2000 do not carry a rental right in violation of TRIPS Article 11. In Chapter 8, the transitional provisions of the new Amendments, Section 12(a) provides that copies of computer software acquired prior to the effective date of the law do not carry a rental right. This would appear to be TRIPS-incompatible since Berne Article 18 permits no such exception.

Enforcement Deficiencies (On Their Face)

- Arguably the most serious and damaging facial TRIPS violation is that end-user software piracy is not defined clearly in the law as a criminal offense, in violation of Article 61 of TRIPS. Article 3(c) of the Copyright Ordinance criminalizes the “distribut(ion) [of] infringing copies of such a work for business purposes or to an extent damaging to the owner of the copyright.” There was a recent Supreme Court case imposing criminal liability on a business end-user, however, the facts of this case are unique and are regarded as not clearly “criminalizing” end-user piracy. It is therefore critical that the Israeli government amend the Copyright Law to clarify that end-user piracy is a crime. While there has been support from influential figures in Israel to provide protection against pirate end-users, it is unfortunate that the Knesset decided, in its deliberations leading up to the passage of the TRIPS Omnibus legislation, not to amend the law to explicitly criminalize end-user piracy, arguably leaving Israel’s law in violation of TRIPS. Over the past several years, the Israeli government has not taken a consistent position regarding whether Article 3 provides for criminal procedures and penalties in cases of willful copyright piracy on a commercial scale.
- Civil damages are too low to compensate the rightholder and statutory damages are applied per title, not per copy and/or per infringing act, and are therefore too low, in violation of Articles 41 and 45 of TRIPS. Israel should consider “per copy” and “per infringing act” pre-established damages. Israeli officials have indicated that they plan to have 200 to 100,000 NIS “per copy” pre-established damages in the new copyright law, with the plaintiff electing proved damages or statutory damages. The problems with this proposal are two-fold: they do not encompass “per infringing act” damages and the minimum is far too low to deter piracy.

Enforcement Deficiencies (In Practice)

- Effective action to deter infringements is not present in either civil or criminal cases in violation of TRIPS Article 41. Criminal penalties, as imposed, are too low in violations of TRIPS Articles 41 and 61.
- In Section 7C of the Copyright Ordinance, the court may only order the destruction of the manufactured objects so long as the party filing the motion notifies the police and the police are present to hear the motion. The requirement for police presence seems unreasonable, in light of the fact that the police are already understaffed and under-supported. If, in practice, this requirement results in the failure of courts to order destruction of manufactured objects, such a failure may defeat the effectiveness of the provision and render it inconsistent with Article 61 of TRIPS.
- Israel must provide adequate protections for witnesses who seek to report copyright infringement, and it must dedicate adequate police, prosecutorial, and judicial resources to the problem. It also must simplify and expedite enforcement procedures and process a greater volume of cases, with greater results, through its judicial machinery.

Civil Remedies in Israel are Inadequate and Ineffective

Israel must reform its copyright law to provide adequate compensatory and deterrent civil damages. At present, unless a right holder is willing to endure substantial burdens, delays and risks, it can only recover a specified statutory sum that is artificially and unreasonably low (i.e., NIS 10,000 -NIS 20,000, or roughly \$2,450 - \$ 4,900), calculated per infringed title rather than infringed copy and infringing act (i.e., so the damages are the same, whether there is one illegal copy or one million, or whether there is one illegal download, for example, or one million). As noted above, without the option to sue for meaningful statutory damages measured per copy and/or per infringing act (in addition to the existing per infringed title option), illegal resellers and end-users can regard these minimal penalties as merely a cost of doing business, and infringement becomes a rational business choice. The current draft overhaul of the copyright law proposes a minimum per-copy damage award of NIS 200 (approximately \$49). This amount is far too low to serve as a deterrent.

Not surprisingly, illegal resellers that have been subject to private criminal prosecution or civil actions in Israel often return to their illegal activities, as the profits substantially outweigh the costs, even after court-ordered injunctions. As previously noted, IIPA is aware of at least six instances where an infringer has been caught, admitted culpability, settled and returned to piratical activities. IIPA and its members have asked the Israeli government to increase statutory damages and provide deterrent penalties (as required under TRIPS).

Israel Should Move Forward with Modernization of Copyright Law

Since 1989, the Israeli authorities have planned to overhaul and modernize the copyright system. While the Ministry of Justice (in charge of drafting) had intended to put the comprehensive overhaul forward in 1999, in part because they received an overwhelming number of comments, the overhaul was put aside in favor of stop-gap legislation to attempt to address the immediate TRIPS-deficiencies.

Apparently, a new draft copyright law may be available as early as late 2001. IIPA will be interested in reviewing the draft, which will take into account the latest technological developments, including the provisions of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), to which Israel is a signatory. It would send an important signal for Israel to become a charter member of the WCT and WPPT, as it would demonstrate that Israel is prepared to establish and uphold an adequate legal framework for the protection of copyright in the digital environment. Israel should certainly take the opportunity in the current round of drafting to address the deficiencies noted above, but in addition, to address new technologies, specifically providing adequate protection to copyright owners for technological protection measures they use to aid in the exercise of their rights.

Unauthorized Retransmissions By Cable Operators

For a number of years, Israeli cable operators have been retransmitting U.S., European and Russian content without the authorization of right holders. As a consequence, the motion picture industry and concerned right holders have filed a legal action under the auspices of the international producers' collection society, AGICOA, against cable operators for royalties that should have been paid to the right holders. Israeli cable operators continue to insist that they can steal these signals without payment. IIPA believes that the law grants an exclusive retransmission right. In addition, the Israeli Government has reportedly considered draft amendments to the Telecommunications Law (although the latest we have heard from the Ministry of Justice is that they have rejected this draft) that would authorize cable operators to retransmit un-encrypted satellite services (of original programming) by means of a compulsory license mechanism. If this draft were to make it forward to the Knesset, that body should reject this totally unacceptable compulsory license as completely out of line with international practice. Copyright owners of content over hertzian and satellite signal programming should retain the ability to license programming as market forces dictate and not be subject to government-imposed compulsory licenses.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

KUWAIT

EXECUTIVE SUMMARY¹

IIPA recommends that Kuwait be elevated to the Priority Watch List, due to worsening piracy (pirate CDs and videos with new movies not released in Kuwait, sale of “smart cards” that allow unauthorized viewing of satellite channels, etc.) and the failure to implement and enforce the 1999 copyright law to provide a deterrent to such piracy. While IIPA recognizes the Kuwaiti government’s passage of a new copyright law in late 1999, along with commencement of enforcement actions in early 2000 (including those against pirate resellers and unauthorized end-users of business software as well as several video duplication plants) as positive steps, unfortunately, promised amendments needed to bring the law into compliance with TRIPS, along with sustained raiding needed to provide a deterrent to further infringement, have not been forthcoming. The failure of Kuwaiti authorities to enforce the law to date leaves Kuwait as one of the worst pirate countries in the Gulf region. The seriousness of the piracy situation in Kuwait is summed up by two recurring anecdotes: one, pirate street vendors continue to set up stalls right in front of legitimate video retail outlets; and two, street vendors sell their illegal pirated cassettes right in front of police cars without fear of any sanction.

The Kuwaiti Copyright Law was passed into law by the National Assembly on December 14, 1999 and went into effect on February 9, 2000. The law provides the basis for enforcement against rampant piracy in Kuwait, but remains TRIPS-incompatible in certain respects, and must be fixed or Kuwait will remain in violation of its international obligations. The Kuwaiti Ministry of Information carried out its first raids against video duplication and software piracy in January and February 2000, and there was some additional raiding against software piracy in 2000. Nonetheless, concerted and sustained raiding must continue against piracy of all copyrighted goods; without such an approach, Kuwait will undoubtedly remain largely a pirate market with unacceptably high piracy rates. Publicized raids, followed by fines and punishments meted out on infringers, would go a long way to reducing the piracy levels. Industry estimates that trade losses to the U.S. copyright-based industries due to copyright piracy rose to \$23.2 million in 2000.

¹ For more details on Kuwait’s Special 301 history, see IIPA’s “History” Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	8.0	85%	8.0	85%	7.5	85%	7.0	70%	7.0	70%	7.0	70%
Sound Recordings / Musical Compositions ²	3.0	50%	1.0	45%	3.0	50%	3.0	50%	2.5	46%	NA	NA
Business Software Applications ³	9.7	79%	10.5	81%	5.3	88%	5.9	88%	10.1	90%	6.7	91%
Entertainment Software ⁴	NA	NA	3.1	82%	3.7	85%	3.5	85%	3.5	85%	3.5	85%
Books	2.5	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS	23.2		25.1 ⁵		22.0		21.9		25.6		19.7	

COPYRIGHT PIRACY IN KUWAIT

Kuwait Remains a Pirate Market, Despite Some Enforcement in Early 2000

The passage of the new Copyright Law in December 1999 and raids by the Ministry of Information in January and February 2000 provided hope that sustained enforcement was beginning in Kuwait, after years of unfettered piracy. Unfortunately, the raiding largely stopped (except for some raiding against business software piracy), and the law has not been properly implemented. Hence, Kuwait remains a pirate market, replete with:

- pirate video cassettes being sold openly in the streets for 1 KD with complete impunity and often in front of retail outlets and next to police cars.
- pirate release of VCDs of movies showing theatrically (called "pre-release" as these movies are not yet authorized for video release) and audio CDs still being offered to Kuwaiti wholesalers at low prices from sources in China or Southeast Asia, flooding Kuwaiti markets;
- parallel imports of large quantities of U.S. motion pictures in digital formats such as VCD, LaserDisc and DVD, many coming from Asia;

² The loss figures reported for music and sound recordings are U.S. only. The percentage figures represent the overall piracy level for music and sound recordings (including Arabic, Indian and international repertoire). The piracy level for international repertoire was 70% in 1999, up from 65% in 1999 (while Indian repertoire piracy is over 90%).

³ BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss figure of \$9.4 million was also reported as preliminary, while no level figure was reported at that time. These numbers were finalized in mid-2000, and are reflected above.

⁴ IDSA estimates for 2000 are preliminary.

⁵ In IIPA's 2000 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Kuwait were over \$24.0 million. Because of the adjustment to reflect BSA's final 1999 loss statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Kuwait in 1999 are raised to \$25.1 million.

- hardware to play Zone 1 DVDs (not authorized for sale in Kuwait) that has become readily available;
- book piracy in Kuwait dominated by unauthorized copies originally intended for the Indian market, and some pirate photocopying in universities, mainly if books do not arrive on time;
- pirate videocassette operations well known to us and the Kuwaiti authorities, that duplicate, distribute and supply pirate and “pre-release” videos;
- pirate retail shops selling under the counter or on demand from stocks sold door to door:
 - all types of unauthorized compilation CD-ROMs, including copies of top-end engineering programs, video games, and routine business software applications available openly on the streets;
 - an *a la carte* menu of free preloaded software suiting the customer's preferences, with purchase of a new computer;
 - pirate videos (including in the Farwamia and Fahaheel districts in Kuwait City), selling movies for 1KD (US\$3.50) per cassette (and advertising with pirate movie posters for movies not even released in Kuwait or on videocassette);
 - pirate sound recordings of international repertoire (95% on audiocassette, reproduced locally), including pirate CDs (being offered to Kuwaiti wholesalers for as little as US\$1.20) from CD-Rs locally replicated or imported, mainly from Pakistan (which has recently replaced Asia a principal source for pirated CDs)..
- business software end-user piracy (local sources indicate that both government and the vast majority of leading businesses, for example, the largest banks, trading houses and service sector companies, are highly pirate and uninterested in licenses) and hard-disk loading piracy, making legitimate market size only a fraction of that of neighboring markets of a similar size (e.g., UAE); ⁶
- piracy of entertainment software (including videogame console CDs, cartridges, personal computer CDs and multimedia products);

It should be noted that none of these forms of piracy is unique to Kuwait; indeed, other countries in the Gulf have all suffered from similar phenomena at one point or another. Those countries, unlike Kuwait, have for the most part, recognized the importance of strong copyright protection and made the decision to enforce copyright in the market. Kuwaiti authorities, if they have the will to do so, can easily commence a sustained enforcement campaign, running and publicizing raids, seizing production equipment and pirated copies that are ruining Kuwait's market, and fining and (where warranted) imprisoning known commercial pirates. Such a sustained enforcement campaign is virtually guaranteed to lower piracy levels in Kuwait, improve market conditions for legitimate copyright industries (which in turn look to contribute to the Kuwaiti economy by providing tax revenues and other benefits), and address the main concerns in this report. The legitimate copyright companies, furthermore, will cooperate with censorship authorities and adhere to standards set in Kuwait, in direct contrast to unregulated piracy operators who encourage the illegal distribution of uncensored product. IIPA

⁶ Kuwait has an estimated installed base of more than 162,000 personal computers. A paltry 2,000 legal operating systems were sold with the 35,000 computers were sold in Kuwait between September 1999 and September 2000.

encourages and urges the Kuwaiti government to take the steps Kuwait's neighbors have already taken or are in the process of taking.

Rampant Smart Card Piracy Decimates the Legitimate Market for Audiovisual Works in Kuwait

In addition to the more traditional forms of piracy noted above, Kuwait's market suffers from a pervasive and highly damaging form of piracy: wide scale smart card and CAM ("Conditional Access Module") piracy in which end-users buying the smart cards may watch popular satellite channels without a legal subscription. Pirates in Kuwait openly sell illegally hacked smart cards and CAMs in the satellite stores at severely discounted prices, giving illegal access to premium channels for as little as 10 KD (around \$33). These pirates engage in sophisticated hacking techniques, using computers, smart mice, specialized computer programs, and select websites, in order to upload onto smart cards the circumvention keys necessary to provide illegal access to premium channels. The entire process takes as little as four minutes and customers literally line up in queues to receive the illegal subscription. The pirates also openly sell hacked CAMs which allow consumers to view all of the premium movie channels without paying a subscription price. Revenues for the satellite broadcast platforms have fallen drastically (over 30%), resulting in losses of millions of dollars. Again, as with the other more traditional forms of piracy noted above, the problem of smart card piracy can be sent underground if the Kuwaiti government decides it has the will to attack this brand of piracy. Although the Kuwait government has taken some limited actions against the satellite pirates, there has yet to be one satellite pirate charged with violating the copyright law. In the interim, illegally coded smart cards and CAMs are sold openly and with impunity.

COMMENCEMENT OF COPYRIGHT ENFORCEMENT IN KUWAIT

Raiding Not Sustained, Infringers Let Off Without Fines or Other Penalties

The year 2000 began promisingly enough, with raiding activity from the Ministry of Information aimed at pirate software resellers, a couple of companies loaded with pirate software, one pirate end user (unauthorized user of software in a business) at the end of the year, pirate video duplication plants, and several shops engaged in smart card piracy. The raids netted some seizures of pirates copies of videocassettes (over 200,000) and software (worth U.S.\$2.9 million), along with videocassette recorders (110) and several computers involved in the piracy. In the case of the software reseller raids, no one was fined and no store was shut down, and in the case of the companies raided, once the pirated software was removed from the computers seized, those computers were returned to the pirates. In the case of the video duplication plant raids, there has yet to be a single pirate charged with violation of the copyright law. None of the seizures have resulted in pirates being criminally charged and subsequently applied with deterrent penalties.

Unfortunately, these raids represent the total Kuwaiti enforcement activity in the year 2000, notwithstanding the fact that industry representatives have continuously provided Kuwaiti authorities with numerous detailed leads about piratical activities (whether video duplication or end-user piracy of software in businesses). In addition, despite numerous attempts to get the Kuwaitis to fine or otherwise impose penalties on the pirate sites raided, the Kuwaiti government has demonstrated time and again its unwillingness to take follow-up action against the targets of the initial raiding. Indeed, industry representatives have been told by the Ministry of Information that the it considers its work done once raids are completed. At the same time,

certain eager investigators in the Ministry of Information have indicated their willingness to conduct more raids and have asked for additional training to answer their technical questions about Internet sites and how smart card piracy of satellite signals works.

Overall, the paltry level of raiding and the Kuwaiti government's attitude toward enforcement cannot adequately address the problem of rampant piracy in Kuwait. Even the raids run by the Ministry of Information required colossal efforts on the parts of industry representatives, and Ministry of Information officials refused to mete out deterrent fines against blatant pirates. In some cases, the ministry even returned seized equipment to the pirates. These inadequate efforts on the part of the Kuwaiti government over the past year have resulted in piracy levels shooting back to the high levels that existed before the passage of the copyright law.

Establishment of Inter-Ministerial Task Force on Enforcement a Positive Development

One positive development in 1999-2000 was the establishment of an inter ministerial task force to tack the piracy problem in Kuwait. The task force is made up of the Ministry of Information (Ghanas Al Adwani), the Ministry of the Interior (the police) (Lieutenant Colonel Mahmoud Al Tabakh), the Ministry of Commerce (Abdullah Al Kalaf), the Public Prosecutors' Office (Usama Al Babteen), and Customs (Mohamed Al Sulaiti). While IIPA sees the establishment of this task force as a positive development with the potential to bring about coordinated enforcement efforts necessary to deter piracy, it appears that to date the group has not effectively revved up enforcement activities, and may in fact be hindering enforcement in Kuwait.

One problem caused by the group is the apparent bureaucratizing of enforcement in Kuwait. For example, Director Ghanas recently informed industry that the Ministry of Information may no longer raid street vendor pirates, but may only check videocassettes seized by the police to verify that they are pirated. Instead, industry representatives have been told that actual raiding comes under the responsibility of the Ministry of Interior (the police) under Lieutenant Colonel Mahmoud Al Tabakh. Once a raid has been conducted, the public prosecutor apparently cannot move forward without a report from the Ministry of Information, and as the Ministry has been extremely slow in producing these reports, most cases are stalled indefinitely. IIPA urges the task force to work together to assist industry in effectively enforcing copyright in Kuwait, rather than using the force to erect roadblocks that would further hinder enforcement efforts. The task force's efforts should aim at streamlining, not hindering, the processes of raiding, seizing pirated product along with materials and implements used in the infringement, evidence-gathering for prosecutors, and actual prosecutions of those caught in the act of commercial piracy.

Some of the key elements agreed to by the task force upon its formation in late-1999 (and progress made to date on these initiatives) include:

- technical training for MOI, police and customs on effective copyright enforcement, namely, how to run investigations and raids and how to identify pirate product (a training seminar for the Ministry of Information, the Ministry of the Interior (Police) and the Public Prosecutors' Office was held on February 12, 2001, and one was held for Customs on February 13); over 70 officials have been trained on the means of effectively enforcing copyright;

- a training for judges and lawyers on the importance of copyright protection and deterrent penalties (this training has not to our knowledge yet been arranged);
- active government press statements warning pirates of its intent to enforce the copyright laws, highlighting the consequences to be faced for continuing to violate the copyright law (including a TV ad campaign) (the Ministry of Information released an ad in the papers at its own expense on August 2, 2000, warning against illegal copying of copyrighted works, but has not allowed industry to re-release the ad, even at industry's expense);
- the initiation of at least three key and comprehensive raids against major pirates, including retail outlets and supporting duplication sites (as noted above, several enforcement actions were commenced in 2000, but there has been no follow-up);
- systematic inspections of all shops that sell copyright materials, including video and audio shops, computer shops and game retailers, booksellers, and organizations that may engage in the unauthorized use of copyrighted materials (including business software); these inspections should be carried out at least once every six months or earlier in specific cases if necessary, at any time, day or night, to introduce the element of surprise in conducting such unannounced inspections;
- publication of the raid results, including who was raided, what was seized, and the possible penalties to be levied, including in the Kuwait-based and international media;
- imposition of deterrent fines and penalties, including imprisonment and heavy fines, in accordance with Section 42 of Kuwait's copyright law.

Procedural and Market Access Barriers Remain

There remain some procedural barriers and market access restrictions that have made operating in Kuwait burdensome. For example:

- Before the passage of the copyright law, the motion picture industry has over the years resorted to antipiracy protection from the Ministry of Information's censorship department by asking that it verify copyright authorization before giving censorship approval for a title. Unfortunately, the censorship fee of KD20 (U.S.\$65) per title is a heavy burden that distributors face in trying to market and protect their products. The censorship fee should be sharply reduced and limited to new titles only.
- The motion picture industry's television divisions have been pressured by the Undersecretary of the Ministry of Information in Kuwait to cease direct sales to Kuwait TV, and instead to hire Kuwaiti agents as middlemen. This attempt to control the sales practices of the motion picture industry in Kuwait constitutes an unreasonable restraint on the ability of the motion industry to enter into voluntary contractual or business agreements.
- An unfair import duty has been imposed on business software; these import duties should be done away with immediately.

COPYRIGHT LAW AND RELATED ISSUES

Kuwait Failed to Introduce Promised Amendments to Fix TRIPS Violations in Copyright Law

While IIPA commends the Kuwaiti government, including the Amir himself and the National Assembly, for taking the badly needed step of passing the Kuwaiti Law on Intellectual Property Rights (1999) ("Copyright Law") in December 1999 (effective February 9, 2000), IIPA remains concerned that the Kuwaiti government has failed to introduce promised amendments in the 2000 Assembly sessions to fix TRIPS deficiencies and other ambiguities, including those noted below. Without amendments, Kuwait's law will remain in violation of TRIPS. In particular, IIPA notes the following non-exhaustive list of deficiencies or ambiguities in need of explicit clarification or amendment by the Kuwaiti government (note: IIPA does not address in this non-exhaustive list "in-practice" enforcement deficiencies, as those are addressed, albeit non-exhaustively, in the previous sections of this report):

Substantive Deficiencies

- **Innovativeness Requirement for Works?** Article 1 of the Copyright Law provides protection to authors of "innovative" works; such an "innovativeness" requirement is inconsistent with TRIPS Article 9.1. It is our understanding that the word used in Article 1 of the Kuwaiti Copyright Law means something akin to "innovative" or "new." Berne Convention Article 2 does not limit the works to be protected to those that are "innovative" or "new," and, for example, provides that the expression "literary and artistic works" include "every production in the literary, scientific and artistic domain. . . ." The term "innovative" in the Copyright Law should simply be replaced by the word "original."
- **Exclusive Rights Limited to Financial Exploitation?** Under the Copyright Law, the right holder is given the exclusive right "to exploit his writing financially," in express violation of TRIPS Article 9.1, which requires that the exclusive rights be granted to an author regardless of whether the exploitation is financial in nature or not. The Berne Convention, as incorporated by reference into TRIPS, does not limit the exercise of exclusive rights to exploitations carried out for financial gain. By adding the word "financially" to Article 4 of the Copyright Law, Kuwait appears to limit the ability of an author to authorize or prohibit the unauthorized use of works when there is no financial gain, in violation of the TRIPS Agreement. The word "financially" should be deleted from Article 4.
- **Unclear Retroactive Protection.** Article 44 of the Copyright Law makes the law applicable to works (for which there is point of attachment under Article 43) that "exist on the date on which [the Copyright Law] shall enter into force," making it unclear whether the law provides full retroactive protection for works (including sound recordings), performances and broadcasts, consistent with TRIPS Article 9.1 (incorporating Berne Convention Article 18 into it) and 14.6. Kuwait must clarify that works (including sound recordings), performances and broadcasts are protected retroactively with their full TRIPS-compatible terms of protection (TRIPS articles 9.1 and 14.6).
- **Protection for Sound Recordings.** IIPA understands that protection for sound recordings has been effectuated by protecting "audio-visual broadcasting works" in Article 2(6) of the Copyright Law (also translated as "work[s] prepared for radio . . ." in the Kuwaiti

National Assembly's "Explanatory Memorandum to the Draft Law on Intellectual Property Rights") as the functional equivalent of what is understood in the TRIPS Agreement as a sound recording or phonogram. Protection of sound recordings/phonograms (which are not specifically mentioned by those names in your law) as audiovisual broadcasting "works" or as radio "works" under the Berne Convention means that Kuwait would comply with its TRIPS Article 14 obligations. IIPA seeks confirmation that the foregoing is a correct interpretation of the Copyright Law of Kuwait.

- **Unclear Panoply of Exclusive Rights for Sound Recordings.** IIPA seeks confirmation that Article 25 of the Copyright Law was not meant to apply to sound recordings/phonograms. Article 25 provides that the producer of a "work prepared for the radio . . . shall be considered as a publisher and shall be entitled to all the publisher rights," which, unless "publisher rights" refers to all the exploitation rights of Article 4 of the Kuwaiti Copyright Law, including those specifically enumerated in Article 5, would be inconsistent with TRIPS Articles 14.2 and 14.4, which requires member countries to provide producers of phonograms with at least the rights to authorize or prohibit "the direct or indirect reproduction of their phonograms" and "the commercial rental to the public of originals or copies of their [phonograms]."
- **Unclear Panoply of Exclusive Rights for Producers of Audiovisual Works.** The panoply of exclusive rights for producers of audiovisual works in Article 25 of the Copyright Law is unclear. The Article provides that the producer "shall be considered as a publisher and shall be entitled to all the publisher rights," and also that

[t]he producer shall act -- during the agreed term of exploitation -- on behalf of the authors of the work and their respective successors. He shall negotiate -- on their behalf -- the agreements on presenting and exploiting the work, without prejudice to the rights of the literal and musical works authors, unless if it shall be otherwise agreed upon in writing.

Kuwait should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing. Vesting all economic rights in an audiovisual in the producer significantly enhances the ability to commercialize works in all release windows and improves the economic viability of an industry, which benefits all groups that contribute to the success of an audiovisual work.

- **Unclear National Treatment for WTO-Member Works and Sound Recordings.** Kuwait must confirm that Article 43 of the Copyright Law binds Kuwait to protect works (including sound recordings) of "international conventions implemented in the State of Kuwait," including works of WTO member states, and that such protection is provided as required under the TRIPS Agreement, namely, in line with the principle of national treatment. IIPA understands, but seeks confirmation, that by the first clause of Article 43, which states, "[w]ithout prejudice to the provisions of the international conventions implemented in the State of Kuwait," Kuwait considers the TRIPS Agreement to be self-executing in Kuwait. The explanatory memorandum contains a statement with regard to Article 43 which does not appear in the law proper, namely, "[t]he writings of foreign authors, nationals of countries which deal similarly with the writings of Kuwaiti authors" shall be protected under the law. This appears to propose a reciprocity provision, which would place Kuwait in violation of its obligation under the WTO to protect works and sound recordings under the principle of national treatment. The fifth excerpt regarding Article 43 in the explanatory memorandum is irrelevant to the question of how WTO member works are to

be treated in Kuwait, but might be relevant to how Kuwait protects works of non-WTO, non-WIPO members. To ensure that the law is not ambiguous on this point, references to this fifth clause of Article 43 in the explanatory memorandum should be deleted.

- **Failure to Provide Express Point of Attachment for Performers/Broadcasters, Etc.** Article 43 of the Kuwaiti Copyright Law fails explicitly to provide point of attachment for: 1) Kuwaiti or WTO members' performers or broadcasters; 2) foreign unpublished works (performances or broadcasts); and 3) works of WTO members who are not members of WIPO. While, as noted above, IIPA seeks confirmation that Kuwait considers the TRIPS Agreement as self-executing, which would mean Kuwait does protect WTO member performers and broadcasters, it would be highly preferable to expressly provide such point of attachment in the law, to avoid possible confusion among jurists. If TRIPS is not self-executing in Kuwait, then Kuwait is in violation of its TRIPS obligations, specifically, Articles 9.1, 14.1, 14.3, and 14.5-14.6.
- **Inadequate Term of Protection for Computer Programs.** The Kuwaiti Copyright Law fails to provide computer programs with at least a TRIPS-compatible term of protection. By doing so, the law also fails to comply with TRIPS Article 10.1, which provides that computer programs must be protected "as literary works" as that term is understood in the Berne Convention (1971). Article 7(1) of the Berne Convention, incorporated by reference into TRIPS through Article 9.1, deals with "Term of Protection," and subsection (1) of that Article, subtitled "Generally" (and understood to apply to "literary" works), requires protection for the "life of the author" plus fifty years after his death. Article 17(2)(3) of the Kuwaiti Copyright Law is incompatible with TRIPS in this regard.
- **Inadequate Term of Protection for Compilations of Data.** Article 17(2)(3) of the Kuwaiti Copyright Law provides for a term of protection of "fifty years as from the end of the calendar year during which the work was published" for "database works," making the provision incompatible with TRIPS Article 9.1, which requires that the term of protection for works for which there is an author be at least "the life of the author and fifty years after his death" and TRIPS Article 10.2, which provides that "[c]ompilations of data or other material . . . which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such."
- **Berne-Incompatible Compulsory License.** Article 14 of the copyright law amounts to an unacceptable compulsory license in violation of the Berne Appendix (and TRIPS Article 9.1).
- **Moral Rights Provision Overly Broad, Possibly Impinging on Exclusive Adaptation Right.** The moral rights provisions exceed what is provided for in Article 6*bis* of the Berne Convention, and arguably nullify the exclusive right of adaptation, which would be a violation of TRIPS Article 9.1.
- **Overly Broad Exceptions.** Several exceptions, including a "personal use" exception, arguably violate TRIPS Article 13, by failing to meet the well-established "tripartite" test of the Berne Convention. At least, Kuwait must reexamine this exception to ensure that the exception is limited to a single analog copy, and would not permit the use of digital copies in a way that would conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holder.
- **Lack of Express Rental Right for Sound Recordings and Computer Programs.** There is no express rental right for sound recordings and computer programs; IIPA seeks clarification

from the Kuwaiti Government that Article 4, clause 2, does in fact include a TRIPS-compatible rental right.

Enforcement Deficiencies (On Their Face)

- **Lack of Express Provision for *Ex Parte* Civil Searches.** The Kuwaiti Copyright Law does not expressly provide for civil *ex parte* search orders. TRIPS Article 50 requires that Kuwaiti judicial authorities have the authority “to adopt provisional measure *inaudita altera partes*” (outside the hearing of the defendant).
- **Insufficient Remedy As to “Materials and Implements,” in Violation of TRIPS Articles 61.** Article 42 of the Kuwaiti Copyright Law authorizes the Court “to confiscate all tools used for the illegal publication—if they are suitable exclusively for such publication . . . ,” making it incompatible with TRIPS Article 61, requiring criminal remedies to include “the seizure, forfeiture and destruction of . . . any materials and implements the predominant use of which has been in the commission of the offence.”
- **Inadequate Criminal Remedies.** The criminal provisions in the Kuwaiti Copyright Law providing for a maximum fine of 500 Kuwaiti Dinars (approximately U.S.\$1,600) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half]” for recidivists”), may be incompatible with TRIPS Article 61, which requires remedies “sufficient to provide a deterrent,” unless such maximums are regularly meted out.
- **Need to Penalize End-User Pirates.** In October 2000, the Ministry of Information, in association with the District Attorney’s office, conducted a criminal search of an end user; the company was unable to produce licenses for the software used. The evidence gathered was used to file a criminal complaint; unfortunately, the case is still pending because the Ministry of Information has not delivered the necessary report to the office of the Public Prosecutor. IIPA looks forward to the speedy resolution of this case, and to the imposition for the first time of criminal penalties on an end user, which would demonstrate, in practice, that Kuwait criminalizes the intentional unauthorized use or copying of computer programs in a business setting, as required by TRIPS.
- **Non-Transparent Border Measures.** The Kuwaiti Copyright Law does not explicitly provide, for example, that competent authorities, administrative or judicial, are given the authority to order the “suspension by the customs authorities of the release into free circulation” of infringing goods, a TRIPS requirement. Kuwait must confirm that its laws (either the Copyright Law or separate laws) are compatible with TRIPS Articles 51-59 regarding special requirements related to border measures.

The Kuwaiti government reportedly plans to submit amendments to address not only TRIPS issues but other operational issues they have encountered that might require a legislative fix. Such a package was reportedly to be submitted to the Cabinet at the end of 2000, but IIPA has received no further word on the filing of amendments. It is hoped that the list of specific issues provided above will spark the amendment process, and that the Kuwaiti government will take seriously its immediate international obligations by fixing the law in line with the comments provided herein.

WIPO Treaties

In addition to addressing the deficiencies laid out above, Kuwait should take the opportunity presented by amendments to implement the WIPO “Internet” treaties, the WIPO

Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). As Kuwait, like the rest of the GCC countries, looks to the future post-oil economy, its new crop of leaders must surely recognize that the development of Kuwait's information economy will be key to its sustained economic development, and implementation of the treaties is essential to the establishment of the proper legal framework for a sound digital economy. The WIPO treaties require effective legal remedies against the circumvention of technical measures used by content owners to protect their property from theft and mutilation. This legal framework that permits content owners to provide for the security of their property online is essential for successful electronic commerce.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

LEBANON

EXECUTIVE SUMMARY¹

IIPA recommends that Lebanon be elevated to the Priority Watch List.

There has been precious little enforcement against copyright piracy in Lebanon, despite the passage of the new copyright law in 1999. Indications of the Lebanese government's lack of commitment to protect copyright include the fact that no effective measures have been taken to eliminate egregious illegal software usage in government offices, as well as in large companies or banks in Lebanon. Cable piracy still runs rampant, with unauthorized broadcasts of first-run movies showing up on "community cable" TV stations throughout the country, although recent self-help actions taken by copyright owners may begin to send the signal to pirates that they cannot continue engaging in cable piracy without fear of action on the part of copyright owners. IIPA has information about one CD plant operating in Lebanon unregulated. Without proper controls, this plant could transform Lebanon from a country with a small domestic piracy problem into an 'export pirate' country. Already, compilation CD-ROMs (with thousands of dollars' worth of software) sell on the streets of Lebanon for U.S.\$10. Meanwhile, book piracy in Lebanon, which took root during the years of civil unrest, is a net-export business. Total losses to the U.S. copyright-based industries in Lebanon were more than U.S.\$15.0 million in 2000.

Piracy generally does not receive any attention from the Lebanese government, particularly the Ministry of Economy, which appears to turn a blind eye to piracy. The courts remain largely backlogged and inefficient, posing major impediments to effective enforcement of copyright across the board. Some ancillary agencies appear to have made some progress in intercepting imports of pirate videos at the borders, and the police conducted the first searches against pirate resellers and end-users of business software. IIPA hopes that the changes in government in November 2000, including the new Prime Minister's promise to increase enforcement, will usher in a new era of cooperation and enforcement sufficient to improve the situation.

Lebanon passed a new copyright law in March 1999 (effective June 14, 1999), but the law has never been properly implemented. In addition, two last-minute amendments added exceptions authorizing 1) educational institutions to make "copies" of a computer program they have acquired an original copy of, and 2) students to make one copy of a computer program for their own use. These provisions take Lebanon outside the realm of well-established international principles of copyright protection, and must be deleted before Lebanon will have any hope of benefiting from the global trading system. November 1999 implementing regulations that attempt to limit the exceptions also violate the major copyright treaties, and will not work.

¹For more details on Lebanon's Special 301 history, see IIPA's "History" Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	8.0	60%	8.0	60%	8.0	80%	8.0	80%	19.0	99%	43.7	100%
Sound Recordings / Musical Compositions ²	2.0	45%	2.0	45%	2.0	40%	1.0	40%	1.0	30%	NA	NA
Business Software Applications ³	1.5	87%	1.6	88%	0.9	93%	1.4	79%	1.4	76%	0.9	79%
Entertainment Software ⁴	1.5	96%	0.5	70%	0.6	70%	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.5	NA	2.5	NA	2.0	NA	2.0	NA	1.5	NA
TOTALS	15.0		14.6⁵		14.0		12.4		23.4		46.1	

COPYRIGHT PIRACY IN LEBANON

Cable Piracy Continues to Threaten Legitimate Market for Copyright Owners

There are an estimated 1,300 cable operators serving over 50% of the Lebanese population. These operators retransmit domestic and foreign terrestrial and satellite programming without authorization to their subscribers (estimated to number about 460,000) for an average monthly fee of U.S.\$10.00. Occasionally, these systems also use videocassettes to broadcast directly to their subscribers, including the broadcasting of recent blockbuster titles. Each cable operator retransmits an average of 40 to 50 different television channels. Included among those channels is a minimum of four movie channels that broadcast motion pictures 24 hours a day. Films are frequently retransmitted by these pirate cable operators prior to their legitimate broadcast by television stations in Lebanon.

Cable piracy in Lebanon seriously damages the legitimate theatrical, television and video markets in Lebanon. In addition, in 2000, ticket sales in the theatrical market went down by approximately 50% compared to 1999 (which indicates additional damage inflicted by cable piracy). Local broadcast television stations have started canceling long-standing licenses with copyright owners because they cannot compete with the pirates. The legitimate video market has

² Loss figures represent U.S. losses only. Piracy levels represent the total level (including Indian, Arabic and international). The piracy level for international repertoire in 2000 was higher, at 68% (an increase over the 60% piracy level for international repertoire for 1999).

³ BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss figure of \$1.4 million was also reported as preliminary, while the piracy level was unavailable at that time. These numbers were finalized in mid-2000, and are reflected above.

⁴ IDSA estimates for 2000 are preliminary.

⁵ In IIPA's 2000 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Lebanon were \$14.4 million. Because of the adjustment to reflect BSA's final 1999 statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Lebanon in 1998 are raised to \$14.6 million.

been almost entirely decimated by the various forms of piracy in Lebanon. Earlier in 2000, a survey on the economic impact of cable piracy estimated that the Lebanese government is losing about U.S.\$38 million a year due to cable piracy.⁶

Retail Piracy in Lebanon: A Pirate Haven

Piracy runs rampant in Lebanon, and Lebanese authorities, while fully acknowledging the dominance of piracy in the retail markets, do nothing about it. A sampling of the market reveals that:

- Pirate versions of virtually any business software, entertainment software, sound recording, or published interactive software (i.e., encyclopedias on CD-ROM) can readily be purchased for U.S.\$7 or less.
- Lebanon is a “pirate haven” for video games, with no enforcement in sight. Console-based videogames are 99% pirate, while personal computer videogames are 98% pirate in Lebanon (roughly 70% of each of which are imported, mainly from Asia, while 30% are domestically produced). Silver counterfeit CDs complete with packaging and manuals are available on the streets of Lebanon. These come in compilation-CD format and single discs.
- Piracy levels for business applications remain the highest in the Middle East. End-user piracy of business applications is pervasive in the largest banks, trading companies and virtually all government ministries.
- As noted above, the legitimate video market is almost completely defunct. Pre-theatrical and pre-video release piracy sourced from off-screen copies and parallel imported laser discs is widespread. Copies of new U.S. cinema releases are on the market within days of their U.S. theatrical release. The home video market is estimated to be 80% pirate.
- The parallel importation of laser discs and Zone 1 DVDs (Zone 1 refers to DVDs programmed for distribution and playback in North America only) is a growing problem.
- Music cassette piracy harms the industry, with Syria supplying many of the pirate cassettes.
- Book piracy took root during the 1980s, and remains a serious problem, although the legitimate university community has recently made some efforts to have students use only legitimate textbooks. Nonetheless, pirate photocopying and pirate publications are still the norm on college campuses. Pirate scientific, technical and medical and other English-language materials continue to flow out of Lebanon into Jordan, Saudi Arabia and the United Arab Emirates, among other countries.

Optical Media Piracy Arrives in Lebanon

In addition to retail optical media piracy, IIPA has learned of one CD plant operating in Beirut, Lebanon unregulated. Without proper controls, this plant could transform Lebanon from a

⁶ Levels of broadcast television piracy have fallen, however, reflecting the ongoing regulation of the broadcast market. Implementation of the Broadcast Law and regulation of the market have removed most of the pirate stations from the air.

country with a small domestic piracy problem to an 'export pirate' country. Given that local demand for CDs is very small (for example, it is 500,000 for sound recordings), IIPA is concerned by the existence of this known plant, that reportedly has one line in operation and does not use Source Identification (SID) code. IIPA urges the Lebanese government immediately to implement effective measures against CD and CD-ROM piracy. In particular, the Lebanese government should introduce effective optical media plant control measures, including the ability to track the movement of optical media production equipment, as well as the raw materials (including optical grade polycarbonate), and also including the compulsory use of Source Identification (SID) codes, in order successfully to halt the production of pirate CDs and CD-ROMs. In addition, Lebanese authorities should contact unregulated plants to ensure that they are engaged in the production of authorized product. If necessary, authorities must seize infringing copies and machinery, and must impose criminal penalties to deter the organized manufacturing and distribution of pirate product.

COPYRIGHT ENFORCEMENT IN LEBANON

Self-Help Measures Taken Against Cable Pirates Begin to Bear Fruit

Largely through self-help measures on the part of the motion picture industry, some cable pirates are coming to recognize that they may not continue retransmitting domestic and foreign terrestrial and satellite programming without authorization to their subscribers. As the result of the commencement of some civil actions and several private criminal complaints being lodged with the Public Prosecutor (in 1999), then raids largely run (and funded) by the industry in December 2000, several cable pirates were caught in the act of illegal retransmissions, and eventually have agreed in writing not to retransmit copyright owners' broadcasts. While the outcomes of these cases is somewhat promising, the fact remains that the Lebanese government has played almost no role in seeing that these cases were taken and that the cable pirates were brought to justice. No cable pirate has ever been fined or sentenced to a day in jail for these commercial piratical activities. It is the Lebanese government's responsibility to tackle the problem of 1,300 cable pirates, and the industry, while willing to do whatever is necessary to support the enforcement activities of the government, cannot go it alone.

Censorship Police Begin to Intercept Pirate Videos at the Border

In a positive development in Lebanon in 2000, while video piracy levels remain unacceptably high, some legal product is now available in the market, partially as a result of the cooperation and action of the Censorship Police. Several actions taken by the Censorship Police have resulted in unauthorized videocassettes destined for import into Lebanon being seized at or near the border. In addition, the police are working diligently to seize pirate cassettes from video shops. While much more needs to be done, this avenue of enforcement (unlike the traditional avenues for copyright infringement, or, for example, the Ministry of Economy, which is responsible for fighting piracy in Lebanon) is proving worthwhile to the motion picture industry. IIPA calls upon other ministries within the Lebanese government to follow the lead example set by the Censorship Police and get to work in fighting rampant piracy in Lebanon.

Few Other Enforcement Actions Against Piracy

Other than the actions outlined above, precious little has been done by the Lebanese

government to go after piracy, even when the pirates are well known and the law is completely clear as to their activities' illegality. For example, to date, only one enforcement action against software piracy has been brought by the Lebanese government. In January 2000, the Central Detectives Division conducted a raid against a reseller in Beirut and seized a small number of pirate products. At the same time, no action has been taken against five companies using illegal software, for which the business software industry filed petitions with the Ministry of Economy in December 1999, despite extensive follow-up. Industry has provided Minister of Economy Nasser Saidi with an appropriate "target list" for his investigators (in the IPPA) but, while he has indicated in several seminars that he supports strong intellectual property protection, apparently he is not willing to put his money where his mouth is.

The business software industry launched an awareness campaign in the Lebanese media in 1998, months before passage of the new Copyright Law, and this awareness exercise has continued to this day. Some companies, including Microsoft, opened offices in Beirut because of Lebanon's passage of copyright law and in the anticipation that enforcement would follow. Educational discounts for students and educational institutions were offered, including the possibility of the establishment of training centers and the establishment of programs to wire schools and governmental offices to the Internet. The industry is deeply disappointed by the lack of enforcement actions by the Lebanese government, and would gladly offer increased training if the government demonstrated more of a willingness to enforce the copyright law. The Ministry of Economy in particular has emerged as a force against legitimate right holders, criticizing industry for asking to institute actions against blatant pirates, and supporting the suspects during raids carried out. In addition, the police raids that have been conducted generally only occur only in response to a great deal of effort and pressure from industry representatives.

The copyright industries have also spent enormous amounts of time and capital on enforcement trainings and seminars, and on seminars devoted to Lebanon's new copyright law. Extensive copyright-related seminars have been run, but to no avail; indeed, it is clear that distributors and users of illegal software have decided they are safe in ignoring the promises of senior government officials to support the copyright law. Due to the complete lack of will to enforce the law, the vast majority of companies feel free to totally disregard legal warning letters alleging software piracy.

Defunct Judicial System

The most significant impediment to enforcement in Lebanon is a severely backlogged and inefficient court system. Postponements, even of urgent matters, are the norm, and criminal cases can take years to reach judgment. Although the police carried out the first criminal raids against pirate resellers and one end user of software, no court actions (and therefore no decisions) have resulted. The motion picture industry has now brought private criminal complaints to the Public Prosecutor to obtain the initiation of criminal actions against pirate cable operators. IIPA will be monitoring these and other cases very closely to assess whether Lebanon is fulfilling its promise to implement and enforce the copyright law.

There are no courts specializing in IP matters, and Lebanese judges often mistake copyright law for patent or trademark. *Ex officio* public criminal actions against copyright infringers have never been taken in Lebanon, meaning that private criminal complaints must be filed even to seek to obtain copyright enforcement. In order to facilitate enforcement, piracy should be made an ex

officio crime, prosecutable by public authorities. The Lebanese government should encourage judicial authorities to promptly adjudicate all intellectual property cases and to impose the maximum criminal penalties allowed under Lebanese law. Special prosecutors and judges should also be designated for intellectual property cases.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Law of Lebanon (which entered into force on June 14, 1999) provides, on its face, a firm basis for copyright protection for U.S. works and sound recordings, including protection of life plus 70 years (70 years of publication in the case of cinematographic works and works authored by legal entities), stiff penalties for copyright infringement, confiscation of illegal products and equipment, the closure of outlets and businesses engaged in pirate activities, and a Berne-compatible evidentiary presumption of copyright ownership. The law also grants right holders the ability to authorize or prohibit the communication of their works to the public (Article 15), and prohibits the installation and use of descrambling devices (Articles 87 and 88). Unfortunately, the law remains deficient with respect to international standards in various respects.

Article 25 Violates Berne (and TRIPS)

The software exception created by Article 25 of the new Copyright Law of Lebanon violates Article 9(2) of the Berne Convention (Paris [1971] text). It is not limited to “certain special cases,” but appears to allow unauthorized copying for any purpose; it “conflicts with a normal exploitation of the work,” especially with regard to software aimed at the educational market; and it “unreasonably prejudices the legitimate interests of right holders,” by threatening to eliminate completely a market that many copyright owners already serve on extremely generous terms. While many modern copyright laws include specific exceptions for the copying of computer programs under narrowly defined circumstances, and/or exceptions allowing the copying of certain kinds of works (but almost never computer programs, except for “back-up” purposes) for “personal use,” Article 25 sweeps far more broadly than comparable provisions of either kind, to the detriment of copyright owners.

Specifically, Article 25(1) authorizes “not-for-profit” educational institutions and public libraries to make copies of original computer programs they have acquired and to lend such copies to students for free. Such copies are made without the copyright owner’s authorization and without compensation. The last sentence of Article 25(1) provides, “ [t]he student shall have the right to make one copy for his personal use. ” This clause does not state whether the student must first have a license to use the software before being allowed to make a copy. It is not clear if this provision is intended to allow a student to make a copy of any computer program regardless of whether he is entitled to use of such program, and regardless of whether the program in question is itself original or is already a copy. Such a provision could be interpreted to allow the making of limitless copies from a single piece of original software.

Implementing regulations for Article 25 were issued on November 25, 1999. The regulations set numerous conditions for educational institutions and public libraries to copy original software. While IIPA has not fully analyzed these regulations, it is clear that they do not cure the provision’s inconsistency with well established international legal standards. For example, condition 8 requires educational institutions and public libraries to “program” the copy made so that it does not function if it is copied. Such “programming” could be interpreted to be an unauthorized alteration

of the work, an infringement of copyright or moral rights. Moreover, we are not aware of any readily available process to limit copying in this manner, thus making the requirement unworkable as a practical matter.

Ultimately, Lebanon must delete Article 25 to comply with international treaty obligations (Berne, Paris [1971] text, TRIPS, WIPO Copyright Treaty).

Other Deficiencies

- There is no express distribution or rental right for sound recordings (which would violate TRIPS Article 14).
- There is no direct point of attachment for U.S. sound recordings (Article 36) (although point of attachment for U.S. sound recordings can be achieved by simultaneous publication in the U.S. and any Rome Convention Member).
- There are overly broad exceptions to protection (Articles 23, 25-30, 32-34).
- It is unclear in the law whether works and sound recordings are protected with full retroactive protection in line with international treaties (Berne and TRIPS).
- There is a mandatory deposit requirement, including onerous costs and documentary burdens; implementing regulations should clarify that this deposit requirement does not apply to foreign works or sound recordings.

Lebanon is a member of both the Berne Convention for the Protection of Literary and Artistic Works (Rome [1928] Act), as well as the International (Rome) Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961). Lebanon should be urged to accede to the Paris Act of 1971 of the Berne Convention as well as the Geneva Convention, in order to provide clearer protection to international sound recordings.

WIPO Treaties

Several of Lebanon's lawmakers have already signaled a desire to join the necessary treaties in order to participate in and fully enjoy the emerging global information society. Economy Minister Saidi has indicated a strong desire to pass a slate of e-commerce-related legislation. An important component of such participation would be ratification and implementation of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which bring copyright protection into the digital age. Specifically, the WIPO treaties require effective legal remedies against the circumvention of technical measures used by content owners to protect their property from theft and mutilation. This legal framework that permits content owners to provide for the security of their property online is essential for successful electronic commerce. Lebanon has resolved at several international copyright seminars to consider swift accession and implementation of these treaties. The WIPO national seminars in Beirut in September 1999 and the regional seminar on the treaties in November have provided Lebanon with technical know-how on the treaties. Lebanon should be urged to join the treaties as the legal framework for Lebanon's growing information society.

Generalized System of Preferences

Lebanon currently participates in the U.S. GSP Program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Lebanon meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." At the same time that Lebanon caused losses to the U.S. due to piracy, Lebanon imported (during the first eleven months of 2000) \$26.9 million of products into the United States without duty (60.3% of its total imports into the U.S.). Lebanon should not continue to expect such favorable treatment at this level if it fails to meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

LITHUANIA

EXECUTIVE SUMMARY¹

The biggest problem confronting the copyright industries in Lithuania is the absence of any on-the-ground enforcement by police or prosecutors, and especially by customs officials at the Lithuanian border. Lithuania took a proper first step to fix its laws in 1999, and it has joined the appropriate treaties over the past several years. But the failure to engage in effective domestic criminal enforcement is destroying the possibility of establishing a legitimate Lithuanian market for music, films, or computer programs including business and entertainment software.

Even more serious is the poor border enforcement situation. Due to the geographic location of Lithuania near Eastern and Central European countries that are major producers of illegal material including optical media products, and those with established markets for these products in Central and Western Europe, Lithuania is a major transshipment point for this material. Lithuania must address these problems by implementing better customs procedures and by using the new criminal law to punish organized pirate operations.

In fact, to have an enforcement regime compatible with the World Trade Organization TRIPS Agreement, Lithuania needs to implement its criminal, civil, administrative, and border provisions and get these measures into actual effective operation. In 1999, Lithuania took a major step forward to improve its legal regime with the adoption of a comprehensive Copyright Act to replace what was essentially the revised Soviet Civil Code. A second major positive step was adherence to the Geneva Phonograms Convention, effective January 27, 2000. This fixed the long-standing legal deficiency of the absence of a point of attachment for foreign sound recordings.

Two other important legal reforms were made in the last year. In January 2001, the Customs Code was revised and reportedly includes the all-important *ex officio* authority to allow customs authorities to properly seize material at the border. In May 2000 Lithuania adopted improvements to its Criminal Code. These provisions must now be put to use by judges and prosecutors to stop the organized criminal piracy activities within Lithuania. Also, the Customs Code revisions reportedly granting *ex officio* authority are important to be able to take effective enforcement actions against commercial piracy operations at the border. In short, all of these new provisions must now be properly implemented and put into action.

On the ground enforcement has been almost non-existent, and weaknesses in the legal and enforcement regime to date have been exploited by the pirates. Lithuania is a major exporter of pirated copyrighted materials to Eastern, Central and Western Europe, and this has seriously harmed other markets, in Latvia, Estonia, and Poland, for example, as well as in some Western markets. It is estimated that the scope of this problem amounts to several million CDs

¹ For more details on Lithuania's Special 301 history, see IIPA's "History" Appendix to filing.

per year. The domestic Lithuanian market is flooded with pirated cassettes, videos, game cartridges, and optical media product, almost all of which are produced elsewhere. A starting point for Lithuanian enforcement, in addition to implementing the changes to the criminal code, would be for police to commence raids and seizures, as well as to implement administrative actions, for example, taking licenses away from infringing kiosks. Lithuania also needs to commence effective enforcement activity at the borders against infringing product. Last, the 1999 Copyright Law provisions (Article 69) must be properly implemented by courts to grant *ex parte* search orders against end-user pirates, especially important for the software industry.

As a result of these overall enforcement failures, and the harm caused to many countries in Eastern, Central, and Western Europe as a result, IIPA recommends that Lithuania be placed on the Special 301 Priority Watch List this year.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
AND LEVELS OF PIRACY : 1999 - 2000

INDUSTRY	2000		1999	
	Loss	Level	Loss	Level
Motion Pictures	1.5	80%	NA	100%
Sound Recordings / Musical Compositions	7.0	85%	5.0	85%
Business Software Applications	NA	76%	NA	80%
Entertainment Software ²	3.5	98%	NA	NA
Books	NA	NA	NA	NA
TOTALS	12.0		5.0	

COPYRIGHT PIRACY AND ENFORCEMENT

Lithuania as a Transshipment Point for Pirated Traditional And Optical Media Products

Only in 1999 did Lithuania begin to modernize its copyright legal regime with the adoption of a new copyright law; however, without the Customs Code or Criminal Code amendments (only adopted in 2000 and early 2001) to properly enforce copyright infringement, Lithuania to date has been ripe for piracy operations. Given its geographical location between East and West Europe, and its totally ineffective border enforcement, Lithuania has, over the last several years, become a pivotal regional exporter of pirated material – audio CDs, CD-ROMs containing entertainment and business software, videos and audiocassettes, and videogame cartridges. Most of the material is produced in other countries, especially Russia and Ukraine. It is then shipped through Lithuania to other countries in Eastern, Central, and Western Europe.

² IDSA estimates for 2000 are preliminary.

The Customs officials, until January 2001, did not have the proper (*ex officio*) authority to do their jobs, and still do not have the proper equipment and training to make much of an impact on the large quantities of material produced in the East and shipped to the West. To make matters worse, Customs officials reported to IIPA that there are many shipments of Russian materials that are entering Lithuania, with the Russian distributor claiming the same invalid licenses to distribute there (i.e., "within the territory of the USSR"). Lithuanian officials claim they have no means of verification, and no ability to stop this material.

Similarly, the police and prosecutors are hampered by basic legal deficiencies and evidentiary problems. The legal deficiency, until May 2000, was simple – the Criminal Code did not apply deterrent penalties to copyright violations. The only way to stop organized pirate activities is by the actions of the police and prosecutors imposing criminal fines and jail sentences. The new Criminal Code provides penalties including fines and up to two years imprisonment. These penalties must be applied to organized criminal syndicates working in Lithuania to stop the piracy. Also, in May 2000, the prosecutors were given the authority to commence intellectual property infringement cases on their own volition (that is, without a specified complaint from the copyright or neighboring right holder). This authority must now be utilized by the prosecutors to engage in effective enforcement against IPR crimes.

The evidentiary problem is also easily fixed. As with other countries in the region, the problem is that the police, prosecutors and courts will not apply a presumption of ownership or authorship. The police reported numerous times to IIPA officials that even if they conducted raids, the perpetrators would likely not be prosecuted because the police were required to get an expert opinion (that can include a "recognized" specialist) to determine proof of ownership for each copy seized. Further, expert witnesses are needed for many cases to proceed; the software industry has reported that it has not been confronted with this problem, but other industries have been. Private citizens, even though expert in this area of the law, are often barred; thus, only designated experts in some cases are allowed to serve this function, completely hampering those cases from moving forward.

The Motion Picture Association (MPA) for example, notes that expert reports have to be filed for every videocassette seized. Still, the MPA has brought cases and notes that they have been processed relatively quickly (six months), but cases have been postponed because of technicalities found in the papers submitted. As of October 2000, the MPA reported that their local distributors had filed 120 cases, about half of which included rulings against accused pirates.

The copyright industries report that police and prosecutors are similarly unable to deal effectively with false contracts that are common in this region. Last, in meetings judges have reported to IIPA that there were some difficulties with legal entities commencing copyright suits; however, some industries (software) report that this has not been a problem for them.

There is one known CD manufacturing plant in Lithuania. According to the recording industry, this plant has not implemented the Source Identification Code (SID) program. It has also been reported that there may be at least two additional plants, but their existence has not been confirmed.

Effective Enforcement Efforts to Combat Piracy Are Needed

It has been almost two years since the Copyright Act amendments were adopted. It is time for Lithuanian authorities – the police, prosecutors, courts as well as border authorities -- to take concrete actions to ensure that Lithuanian laws are actually being enforced in practice. While Lithuania has now implemented the legal reforms necessary to provide such enforcement-related measures (with the copyright law, customs code, and criminal code revisions), it has not taken the appropriate steps to deter piracy in Lithuania, either within the domestic market or at its border even under this meager legal regime.

The IIPA and its members have devoted significant time and resources to assist Lithuanian officials with enforcement, as well as to understand the substantive copyright law obligations of a modern and effective legal regime. In 1998 and 1999, a three-part training program was organized and undertaken by the IIPA and its members in the U.S. and in Lithuania (as well as Estonia and Latvia) to train police, customs officials, prosecutors, judges and government officials in the ministries and in the Parliament on copyright enforcement matters. Other programs have also been undertaken by U.S. and European copyright industry officials.

Over the past several years, Lithuanian officials have adopted several plans to improve the domestic interagency infrastructure to support anti-piracy efforts. For example, in 1997, the Ministry of Internal Affairs set up a Special IPR Division for enforcement (including the Taxation Police). Also, copyright cases are heard in the Regional Courts, as opposed to the District Courts, and this has been viewed by the industry as a positive step. In addition, also in 1997, a judicial training center was established with the support of the Ministry of Culture, to help raise the level of judicial expertise on IPR issues.

However, these efforts have so far not resulted in effective enforcement, especially not at the border. The levels of piracy for sound recordings and music was 85% in Lithuania in 2000 (the same as in 1999). Estimated trade losses due to recording and music piracy was \$7 million in 2000, up from \$5 million in 1999. Cassettes and CDs are pirated in almost equal amounts. Apart from the very high levels of domestic piracy, one of the main problems for the recording industry is that Lithuania is the main transit country for pirate CDs from the Ukraine, Russia and Belarus, that are going to Estonia and Latvia, as well as to Poland and other neighboring countries. Before Ukraine took over as the region's number one pirate CD producer, Bulgarian pirate CDs were being shipped through Lithuania. For example, Polish Customs officials have instigated 49 criminal cases with regard to smuggling of pirate CDs through the Polish-Lithuanian border (47 of the cases being against Lithuanian citizens). However, investigating the transshipment of CDs through Lithuania has proven very difficult – shipments in transit cannot be seized by Lithuanian customs.

In general, the recording industry reports that prosecutorial enforcement remains almost non-existent; there has been some, but not enough, cooperation from the enforcement authorities. Successful enforcement actions by the relevant authorities, including the Economic and Tax Police, take place, but not as often as is needed. For example, there have been raids taking place; but, there is no deterrent effect to this activity. In fact, of approximately 51 raids undertaken in 2000 (up from 28 in 1999), most resulted in the seizure of only a few hundred CDs or cassettes.

For the most part, court cases against pirates are brought as administrative proceedings. These proceedings are slow and ineffective; the penalties that do exist are not deterrent. Until

last year, the number one problem was the lack of criminal penalties for copyright piracy; now that such penalties exist, they must be put to use. In fact, the recording industry tried to pursue 9 criminal prosecutions in the past year, but none have resulted in convictions to date. The Lithuanian government and authorities should work with the copyright industries and bring prosecutorial actions against the criminal organizations in Lithuania to deter piracy.

In January 2000, Lithuania finally joined the Geneva Phonograms Convention; this was one of the terms in the (un-ratified) 1994 Bilateral IPR Agreement with the U.S. Because it took so many years to join this treaty and to provide protection for foreign sound recordings, during the 1990s Lithuania became a haven for sound recording piracy. There are many examples of the size of the illegal CD piracy problem in Lithuania and the disruption it is causing in other countries. For example, in July 2000, the Lithuanian police, working with the IFPI, were able to breakup one organized criminal enterprise smuggling Ukrainian CDs into Lithuania. Over 110,000 pirated CDs were seized. The reach of the Lithuanian organized crime activities was indicated in December 2000, when London police arrested three Lithuanians with over 10,000 CDs originating from the illegal plants in Ukraine; the material seized included top best-seller repertoire such as the "Beatles 1" CD. In another case, in February 2000, a Lithuanian woman was arrested by the Polish police for attempting to smuggle 9,000 CDs, hidden in a secret car compartment, into Poland for sale there. In fact, in 2000, the recording industry did report a significant increase in the amount of material seized – over 140,000 CDs and 10,300 cassettes in 2000, compared with 5900 CDs and 2500 cassettes in 1999.

For the motion picture industry the lack of an effective anti-piracy regime in Lithuania is the major impediment to the development of business. Lithuania, though the largest of the three regional countries (Estonia, Latvia and Lithuania), has the least developed legitimate audiovisual market. Still, all of the MPA member companies are releasing legitimate films in local cinemas and on videocassette with subtitles and local publicity materials.

The distribution of pre-theatrical release titles on videocassette is the primary piracy problem now facing the nascent Lithuanian audiovisual market. Organized crime has come to dominate this trade, and titles are most often produced from clandestine camcordings from U.S. or Israeli theatres. These masters are first dubbed and then imported from Russia. Pirate cassettes are duplicated locally using the Russian-language masters. Many amateur Web sites posted by individuals can also be found marketing pirate videocassettes, VCDs and parallel imported DVDs. Cooperation with Internet Service Providers (ISPs) in Lithuania has reportedly been very good in removing such sites.

Relatively high-quality Lithuanian-dubbed pirate videos have also been reported in the past year, with packaging ranging from poor quality to sophisticated color video sleeves.

The legitimate video industry is trying to make inroads into this predominately pirate videocassette market, and local partners of several MPA members work closely with enforcement officials, particularly the Tax Police. These companies conduct extensive media campaigns, highlighting every enforcement action and every legislative initiative undertaken by the authorities.

Television piracy is also reported to occur in Lithuania, with small cable stations showing unlicensed blockbuster movies. There are currently four national television stations, 11 regional stations and 60-70 micro-cable television stations which appear largely unregulated.

The MPA estimates its losses in Lithuania were \$1.5 million in 2000; the video piracy rate is estimated to be 80%, and the broadcast piracy rate is estimated to be 50%.

The Business Software Alliance (BSA) reports that in 2000 there were 80 raids and seizures directed at flea markets, and at other resellers and end-users. Also, there were 49 administrative judgments at a lower court level and 10 at the higher (Appeals Court) level. Currently, there are six civil cases pending, and the BSA is assisting in 6 criminal investigations. There is one criminal case pending in court and 25 pending administrative actions. In addition, 16 cases were closed as a result of settlements reached between the respective parties.

The BSA reports that in Lithuania, the piracy rate was 76% in 2000; in 1999 it was reported at 80%. There are no figures available on trade losses in Lithuania from the business software industry.

Last, in relation to the Lithuanian government's use of software, BSA has for some time been negotiating the terms of a proposed Software Asset Management Agreement with the Lithuanian government. These negotiations remain ongoing.

The entertainment software industry, represented by the Interactive Digital Software Association (IDSA), reports that they have had a few successes with small-scale raids and the use of administrative sanctions in the past few years. However there is little or no police assistance with criminal cases unless they can prove a very high likelihood of success. In one instance in 2000, a computer CD production facility was successfully raided and closed by the police and over 6000 CDs, containing mostly entertainment software, were confiscated. There were no reports on whether anyone was ultimately prosecuted for this illegal activity.

The entertainment software industry reports that most of the illegal material (especially pre-recorded discs) comes from Russia and Belarus, but that there is evidence that material from Southeast Asia is also coming into Lithuania because of the poor border enforcement. The material is then stored in Lithuania for distribution throughout Eastern and Central Europe, as well as for distribution in Lithuania itself.

Additional Protection and Enforcement Obligations

Lithuania currently participates in the U.S. Generalized System of Preferences (GSP) program, which offers duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . .". At the same time that Lithuania caused millions of dollars of losses to the U.S. due to piracy, it exported \$3.3 million worth of products without duty into the U.S. in 1999 (the last full year of available GSP statistics), and over \$2.6 million in the first 10 months of 2000. Lithuania should not continue to expect such favorable treatment at this level if it is not providing adequate and effective protection and enforcement of copyright material.

LEGAL REFORMS – COPYRIGHT LAW, CRIMINAL CODE, CUSTOMS CODE, AND RELATED ISSUES

Lithuania made important revisions to its Copyright Law in 1999, finally replacing the outmoded Soviet Civil Code. Plus, in May 2000 with the Criminal Code revisions and the January 2001 Customs Code reforms, the important copyright enforcement laws have now been updated.

However, even with this impressive list of legal reforms, the Lithuanian IPR legal regime is currently incompatible with the World Trade Organization (WTO) TRIPS Agreement's enforcement obligations found in Articles 41 through 61 because it has taken a long time to get these reforms adopted and copyright and neighboring rights violations are not currently enforced. Since, on December 8, 2000, the WTO's General Council approved the accession of Lithuania to the WTO, it must bring its enforcement regime into compliance quickly. Before acceding to and in order to comply with the WTO TRIPS obligations, Lithuania must put all of its enforcement tools into working order; this includes its Criminal Code, Customs Code, Civil Procedure Code, and any appropriate administrative sanctions. All of these provisions are part of an enforcement arsenal necessary to fight commercial piracy. For example, the Criminal Code must not only contain the appropriate provisions, but must be put into action, so that fines and jail sentences for IPR violations act as deterrent penalties. Businesses and kiosks should lose their licenses under administrative sanctions if they are caught selling infringing materials.

It has taken eight years for Lithuania to transform its Copyright Law and its Criminal Code and Customs Code from the old Soviet-style one to a system that at least in black letter law complies with most of the modern bilateral and multilateral standards. Hopefully, the implementation of these new laws will be acted upon quickly.

The history of Lithuania's legal (and political) reform has of course been compacted into an approximate ten-year span. In July 1992, Lithuania signed a bilateral Trade and Investment Framework Agreement with the U.S. in which it committed to provide intellectual property rights protection. On April 26, 1994, Lithuania and the U.S. entered into a Trade Relations Agreement and a Bilateral Intellectual Property Rights Agreement. The Bilateral IPR obligations, meant to bring the Lithuanian law up to Berne and Geneva Phonograms Convention standards, were supposed to be in place by the end of 1995. Unfortunately, this Bilateral never entered into effect because Lithuania did not ratify it.

Still, Lithuania did join the Berne Convention on December 14, 1994, and after years of delay, it joined the Geneva Phonograms Convention effective January 27, 2000; it also joined the Rome Convention on July 22, 1999. These treaties were obligations of the Bilateral; but other obligations, notably the required enforcement obligations, have not been met. Because Lithuania is not yet a WTO member, joining the Geneva Phonograms Convention was an important milestone to assure protections for U.S. and other foreign sound recordings, by providing a point of attachment. Foremost, Lithuania must make it clear that it does provide protection for pre-existing sound recordings and works consistent with the requirements of the WTO TRIPS Agreement. For example, Lithuania must provide a minimum of 50 years of protection for foreign sound recordings created prior to January 27, 2000.

The history of copyright reform in Lithuania began in 1991. After regaining its independence from the Soviet Union, Lithuania amended its copyright and administrative law,

albeit only slightly, in May 1994. These 1994 amendments updated its old Soviet-style Civil Code with two new chapters that adopted a general framework for a Berne-compatible law, but which fell short of even the minimum standards of substantive protection. Also, these amendments fell far short of meeting TRIPS standards, especially with regard to civil and criminal remedies. In January 1996, a separate Law on Computer Programs and Databases was adopted, in part to provide laws compliant with the European Union directive on software.

Criminal Code Revisions

It took many years for the Lithuanian government to adopt amendments to the Criminal Code and Criminal Procedure Code. Now, these new fines and terms of imprisonment must be put into force. Until May 2000, the only extant criminal provision for IPR crimes was Article 142 from the Soviet Civil Code.

The IIPA has not been able to obtain a copy of the new Criminal Code (and is unaware of the scope of amendments to the Criminal Procedure Code). It is our understanding that the provisions include fines and a two-year term of imprisonment. Also, the revisions include penalties for infringements against the new digital rights, that is, rights management and technological protection measures, punishable by one and two year imprisonment terms, respectively, as well as fines.

IIPA members continue to urge the implementation of criminal penalties that are fully compatible with the provisions in the WTO TRIPS Agreement (Article 61). Criminal penalties should be imposed in such a way so that they vary depending on the nature of the infringing activities and the number of copies imported, reproduced or distributed, and there should be a provision for indexing fines in order to insure that the fines adjust with inflation.

Furthermore, where an infringement of copyright is established to be willful and on a commercial scale, fines and penalties should be significantly higher to deter such infringing activity. The Criminal Code should also explicitly provide that the terms of imprisonment and fines apply to each violation, in order to comply with Article 61 of the TRIPS Agreement. This will provide a real deterrent to infringing conduct. Last, there should be criminal penalties for (1) the unauthorized importation of parallel imports and (2) re-transmitting protected programs without authorization.

Finally, the Lithuanian law must include *ex parte* search orders at least as required by the WTO TRIPS Agreement in Article 50. This type of search order should be available for both criminal and civil cases, allowing a right holder with evidence of piracy to obtain, without advance notice to the alleged infringer, a court order for an inspection of equipment and the premises of the business suspected of piracy. Article 69 of the Copyright Act reportedly provides for such civil procedures.

Customs Issues

In January 2001, the Lithuanian Parliament reportedly adopted new provisions in the Customs Code granting the authority to customs officials to make *ex officio* seizures. Because IIPA does not have a copy of this newly adopted code, we are hopeful that it provides the authority to customs officials to: (1) search, on their own initiative (with or without a judicial

order), all persons, objects and vehicles that enter or leave Lithuania; (2) seize infringing copies of audiovisual works, including parallel imports; and (3) detain all persons in possession of such goods.

In meetings with IIPA and its members, Customs officials have in the past, complained that in addition to the lack of this proper *ex officio* legal authority, they also lack the proper training and resources to effectively conduct border enforcement. This must be corrected if Lithuania is going to deter piracy, since much of the pirated operations are imported from neighboring countries.

Copyright Law of 1999

In 1995, Lithuania began the legislative consideration of an entirely new Copyright Bill that was finally adopted in 1999. IIPA submitted detailed comments to the Parliament on the penultimate draft of the bill in October 1998, at the request of the drafters of the law and the government of Lithuania. Our comments expressed concerns that the Copyright Bill, although a major improvement over the existing Copyright Law of 1994 (Civil Code), still contained serious deficiencies that needed to be addressed if Lithuania was going to adopt a modern copyright law and an effective enforcement regime.

According to the Copyright Law of June 1999, the Ministry of Culture was appointed by the government (effective November 17, 1999) as the agency responsible for the implementation of the copyright law. Also, a special "Copyright Board" was formed effective January 2000 under the Law (Article 63); it includes representatives of the copyright industries to consider enforcement activities.

The Copyright Law (Act No. VIII-1185) was finally enacted on May 18, 1999; the date of entry into force was June 9, 1999. The Act was a major step forward for the legal regime in Lithuania; unfortunately, it still contains significant deficiencies.

Below is a summary of the key deficiencies in the law, in the opinion of the IIPA. Many of these were also included in our October 1998 comments to the Lithuanian Parliament, and were not resolved. With respect to substantive copyright law issues:

- The transitional provisions of the Copyright Law should explicitly provide for protection for preexisting works and sound recordings in Article 71 (i.e., full retroactivity consistent with Article 18 of Berne and Article 14.6 of TRIPS).
- Producers of sound recordings should be vested clearly with exclusive rights in respect of broadcasting and communication to the public. The law should make it clear that the remuneration claim does not substitute for the exclusive right.
- The law should provide for a term of 95 years from first publication in the case of audiovisual works, or where the author is a legal entity.
- Amendments should be made to initially vest all economic rights in an audiovisual work in the producer of the work, subject to agreements to the contrary.
- The definition of an "author" of an audiovisual work is very broad and should be clarified.

- The law should provide for clear presumptions of authorship and ownership that would include not only “natural persons” but also a “legal person” (“legal entity”). This should include, for example, a provision that the producer (including a legal entity) of an audiovisual work or a sound recording is the initial owner of all economic rights. This would avoid the problem of proving ownership for illegal copies of works seized, and would permit one entity (producer) to commence legal actions on behalf of the authors and performers.
- The scope of the Lithuanian Copyright Law should apply to works or phonograms first or simultaneously published in Lithuania; the Act’s language requires clarification.
- The limitations on exclusive rights of copyright owners and producers of sound recordings should be narrowly tailored to fit the scope of the exceptions provided for in TRIPS. This includes: clarifying the TRIPS Article 13 tri-partite test and clarifying the vague scope of the “fair practice” definition; narrowing the “personal use” exception; limiting the blank tape/recording equipment levies to analog (not digital) material; and, preserving a meaningful practice of the copyright owner to add copyright protection technology to copies.
- The provisions with regard to collective management should delete the provisions that over-regulate author and producer contracts, make the collecting society more democratic, and lower the mandated administration fees.

IIPA also continues to press for clarifications to various definitions in the 1999 Act.

One positive legal reform note in 2000 were the steps taken towards accession to the two 1996 WIPO digital treaties. On September 26, 2000, the Parliament approved Lithuania for accession to the WIPO Performances and Phonogram Treaty (WPPT); in December 2000 the Parliament was expected to, but then delayed, approval of the WIPO Copyright Treaty (WCT). In January 2001, Lithuania deposited its instrument ratifying the WPPT. Lithuania should be encouraged to quickly accede to both treaties and then to adopt provisions to implement them fully in order to protect against Internet and other forms of digital piracy.

In fact, in the 1999 amendments, Lithuania adopted some, but not all, of the provisions required by these treaties into its law. In particular, Lithuanian law must: (1) ensure that the right of reproduction covers temporary copies; (2) amend the Act’s right of communication to the public to make clear it applies to all disseminations, not just “transmissions,” and that there is no exhaustion of the distribution right by transmission and (3) allow right holders to fully enforce their rights against the circumvention of technological protection measures. Technological protection measures are the tools that right holders use to manage and control access to and copying of their works in the digital environment.

Although the Lithuanian amendments (Art. 64) cover some of these activities, full implementation would include a prohibition on the manufacture, importation, sale, distribution, or other trafficking not only in devices but also in services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention (and not just the removal of a technological measure). The Lithuanian Copyright Act did add protections for so-called “copyright management information” that is attached to or accompanies a work, performance, or sound recording. However the Act does not provide the full panoply of rights

for the protection against the alteration, removal or falsification of this information but it excludes the reproduction and offering for distribution or dissemination activities.

The Copyright Law was amended to provide for the recovery of profits and statutory damages, in order to be consistent with the WTO TRIPS Agreement. The law sets punitive damages at three or four times actual damages, in the discretion of the court; this is to be determined by multiplying two or three times the retail price for each illegal copy sold. Lithuanian courts need to put these provisions into actual use.

In 2000, for example the BSA reports that there are six pending cases involving the revised damages law. The BSA reports that it was able to benefit from this law with several settlements with illegal end-users; the settlements involved damages agreed to at the statutory level. It is worth noting that the level of damages present in the Lithuanian law has attracted a good deal of adverse press, and has resulted in several parliamentary debates on the subject. There is a perception held by some that the penalties are too harsh, and there have been some unsuccessful attempts to roll back these penalties.

In sum, to fully comply with the WTO TRIPS enforcement obligations, IIPA and its members suggest that Lithuanian government officials must now implement the new laws in accordance with the obligations set out in the provisions in Articles 41 through 61 pertaining to civil, administrative (including customs regulations and authority) and criminal penalties. Last, the Copyright Law should be extended to cover other organizations representing the collective interests of right holders, including anti-piracy organizations besides the one included in the law now.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

MALAYSIA

EXECUTIVE SUMMARY¹

During 2000, Malaysia enacted optical disc legislation and issued implementing regulations to this law, providing an important legislative tool to combat the manufacture of illegal optical discs. Malaysia also made helpful changes to its copyright law, including amendments that reduce the documentary burden of proving copyright subsistence and ownership. In addition, Malaysia conducted many enforcement actions against retail outlets and more recently against optical disc plants. Malaysia has also demonstrated great willingness to act against corporate end user piracy of software. However, despite these positive developments, the absence of a continuous and methodical government effort, including the imposition of deterrent sentences, against entrenched owner-operators of pirate replication facilities meant that there was little impact on the local pirate production/exportation network which has made Malaysia one of the world's leading exporters of pirated IP product. Widespread optical media piracy continues to dominate Malaysia's domestic market for copyrighted materials; to tarnish its international standing, as pirate optical media exports from Malaysia find their way into the global marketplace; and to cloud its hopes to be a leading regional player in the healthy development of electronic commerce.

2001 could be a watershed year in Malaysia's fight against optical media piracy. To achieve success, Malaysia must aggressively enforce the optical disc legislation, on a strict and deliberate timetable, and its vigorous and sustained enforcement efforts must be complemented by expeditious prosecutions, and the consistent imposition of deterrent sentences. Removing judicial bottlenecks and imposing tough sentences are also essential in combating the chronic problem of book piracy, and in attacking end-user business software piracy, where the government's exemplary cooperative efforts with industry are undermined by the shortcomings of its criminal justice system.

Despite the legislative changes Malaysia made in 2000, it remains very clear that the piracy situation in Malaysia will not change until there is sustained and meaningful government enforcement action against a number of local pirate manufacturers and exporters. The U.S. government should continue to maintain Malaysia on the Special 301 Priority Watch List for 2001, but should conduct an out-of-cycle Review in November, by which time IIPA would fully expect Malaysia to have made an all-out and effective effort to close down illegal optical disc manufacturers. If by November Malaysia has pursued enforcement efforts and fulfilled specified benchmarks in the following areas, IIPA would call on the U.S. Government to move Malaysia's Special 301 designation to Watch List:

- Well-publicized enforcement of the optical disc law, including publication of a list of applicants for licenses; expedited review of applications and issuance of licenses

¹ For more details on Malaysia's Special 301 history, see IIPA's "History" Appendix to filing.

only in appropriate cases; enforcement against unregistered plants beginning March 15, and against registered plants with regard to statutory and license terms compliance beginning September 15; seizure of equipment at plants that violate the copyright law, trademark law and/or the Optical Disc Law, and impoundment until all prosecutions are successfully resolved.

- Prompt indictments for violations of the copyright law, trademark law or the Optical Disc Law, and speedy court processing of pending cases, culminating in the imposition of deterrent sentences upon conviction. Judicial proceedings should be closely monitored to ensure that meaningful remedies are made promptly available.
- Immediate and sustained enforcement actions under the copyright law and other applicable laws against pirate manufacturers, exporters, distributors and retailers.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2000

INDUSTRY	2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	41.0	80%	42.0	85%	40.0	80%
Sound Recordings/ Musical Compositions	16.0	60%	5.0	40%	13.0	70%
Business Software Applications ²	96.0	66%	67.8	71%	63.8	73%
Entertainment Software ³	NA	98%	164.0	99%	135.2	99%
Books	8.0	NA	8.0	NA	8.0	NA
TOTALS	161.0		286.8		260.0	

OPTICAL MEDIA PIRACY

Beginning in the late 1990's, authorities in China, Hong Kong, and other jurisdictions started to crack down on the pirate production and export of optical media products – including music and video CDs, and CD-ROMs containing entertainment, educational and business software and literary material. As a result, Malaysia became an increasingly attractive destination for the organized criminal enterprises that are suspected to be running optical media factories and distributing their output worldwide. In 2000, Malaysian authorities took some important steps to combat this plague, including enactment of a new Optical Disc Act and the most extensive series of raids yet mounted against pirate production facilities. But these efforts have not yet effectively addressed the problem.

² BSA loss numbers for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

Malaysian authorities now clearly recognize the scope and seriousness of the optical media piracy problem. They appear to be committed to the fight against it, and in many cases work ably and willingly with affected industries. But not until raiding and legislating are supplemented by thorough investigating, aggressive prosecuting, and deterrent sentencing will Malaysia be able to turn the corner in this struggle, in which the viability of its hopes to play a leading regional role in electronic commerce are clearly at stake.

The Scope of the Problem

The Malaysian market for copyrighted materials of all kinds remains dominated by piracy. The Malaysian authorities candidly admit this, estimating that 71 percent of all computer programs, 80 percent of all audiovisual products, and 60 percent of all musical recordings in the country are pirate.⁴ Other government statistics place the overall piracy rate at a shocking 85 percent.⁵ The market impact of such widespread piracy, unsurprisingly, has been substantial. For instance, within days after new films are first released for theatrical exhibition in the U.S., pirate VCD versions are readily available on the streets of Kuala Lumpur at prices as low as RM6 (US\$1.60). In a market flooded with pirate videos, legitimate exhibitors cannot survive: according to press reports, some 219 Malaysian theater screens went dark in 1998-99.⁶ Piracy is so prevalent that often two or three different pirate VCD versions of a single popular title, marketed by five to seven competing distributors, can be found in the market. The Malaysian market for recorded music has been similarly damaged by piracy, with sales by the local industry dropping a reported 75 percent between 1996 and 2000.⁷ Entertainment software companies find it nearly impossible to compete in a market dominated by piracy.

At the root of this market damage is the enormous excess capacity for the production of optical media formats, most of which is devoted to pirate production. While officially there are 38 optical disc plants in the country, industry estimates there may be as many as 200-300 optical disc production lines, scattered across the country. The total capacity of these facilities far exceeds the legitimate demand for optical media products either for domestic production or for authorized export. Indeed, these Malaysian plants remain a primary source for pirate optical media products that are exported all over the world.

Pirate product of all kinds enters Singapore from Malaysia over the causeway connecting the two countries, and forms the basis of the active pirate market in Singapore. But the impact of Malaysian-based piracy is also felt at much greater distances. Markets all over the world are compromised by the influx of product manufactured by pirates in Malaysia. Pirate music CD's from Malaysia have been seized throughout Asia, Latin America and Europe. The country is a major supplier of pirate video CD's to India, Indonesia, Philippines, Singapore, New Zealand and Australia, and these products have also turned up in South Africa, Canada, and throughout South America and Europe. Malaysia is a leading source of high quality counterfeit business software products which are shipped via Singapore into the United States and other markets. And with regard to entertainment software in CD-ROM format, Malaysia continues as

⁴ "New Ruling for Optical Disc Makers," New Straits Times, July 27, 2000, at 7.

⁵ "Malaysia 4th Biggest User, Producer of Pirated Items," New Straits Times, Sept. 8, 2000.

⁶ Cheung, "Malaysian Pirates Rule Movie Market," Reuters, June 5, 2000.

⁷ Ghani, "Piracy Woes," Malay Mail, Dec. 16, 2000, at 5.

the world's single leading source of pirate product, and the unauthorized output of Malaysian optical media plants has been identified in markets on every inhabited continent.

Pirate optical media exports from Malaysia move fast and far. The James Bond movie "The World is Not Enough" had its theatrical world premiere in Malaysia on November 19, 1999. The next day, pirate VCDs recorded in a Kuala Lumpur cinema were available on the streets of Malaysia. A day later they were in India and Pakistan. Within five days they were in Hong Kong, within a week in Bangkok, within ten days in Manila, and within two weeks in Beijing. The U.S. market is an important part of the picture. Between Fiscal Years 1999 and 2000, seizures by U.S. Customs of counterfeit products from Malaysia increased by nearly 3300%. In the latter year, three-quarters of those seizures of Malaysian imports were for copyrighted materials, amounting to some 38% of the total of all seizures of such products. Pirate export is a high volume business; one manufacturer in Malaysia of pirate optical media product for export reportedly rejects orders that would occupy less than a full shipping container.

Optical Disc Act

On September 15, 2000, Malaysia's long-awaited Optical Disc Act came into effect. The legislation provides a comprehensive framework for the regulation of optical media production facilities in Malaysia. Plants must be licensed, and may be inspected without warning for compliance with license conditions. Violations of these conditions may lead not only to license revocation, but also to seizure and forfeiture of the production equipment and significant fines and jail terms. All plants must employ unique source identification (SID) codes, not only in replication operations but also in the production of masters. Regulations issued to implement the legislation impose record-keeping requirements on the inventory of optical grade polycarbonate (the key raw material for optical disc production), production runs, shipment of finished product, and production orders received, including copyright licenses or other documents relied on for authorization. When the Optical Disc Act is fully implemented, Malaysia will have in place what should prove to be an effective tool in bringing much greater transparency to the operation of optical media production facilities, and in ensuring that excess production capacity is not devoted to piracy.

Unfortunately, none of these benefits have yet been realized, because of the slow implementation schedule contained in Section 57 of the Act. Once the law does become effective, vigorous enforcement is essential. Authorities must move swiftly beginning on March 15, 2001, to shut down any production facility not covered by a pending license application, and to enforce the law with respect to all registered plants beginning September 15. In the meantime, we call on the Malaysian government to continue and intensify its enforcement efforts against pirate optical disc factories under the Copyright Act, as described further below, and any other legal tools available.

The Optical Disc Act is already beginning to have some positive impact. Some syndicates operating pirate production facilities in Malaysia are already reported to be scouting new locations in neighboring countries that are thought to pose less threat of enforcement. But the built-in delay in bringing this legal weapon to bear could have the effect of providing a safe harbor of several months during which pirates can close out their Malaysian operations before moving them abroad. If this commendable legislation is to achieve its full potential in the fight against copyright piracy, it must be vigorously enforced, and violations must trigger deterrent penalties that will put pirates out of business and discourage others from following in their footsteps.

Factory Raids

During the second half of 2000, enforcement officials of Malaysia's Ministry of Domestic Trade and Consumer Affairs (MDTCA) carried out more raids against pirate optical media production facilities than ever before. Without waiting for the Optical Disc Act to take effect, MDTCA has used the Copyright Act as the basis for conducting some nine raids against pirate plants with a total of at least 15 optical disc production lines. The results give some indication of the scope of the pirate production and export problem that Malaysia must grapple with.

For instance, in a series of raids in August against a factory in Selangor and warehouses in Kajang and Puchong, officials seized not only 138,000 pirate CD-ROMs containing videogames, but also 45 "stampers," or master copies, each capable of producing thirty to ninety thousand additional units of pirate product. Another 500 pirate stampers, including those used to produce unauthorized VCD versions of U.S. motion pictures such as "Con Air," "Rome Must Die," and "Home Alone," were seized in a raid in late October in Shah Alam. This raid closed down three pirate production lines, capable of producing 100,000 units of unauthorized product daily, which authorities said had been in operation for a year.⁸ Three more pirate lines were discovered in Batu Caves in Selangor in November, along with pirate CDs, CD-ROMs, and VCDs of U.S. film titles such as "Charlie's Angels," which was slated to have its theatrical debut in Malaysia the next day. Records seized in the raid indicated that the plant had produced five million discs before being shut down.⁹ Other evidence underscored the international nature of the syndicates operating the pirate plants in Malaysia; for instance, the master copies seized in one raid had been made in Macau.

MDTCA should be commended for carrying out these factory raids, and such enforcement efforts should be continued and stepped up, particularly in the coming months before enforcement can begin under the Optical Disc Act. But the ultimate effectiveness of these efforts remains to be seen; surely they have not yet put a dent in the prevalence of pirate product in the Malaysian market nor in the thriving pirate export trade. While some of the production facilities targeted in last year's raids have been effectively sealed, other pirates, such as the distributors raided in August, appear to be back in operation. And government enforcement efforts suffer from a lack of coordination. For instance, after Customs investigators discovered an underground CD production facility in North Malaysia in mid-December, the case was not handed over to MDTCA for two weeks, and by the time an inspection was carried out, two production lines had disappeared, probably to resurface later elsewhere. MDTCA's raiding activities have not been matched by a willingness to conduct follow-up investigations; this reluctance virtually guarantees that if anyone is held responsible for the operations of pirate CD plants, it will be low-level operatives and not the criminal masterminds who finance, direct and control these facilities. Finally, as with nearly all other copyright enforcement efforts in Malaysia, none of these impressive raids has yet resulted in a criminal conviction of those responsible, much less in deterrent sentencing of anyone involved in a pirate syndicate.

⁸ "Syndicate Behind Pirate CDs Crippled," New Straits Times, Nov. 4, 2000, at 6.

⁹ Puvaneswary, "Replicating Machines Worth RM20M Seized at Batu Caves Factory," The Sun (Malaysia), Nov. 23, 2000.

Retail Raids

Two of the largest Malaysian retail markets for pirate product are found on Petaling Street, in Kuala Lumpur, and in the Holiday Plaza shopping center in Johor Baru. In these bazaars, dozens of stalls or shops openly sell pirate VCDs, music CDs (usually unauthorized compilations), videogames and entertainment software. Malaysian authorities devoted considerable resources to enforcement against pirate retailers in these locations last year, with mixed results.

Holiday Plaza, which is only a half-hour's drive from Singapore, is a popular shopping destination for day-trippers from that country, and also a major supply source for pirate vendors in Singapore. MDTCA carried out well-publicized blanket raids in Holiday Plaza early in 2000, reducing the number of outlets for pirate product in this mall from 70 to 6. Repetitive enforcement efforts have prevented piracy from regaining its foothold in Holiday Plaza, a notable achievement, although more dispersed pirate vendors have set up shop in other Johor Baru malls like City Square and Giant. There was less success in Kuala Lumpur, however. "Operation Blockbuster," with the avowed aim of stamping out VCD piracy in the capital, involved a series of raids against retailers and warehouses involving MDTCA, Police, and Customs officials. A nine-day blitz against Petaling Street in April closed the pirate stalls, but most of them re-opened a day later. Other pirate retailers simply switched temporarily from VCDs to pirate videogame or music product until things quieted down. Others fought back: on May 15, during the ninth raid on Petaling Street, a mob attacked the van carrying government and industry investigators, pelting it with bottles and breaking windows. In the end, after seizures of hundreds of thousands of pirate discs, Petaling Street continues to offer tourists and locals a seemingly inexhaustible supply of illegal product. The same is true at scores of other, less celebrated pirate bazaars across the country.

As the Minister of MDTCA himself has acknowledged, "We don't have enough officers to monitor the piracy problem throughout the country.... The problem is even when you raid and confiscate at 5 pm, they will come back at 8 pm."¹⁰ But the problem goes beyond the resources issue. MDTCA enforcement officers have no power of arrest, and only a very limited ability to conduct further investigations in order to move up the distribution chain from retailers to wholesalers, distributors, and manufacturers. Other agencies which could make arrests or carry out investigations usually play only a minor role in enforcement against piracy.

Finally, the impact of Malaysia's commendable retail piracy enforcement efforts are undermined by the lack of prosecutions, and the endemic delays in those cases that are prosecuted. In the overwhelming majority of cases, vendors remain free to ply their trade for many months before being called to court. In the end, any punishment imposed against retail pirates is for labeling violations under the Trade Descriptions Act, which brings only a nominal fine. Under these circumstances, the pirate syndicates in charge of optical media piracy in Malaysia seem fully prepared to treat the loss of inventory in raids, and the occasional administrative fine imposed under price control or labeling laws, as an acceptable cost of doing business.

¹⁰ Kadir, "New Act to Help Combat Piracy," New Straits Times, July 8, 2000, at 8.

Bottlenecks in the Criminal Justice System

Despite all the raids and seizures, none of the enforcement activity carried out over the past year, either at the retail or the factory level, has had much impact on Malaysia's pervasive optical media piracy problem. The main reason for this failure is that raiding has almost never been followed up with active prosecutions, much less with the imposition of deterrent penalties on violators. Indeed, the 10,700 raids carried out between April 1999 and January 2000 led to the opening of only 77 investigations of copyright infringement, and not a single copyright prosecution was initiated as a result of these raids. A similar pattern persisted in 2000. Some 145 raids under the Copyright Act were carried out against music pirates, for example, but only four copyright prosecutions were initiated. The Motion Picture Association of America (MPAA) reports that not a single one of the 235 raids in which it participated over the first eight months of 2000 was followed up with a copyright prosecution.

Unfortunately, even if prosecutions were brought, there is little basis for optimism that the Malaysian court system would process them promptly, or that deterrent penalties would be imposed on convicted pirates at the end of the process. The judicial system has never been able to deliver these results, even before the onslaught of optical media piracy began in Malaysia a few years ago. For example, Malaysian authorities carried out a total of 798 raids against audiovisual piracy in 1998 and seized more than 1.1 million pirate VCDs. Not a single criminal conviction has yet resulted from these raids. The only copyright conviction in 2000 in a music piracy case arose from a raid that took place in 1998; many other music cases arising from raids during 1997 have yet to be resolved. Cases arising from optical media factory raids that took place in 1998 have not yet come to trial. Similarly, some prosecutions arising from raids against book pirates dating back to June 1996 have not yet been resolved, and the Association of American Publishers (AAP) reports that prosecutions have not even been initiated in any of the three raids against book pirates conducted in Gelugor, Penang in 1998.

Bottlenecks plague the entire criminal justice process in Malaysia. After a raid is carried out, MDTCA investigators and police prosecutors must prepare the case before charges can be filed. The vast majority of copyright cases are stalled at this point in the process; they fall to the very bottom of the huge investigative docket assigned to these overburdened officials. Those few cases which do result in criminal prosecution are caught in years-long backlogs at the criminal courts. Prosecutors have the authority to move these cases to a faster track but they do not exercise it. Not surprisingly, prosecutors and judges lack expertise in such cases, since they almost never make it to court. Even more familiar causes of action, such as labeling violations, are backlogged; offenders are free on bail during the months or years it takes to move cases through the system, and free to continue their pirate activities. Often the defendant disappears and the case stays mired in limbo.

Two recent cases appear to have escaped some of these bottlenecks. In a case from Johor Baru involving sale of pirate VCDs over the Internet, the prosecution was concluded within two months after the raid. And authorities moved relatively quickly in charging defendants in one of the optical disc factory raids from 2000; they are now awaiting trial. If these cases are harbingers of greater efficiency and responsiveness in the Malaysian criminal justice system, that will be a welcome and praiseworthy change.

The system has produced some convictions in cases arising from raids conducted in previous years, but never any deterrent penalties. For instance, in the 400 cases arising from raids carried out in the first six months of 1997, not a single defendant was sentenced to any jail term. All other cases resulted in low fines, when the defendant bothered to show up at all. The

pattern persists today. Three cases involving the attempted export of over six hundred pirate VCDs of U.S. films were processed under the copyright law with unusual speed in January 2001. The highest fine imposed amounted to just RM8.36 (US\$2.20) per pirate copy.

Section 41 of the Malaysian Copyright Act authorizes punishments that, if consistently applied, could be sufficient to deter commercial copyright piracy (fines of RM 10,000 [US\$2600] per infringing copy, and/or five years imprisonment, with a doubling for repeat offenders). However, these punishments are never imposed at anything close to a deterrent level.

Legislation enacted in 2000 removed one legal roadblock in the path of effective prosecutions against copyright piracy. Section 42 of the Copyright Act was amended to clarify that affidavits from local agents of the copyright owner are sufficient to establish prima facie the subsistence and ownership of copyright. While this move eases the documentary and testimonial burden of proving an infringement case, it can only apply when a criminal infringement case is actually initiated. So long as actual prosecutions remain rare, the value of the section 42 amendment remains limited. Courts should also permit the introduction of a photo-ready copy of a pirated book, rather than the original book itself, as evidence in infringement cases.

Optical media piracy will continue to flourish in Malaysia, despite the government's vigorous efforts to suppress it, until the crimes committed by the syndicates and their operatives are efficiently, swiftly, consistently, and publicly punished. This means that a significant number of prosecutions of substantial participants in the criminal enterprise -- including replicators, distributors, exporters as well as the largest retailers -- must be commenced promptly after raiding; that the cases must be processed fairly and expeditiously; and that deterrent sentences, including jail terms, must be imposed upon those found guilty. The quantity and quality of prosecutions of optical media pirates, measured by these criteria, should be the predominant factor in Malaysia's ultimate placement in the Special 301 hierarchy.¹¹

Export

One of the most injurious characteristics of Malaysian optical media piracy is that the criminal syndicates operating there are producing primarily, or at least substantially, for export, not just for the domestic Malaysian market. No legal attack on these production facilities will succeed overnight, and consequently Malaysian authorities must act much more aggressively to interdict the exports which are leaving Malaysia in huge volumes, including shipments originating in overnight courier facilities.

Seizure of pirate optical media exports should be a top priority for enforcement officials in Malaysia. If new regulations need to be issued to implement this priority, that should be done as soon as possible. U.S. government training resources should be made available to customs officers; the private sector stands ready to offer training as well. The recent prosecution under the Copyright Act of three defendants attempting to export pirate VCD's from the Kuala Lumpur airport is a hopeful sign, although these cases were relatively small and, as noted above, did not result in anything close to deterrent penalties.

¹¹ The problems of judicial bottlenecks and the absence of deterrent sentencing are not limited to enforcement against optical media piracy. As discussed below, similar problems have undermined enforcement against book pirates and against end-user piracy of business software applications.

Malaysian officials should also respond promptly to investigate seizures of pirate product originating in Malaysia, of which they are notified by customs officials in other countries, including the U.S. For instance, in December 1999 and January 2000, U.S. Customs intercepted seventeen separate shipments of a total of almost 28,000 pirate videogames, being transshipped through Los Angeles bound for Paraguay, originating with a single named exporter in Malaysia.

Conclusion

Optical media piracy remains a plague that closes Malaysia's market to most legitimate trade in copyrighted materials and that blights the country's international reputation. With the coming into force of the new Optical Disc Act, most of the legal tools needed to combat this plague are now in place. It is enforcement -- vigorous and sustained enforcement of copyright, censorship, licensing, revenue and customs laws -- that is now urgently needed. This must be backed up by courts that process cases expeditiously and that demonstrate their willingness to impose deterrent sentences on commercial optical media pirates. Only in this way can Malaysia effectively suppress this organized criminal activity, which tarnishes the country's image of leadership in the development of the global electronic commerce marketplace.

BOOK PIRACY CONTINUES UNABATED

Aside from the widespread piracy of reference material and other literary works in optical media formats, as described above, U.S. book publishers face continued illegal photocopying of college textbooks, computer-related books, and scientific/technical/medical (STM) texts in and around universities in Malaysia. The problem is compounded by the fact that university officials condone the illegal activity. Unauthorized reprinting of books on offset presses is also a problem for publishers.

The same problems that optical media piracy cases encounter in Malaysian courts also face book piracy cases: unwarranted delays and extremely low fines. Although successful book piracy raids against piracy of U.S. books were carried out in 1997, 1998 and 1999, there has been no court action on any of them yet; at least one case arising from a 1996 raid in Kajang is officially still "under investigation" five years later. Convictions have been obtained in five book piracy cases involving U.S. publishers arising from raids in 1996; but the average fine in these cases was RM2740 (US\$720), hardly sufficient to deter a pirate commercial photocopying operation.

CRACKDOWN ON BUSINESS SOFTWARE END-USER PIRACY

As in other markets, the most damaging piracy problem for business software publishers in Malaysia is end-user piracy, in which a business or other institution may legitimately acquire one copy of a computer program, but then makes unauthorized copies of it available for use by its employees throughout the premises or over a network. MDTCA and other Malaysian government agencies have actively cooperated with the Business Software Alliance (BSA) in recent years to inform Malaysian businesses about their responsibility to respect copyright.

In 2000, MDTCA joined together with BSA in a campaign against end-user piracy called "Crackdown 2000." The campaign followed up on an "Awareness Campaign" in 1998, jointly organized by MDTCA and the BSA to educate end users on the need to use legal software.

Crackdown 2000 started in May 2000 with public warnings by MDTCA and BSA of the repercussions of using pirated software. The public was forewarned that aggressive and extensive enforcement actions would be carried out by the relevant enforcement authorities against those who continued to use pirated software in their businesses.

On July 1, 2000 MDTCA initiated a series of enforcement actions against suspected end-users of pirated software. These actions included raids, spot checks and personal educational visits by the enforcement officers of the Enforcement Division on a weekly basis. By November 2000, MDTCA had undertaken over 200 of these enforcement actions. MDTCA is conducting further investigations on end-users who were found to be using pirated software during Crackdown 2000 and MDTCA plans to follow up with prosecution where warranted.

2000 also saw the first arrest of a corporate director for end-user piracy. The case arose from a raid carried out in 1999, as a result of which the company had previously been charged with infringement. The individual prosecution reflects the tough stance adopted by the enforcement authorities against the use of pirated software, especially the Attorney-General's Chambers. The BSA hopes this will set the precedent for more prosecutions against the senior management of businesses found to be using pirated software. The sentences imposed in these and other cases, including any arising from Crackdown 2000, must be carefully monitored to ensure that deterrent penalties are imposed.

When criminal remedies have been pursued in end-user software piracy cases, copyright owners have encountered the same problems of inordinate delay and lack of deterrent sentencing that undermine enforcement against optical media piracy and book piracy. In the 22 cases in which criminal raids against end-user software pirates have been carried out since 1997, two have ended in guilty pleas; none of the other 20 cases has been resolved. In four of the cases from 1997 and 1998, formal charges have not been filed yet. The fines imposed in the two end-user cases have been insufficient: the highest was RM1500 (US\$395) per copy, and in one case, the fine per infringing copy was only about one-twentieth the market value of a legitimate copy.

UNAUTHORIZED PUBLIC PERFORMANCES

Uncensored and unauthorized video titles are not only sold openly in Malaysia, they are also publicly shown in minitheaters in some parts of the country. Although the violations are notorious -- some minitheaters in East Malaysia even advertise the illegal showings of banned films in local newspapers -- the authorities do almost nothing to stop them. The Board of Film Censors lacks resources and motivation, and in any event can levy only a small fine for sale or performance of uncensored material. FINAS, the National Film Development Corporation, which licenses both video outlets and theaters in Malaysia, has only seven employees to cover the entire country. While its inspectors are empowered to suspend or revoke these licenses, they almost never do so, even in the case of establishments that repeatedly violate copyright, and they have no power to impose other penalties. Pending legislation that would increase penalties for censorship violations could help address this problem, but additional enforcement resources and more aggressive use of existing license revocation authority are needed.

COPYRIGHT LAW REFORM

Seeking to expand the retail market for their product, Malaysian pirates have taken to cyberspace. Sites based in Malaysia that offer pirate sound recordings, VCDs, videogames or entertainment software for sale are becoming increasingly common. Spurred by a desire to enhance the attractiveness of its Multimedia Supercorridor to high-tech investments, Malaysia has already taken a number of steps toward updating its copyright laws to meet the challenges of the Internet era. On April 1, 1999, amendments to the Copyright Act adopted two years earlier were brought into force. These amendments implement in Malaysian law some of the standards contained in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), such as recognizing that the copyright owner's exclusive right of communication to the public embraces the right to make works available on demand (as via the Internet). However, other treaties requirements, such as the protection of technologies used by copyright owners to manage and control access to and use of their works, are not adequately addressed in the amendments. As a country seeking to participate actively in the global electronic marketplace that is rapidly becoming a reality, Malaysia should ratify both treaties immediately, and should complete work on statutory amendments to fully implement all aspects of both treaties as soon as possible.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

PHILIPPINES

EXECUTIVE SUMMARY¹

The Philippines is rapidly becoming a central battlefield in the increasingly intense campaign against optical media piracy in Southeast Asia; but the country remains ill-prepared to fight this battle. Pirate production capacity in the Philippines continues to increase, as pirate syndicates flee less hospitable jurisdictions; both imports and exports of unauthorized digital copies move freely across the country's porous borders; and the Philippine domestic market remains heavily infiltrated by pirate product in all segments, from software to audio-visual, music to books. Steps toward the enactment of regulatory controls on the optical media business, and toward an updated legal framework to accommodate ecommerce and to outlaw online piracy, are commendable; but the weak link remains enforcement. The country's investigative, prosecutorial, and judicial systems are underfunded, overwhelmed by a relentless tide of piracy, and seemingly unable to muster the political will needed to remove procedural bottlenecks and reduce endless delays. At the end of the process, deterrent punishment is never forthcoming. Meanwhile, the country lags in meeting its international obligations under TRIPS, especially with regard to enforcement, and it has never successfully dealt with the legacy of the Marcos-era decrees that blighted its legitimate book market. The Philippines should be placed on the Priority Watch List for 2001 to underscore U.S. insistence that these long-standing and serious problems be effectively tackled.

The Philippines currently participates in the U.S. Generalized System of Preferences (GSP) Program, which allows duty-free imports of certain products into the U.S. from developing countries. In the first 11 months of 2000, over \$687 million of imports from the Philippines entered the U.S. duty-free under this program. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection for intellectual property rights." The Philippines' failure to address effectively its copyright piracy problems creates serious questions about whether it meets this criterion for continuing favorable treatment under the GSP program.

¹ For more details on Philippine's Special 301 history, see IIPA "History" appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	70%	18.0	65%	18.0	65%	18.0	65%	22.0	65%	26.0	90%
Sound Recordings / Musical Compositions	1.3	33%	2.0	20%	3.0	20%	4.0	20%	3.0	20%	3.0	22%
Business Software Applications ²	28.2	66%	26.7	70%	25.4	77%	36.0	83%	56.7	92%	33.2	91%
Entertainment Software ³	41.0	98%	23.8	89%	24.7	90%	21.3	88%	26.0	86%	28.0	90%
Books	44.0	NA	44.0	NA	39.0	NA	50.0	NA	70.0	NA	70.0	NA
TOTALS	139.5		114.5		110.1		129.3		177.7		160.2	

OPTICAL MEDIA PIRACY CONTINUES TO FLOURISH

Optical media piracy, which took root in the Philippines in 1999, flourished and grew in 2000. This increasingly serious problem -- the production, distribution and sale of unauthorized music CDs, video CDs, and CD-ROMs containing illegal copies of business software applications and/or entertainment software as well as literary material -- damages the legitimate market for every segment of the copyright industries. It dims the prospects of success for authors, musicians, and other creators, both Filipino and foreign; it distorts the Philippines' domestic market for copyrighted materials, damaging legitimate retailers, exhibitors and other distributors; and it denigrates the country's reputation among its neighbors, as the Philippines increasingly becomes identified as a source of pirate product sold in other Southeast Asian markets.

The presence of pirate VCDs in the Philippines market continues to grow dramatically, and is the principal reason that the Motion Picture Association (MPA) reports an increase in the level of video piracy from 65% to 70% for 2000. Pirate copies of popular titles appear on the market, especially in Metro Manila but increasingly in the provinces as well, prior to the date of legitimate theatrical release, and remain on sale, damaging the prospects both for theatrical exhibition and for legitimate release in home video format. For instance, at notorious pirate stalls in the Greenhills district of San Juan, a Manila suburb, pirate VCD versions of films not yet legitimately released in the Philippines are available for PP100 (US\$2.10). Unlike in some other Southeast Asian countries, the VCD format has not yet supplanted VHS videocassettes; but VCD piracy is extending the life of the pirate market in the older format. Pirate VCD's are increasingly used as digital master copies for the production of unauthorized videocassettes, which are sold through the country's estimated 3100 unregistered and unlicensed video retail outlets.⁴

² BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's level figure of **N/A** was also reported as preliminary. This number was finalized in mid-2000 and is reflected above.

³ IDSA estimates for 2000 are preliminary. Changes from previous estimates reflect, in part, changes in methodology aimed at obtaining more accurate estimates.

⁴ The rise of VCD piracy should not obscure the fact that videocassette piracy remains a severe problem in the Philippines. Large-scale duplication and distribution operations for video piracy are found in major

Optical media piracy is the scourge of other copyright industry sectors in the Philippines as well. For the same PP100, a Greenhills shopper can also buy a pirate music CD or a CD-ROM compilation of business software applications, the latter selling at barely 1% of its legitimate retail price.⁵ Pirate CDs are also available in many large shopping malls, often at prices as low as PP50 (US\$ 1.05). The Muslim barter area in Quiapo, Manila is flooded with pirate music product, and the police, fearing armed conflict, do nothing to stop it. The Recording Industry Association of America (RIAA) estimates that one-third of the recorded music market in the Philippines is pirate, up from an estimated one-fifth in 1999. Estimated piracy losses are down to \$1.3 million, mainly because of the drop in pirate prices brought on by the glut of illegal product. The growth of the pirate market in computer games on CD-ROM for play on PCs has been especially marked, and is reflected in the rising estimated level of piracy for entertainment software (98% in 2000). Retailers are canceling their orders for legitimate copies of games and bowing to consumer demand for the far cheaper pirate copies. The Interactive Digital Software Association (IDSA) estimates losses due to entertainment software piracy at \$41 million for 2000. Print publishers also feel the impact of optical media piracy, as their CD compilations are copied without authorization and sold far below legitimate retail prices.

Until recently, the vast majority of pirate optical media products were smuggled or otherwise imported into the country from abroad. This is no longer the case. There are believed to be at least eighteen active production lines for optical media products in the Philippines, more than twice as many as a year ago, and perhaps many more than that. Additional lines are known to be en route from Hong Kong, Macau and elsewhere. Much of this burgeoning capacity appears to be devoted to pirate production. The reason for this growth is apparent: as neighboring countries such as Malaysia move, however slowly, toward more effective enforcement against pirate optical media production, the Philippines becomes an increasingly attractive destination for international criminal syndicates, seeking a safer haven for their illegal factories.

Indeed, Philippines-based optical media piracy is clearly an international affair. Technicians from Hong Kong, Singapore, Malaysia and China operate the pirate facilities, and foreign financing appears to be in control of the operations, some of which seem to have been relocated from Malaysia, Macau and elsewhere. Besides supplying the Philippines market, the plants produce for export to other destinations around the region. Some are even located in government-sanctioned Special Export Zones, to facilitate the importation of equipment and raw material and the export of finished product. The Philippines also still imports a considerable quantity of pirate optical media product, especially in the southern part of the country, where Muslim extremist groups appear to be involved in the distribution of pirate product imported from nearby Malaysia. The recording industry estimates that at least half of pirate music CDs circulating in the Philippines are locally manufactured; the rest are imported from Malaysia, Taiwan, Indonesia, and Hong Kong.

Enforcement statistics help tell the tale of the continuing growth in pirate optical media production. As late as November 1998, the haul from the largest raid against a VCD replication facility in the Philippines was a mere 450 units. In September 1999, a National Bureau of Investigation (NBI) raid in the Pasig area of Metro Manila netted some 4 million pirate optical

population centers. Pirate videocassette titles include films that were released only days earlier in U.S. theaters and have not yet appeared in theaters in the Philippines.

⁵ See Andrade-Jiminez, "Focus – Computer Software, Video CD Piracy," *Business World* (Philippines), June 22, 2000, at 1.

discs (both music and video), 70 stampers (masters for replication), and two full production lines. A series of coordinated raids run between October 1999 and June 2000 hit three factories and five supporting warehouses in Metro Manila, seizing over 800,000 units of pirate product, mostly audio and video CDs, including recordings by Kenny Rogers, Cristina Aguilera, and Mariah Carey. Finally, a September 2000 raid carried out within the Clarke Special Economic Zone shut down a factory that was in the midst of producing pirate videogames, probably for export. Stampers for making additional unauthorized discs of musical recordings, CD-ROM videogames, and films such as "Mission Impossible 2" and "X-Men" were seized at this facility, which apparently had been in operation for several months, producing primarily for export. During 2000, seizures of pirate videogames in CD-ROM format for use on PlayStation consoles totaled 775,000 units, a 37-fold increase over the 1999 figure.

While such enforcement actions are essential and must be continued, by themselves they cannot be sufficient to make any appreciable impact on the growing optical media piracy problem that plagues the Philippines. Lacking are two key ingredients that are essential in the formula for success in the fight against these well-organized criminal enterprises. First, new legal tools are needed to crack down on pirate optical media production. Second, as discussed in more detail in the following section, both existing laws and the new optical media regulatory regime must be effectively enforced through adequately funded and motivated law enforcement and investigative agencies, efficient and responsive prosecutors, and expeditious court proceedings that culminate in the imposition of deterrent penalties.

The Philippines made notable progress in 2000 toward supplying the first of these two missing ingredients. The country still needs a comprehensive regulatory regime for the optical media business. This regime must cover the importation of equipment and raw materials for the mastering and replication of all optical media products; must provide for the licensing of all production sites, subject to spot inspections of their facilities and records, including production orders; and must require the use of the Secure Identification (SID) code or similar unique markings on all masters and copies of optical media products manufactured in the country. Legislation recently adopted by the Philippine House of Representatives, the Entertainment Media Regulatory and Anti-Piracy Act (EMRP), meets many of these criteria. However, some questions remain about the legislation's impact on audiocassette manufacturing; its retail licensing and reporting requirements; its applicability to pirate production and distribution of business software applications; and whether its enforcement provisions adequately spell out the surprise inspection authority of the proposed enforcement agency, an expanded version of the existing Video Regulatory Board. Recent political turmoil and impending elections in the Philippines dim the prospects for a rapid legislative outcome. However, if the remaining questions are promptly resolved, and if the legislative process on the EMRP can be speedily completed, the Philippines will have put in place a regime that enables the close monitoring of the operations of existing optical media production facilities in the country, and that will discourage the regional criminal syndicates from opening new "underground" plants.

ENFORCEMENT REMAINS THE WEAK LINK

Enforcement against copyright piracy in the Philippines remains a tedious, frustrating and all too often risky business. All enforcement agencies in the country suffer from a chronic lack of resources to carry out enforcement actions, which has limited their effectiveness. The most recent example is the zeroing out of the PP 5 million (US\$105,000) enforcement budget of the Video Regulatory Board. The government must not only resist the temptation to cut back on IPR enforcement on budgetary grounds, but should be encouraged to increase the resources

available to enforcement agencies, both within and outside Metro Manila. Adequate resources are particularly needed at a time when the level of violence accompanying pirate operations remains high. For instance, in response to a raid on vendors of pirate CDs in Greenhills on April 15, 2000, some 200 vendors and their supporters rioted, and in the resulting fracas three anti-piracy investigators were injured and a senior police officer died of a heart attack.⁶

Other problems plague enforcement. Numerous enforcement agencies share responsibilities in fields such as videocassette and cable piracy, and interagency turf battles and a lack of coordination undermine the efforts of many dedicated officers. The Presidential Inter-Agency Committee (IAC-IPR) set up to improve coordination is essentially dormant. The track record of Philippines Customs in particular needs improvement. Large volumes of pirate material continue to flow into the Philippines from abroad. Customs' efforts at interdiction are sporadic, at best, although they did make some seizures at the international airport last year. The failure of the Customs Commissioner to issue regulations on border enforcement is a prominent symptom of the problem.

But the fundamental weaknesses of the Philippine enforcement system extend far beyond lack of resources or shortcomings of coordination. While IIPA has frequently called attention to the judicial bottleneck caused by the Philippines' highly inefficient court system, in fact copyright owners encounter a long series of obstacles that make it nearly impossible to move an enforcement case through the system to achieve an appropriate outcome. This systemic failure to deliver effective enforcement is the best explanation for why piracy is a thriving business throughout the Philippines.

The first problem encountered is at the investigative level, when law enforcement officers seek a search warrant to raid a pirate warehouse, factory or other facility. Delays of up to a week in obtaining issuance of a warrant are not uncommon, and during that time word of the investigation often leaks and the contraband is moved or destroyed. Raids are commonly compromised by leaks even when warrants are expeditiously issued. Criminal enforcement against business software piracy faces an even more formidable hurdle at this point in the process: the requirement that the enforcement officer seeking a search warrant swear to personal knowledge that a crime is being committed. This is almost never the case when a corporation is making numerous unauthorized copies of business software for its internal use; in these cases, the source with first-hand knowledge is a private informant, often a former employee. Most other jurisdictions, by contrast, allow a warrant to be issued based on an affidavit from the informant accompanied by indicia of reliability. Until the Philippines modifies its practice to comply with these international norms, business end-user piracy by companies or other institutions, while profoundly damaging to copyright owners and clearly illegal under Philippines law, will remain virtually immune from criminal enforcement. Only two or three such cases were initiated last year.

Investigative malfeasance provides the next barrier against effective enforcement. In at least one instance, enforcement officials took the seized products and sold them to members of the public. Efficient follow-up investigation after a raid is the exception, not the rule.

The third bottleneck is in the prosecutor's office at the Department of Justice, which is overloaded with cases and saddled with procedural requirements that defendants can exploit to delay the filing of a prosecution. Each formal complaint must be investigated by a

⁶ See Billboard, May 26, 2000, at 62.

prosecutor in an elaborate procedure that can take months to complete, and the decision to go forward with a prosecution is subject to appeal to the office of the Secretary of Justice. The Business Software Alliance (BSA), for example, only last month (January 2001) received a final decision from the Department of Justice refusing to prosecute a retailer who was caught with 2800 units of unlicensed software, in a raid that took place in November 1995 – 62 months earlier. Despite the investigative apparatus currently in place, in fact prosecutors rarely conduct much additional investigation of the offenses which are the subject of the complaint.

Finally, if a piracy case manages to survive the obstacle course of raid, investigation and prosecutorial decisionmaking, it arrives at perhaps the most impenetrable bottleneck of all: the court system. Even when aggressive raiding is undertaken against infringers, the value of enforcement is substantially undermined by the absence of judicial follow-through, manifested in chronic court backlogs, the failure to impose deterrent penalties, and delays of up to six or seven years before final disposition -- if it ever occurs. Not surprisingly, many defendants simply disappear at some point during the long odyssey of their cases.

To deal with this problem, in 1996 the Philippine Supreme Court designated 48 courts nationwide as Special Intellectual Property Rights Courts. The copyright industries welcomed this step, have participated in IPR seminars for the courts' judges and for assigned prosecutors, and have initiated some test cases to evaluate the effectiveness of special guidelines promulgated for these IPR courts to try to obtain expeditious decisions. To date, these attempts at judicial reform have been a failure. In September 2000, the Philippine Supreme Court expanded the designation to include 24 municipal courts, half in Metro Manila. This change has had no discernible positive effect. Coordination between designated judges and the rest of the court system continues to be a problem. For example, search warrant applications in piracy cases are not necessarily heard by a designated IPR judge, even if one is sitting in the geographic jurisdiction in which the warrant is sought; an undesignated judge may be assigned to make this crucial decision instead.

At the end of the long road a piracy case must travel in the Philippines is sentencing. The Intellectual Property Code, which came into force in 1998, authorized greatly increased criminal penalties for piracy, and these were beefed up still further in the ECommerce legislation discussed below. But in practice, deterrent sentencing remains a mirage. For example, BSA reports that there has not been a single criminal conviction for business software piracy in the 38 months since the Code took effect. Similarly, there were no known convictions under the Code in music piracy cases last year.

After five years, the copyright industries are still working and hoping for specialized IPR courts in the Philippines that are adequately funded and staffed, that expeditiously process piracy cases, and that consistently hand down the increased deterrent sentences authorized by Philippine law, but this goal seems no closer to attainment than before. While some of its ASEAN neighbors have made great strides in improving the performance of their courts in piracy cases, the Philippines remains mired in inefficiency and delay. The Philippines must address this problem on an urgent basis if it is ever to make significant progress in its fight against copyright piracy. In particular, any initiatives it takes to tackle the optical media piracy problem will be fatally compromised unless it can improve substantially on the current track record. It remains the case that, to date, all the raids on optical disc factories have not produced a single criminal conviction for copyright piracy.

For the Philippines, improving enforcement at every stage of the process is not simply a worthy goal or a matter of national pride. It is also an international obligation that the country took on when it joined the World Trade Organization, and that came into force in 2000 when it became subject to the TRIPS Agreement. Under Article 41 and 61 of TRIPS, for example, the Philippines is required to impose deterrent sentences on commercial copyright pirates. Its failure to do so must be remedied as soon as possible.

Another enforcement problem that particularly afflicts the business software sector may also be ripe for challenge under TRIPS. As in other countries, much of the business software piracy in the Philippines is committed by end-users, who make multiple unauthorized copies of a single legitimate copy of a business application. This enables the program to be installed on, or made accessible to, computers throughout a business, educational facility, or other institution, without purchasing a license for this arrangement from the copyright owner. Enforcement against institutional end-user piracy is extremely difficult without the power to conduct an unannounced search of an institution's computers for evidence of illegal copies -- evidence that could otherwise be destroyed with the touch of a button. Accordingly, Articles 41 and 50 of TRIPS require WTO member countries to make such search procedures available to copyright owners in civil cases without requiring notice to the target of the investigation.

Philippine law lacks clear, effective procedures for obtaining this essential provisional remedy. A request nearly a year ago from Philippine intellectual property officials to the Chief Justice of its Supreme Court seeking the issuance of court rules governing the availability of the remedy has, to our knowledge, produced no substantive result. Philippine authorities insist that the IP Code authorizes the issuance of provisional relief in civil cases on an *ex parte* basis. But as recently as December 26, 2000, a regional trial court specifically ruled to the contrary in a case brought by BSA. The failure to make civil *ex parte* searches available, combined with the difficulty described above in obtaining criminal search warrants in these cases, is a major roadblock to enforcement against institutional software piracy in the Philippines, a clear violation of the country's TRIPS obligations, and one of the key reasons why the incidence of end-user software piracy remains unacceptably high.

CABLE PIRACY REMAINS OUT OF CONTROL

Cable television piracy remains one of the most serious problems for the U.S. audiovisual industry in the Philippines. Hundreds of cable systems, especially those outside Manila, make unauthorized transmissions of new and recent Hollywood productions their standard fare. Cable piracy hurts all the legitimate markets for these products, including theaters and home video. So does the related problem of theft of home entertainment satellite signals. In the past, interagency squabbling virtually immobilized the enforcement effort against cable piracy. In 1998, the National Bureau of Investigation (NBI) executed a number of search warrants in five raids against provincial pirate cable systems, and used new administrative authority to seize cable head-end equipment used in unauthorized transmissions. However, other equipment not actually in use at the time of the raid was not seized. Furthermore, the expense of transporting and housing NBI investigators to outlying locations sharply limited the number of enforcement actions undertaken. Criminal copyright infringement cases have been filed in various parts of the country as a result of these raids, but none of these cases has yet proceeded to final disposition, and there have been no convictions.

The Philippine government's raids on pirate cable systems are to be commended. So is the more active role of the National Telecommunications Commission (NTC), which has

jurisdiction over broadcast stations. NTC has used this authority in the past to stop unauthorized broadcasts of U.S. motion pictures by stations in the southern part of the country. More recently, NTC has issued show-cause orders against operators suspected to be retransmitting stolen satellite TV signals, with some success. Close monitoring and compliance checks on cable TV systems have also contributed to a slight reduction in the cable piracy rate in the Philippines. However, at 50% that rate remains one of the highest in Asia. Increased enforcement and better interagency coordination are essential if this rate is to be reduced further. The number of raids should be increased, and their results should continue to be well publicized in order to discourage piracy by other cable systems. Deterrent penalties must be imposed by the courts on cable pirates.

The required longer term solution is to bring these provincial cable systems under meaningful regulation, so that systems which transmit copyrighted product without authorization can be heavily fined or shut down. Bills now pending in the House and Senate would accomplish this, as well as other needed reforms, such as substantially increasing penalties and giving legal protection to satellite signals. Enactment of such legislation, including protection for both unencrypted and encrypted signals, is long overdue.

PIRACY IN THE EDUCATIONAL SECTOR

Several forms of widespread copyright piracy are harming the prospects for legitimate U.S. products marketed to educators and students. Unauthorized photocopying of textbooks is widespread, especially in and around universities. Increasingly, pirates make illegal photocopy versions on order, to avoid maintaining or displaying pirate inventory. Some universities have issued memoranda to students prohibiting them from ordering such photocopying, but the problem persists.

Reprint piracy, long the nemesis of legitimate publishers, remains rampant. Although the Philippines is the second largest English-speaking market in Asia, its potential for sale of textbooks and reference books was essentially destroyed by the long-standing compulsory reprint license decrees (notably Presidential Decree 1203), which allowed Philippines publishers to reprint U.S. publications at will, with token compensation payable (although even that was often not paid). Although these decrees were repealed by enactment of the Intellectual Property Code (which went into effect over three years ago), they continue to cast a shadow over the publishing market. Authorizations (some issued after enactment of the new code, but before it came into force) from the Philippine government's Reprint Committee for local publishers to reprint current scientific, technical and medical books, without the permission of the U.S. copyright owner, apparently remain in effect. Although the Reprint Committee has finally been disbanded, this last gasp of the old system is unjustified and a flagrant violation of the Philippines' international obligations. All compulsory reprint license lists should be immediately rescinded, the ongoing validity of any such license formally terminated, and existing stocks of reprinted books should be brought under the control of the legitimate publisher.

The piracy of scientific, technical, and medical (STM) books continues to undermine legitimate sales in the Philippines. Pirate printers now participate in medical conventions, displaying original books but selling unauthorized bound photocopies. A particularly aggressive pirate was arrested twice during the same annual convention of the Philippine College of Physicians for selling her wares. For 2000, estimated losses to U.S. publishers in the Philippines were \$44 million, making the country the second largest book piracy haven in Asia.

Book piracy is not the only problem in the educational sector. Unauthorized copying of business software applications remains all too prevalent at for-profit training institutes in the Philippines.

INTERNET PIRACY AND E-COMMERCE: PROBLEMS AND OPPORTUNITIES

During 2000, worldwide coverage of the infamous “Love Bug” virus focused unwelcome attention on the Philippines. To its credit, the Philippines Congress responded relatively quickly by enacting Republic Act No. 8792, the Electronic Commerce Act, in June 2000. The legislation contains several provisions of importance to the fight against copyright piracy on the Internet.

First, section 33(b) of the Electronic Commerce Act creates a new and broadly worded criminal offense for acts of copyright piracy carried out “through the use of telecommunications networks, such as, but not limited to, the internet.” Importantly, the section establishes a minimum penalty for violations that includes both a mandatory six-month jail term and a minimum fine of PP100,000 (US\$2100). The broad coverage of this provision helps to plug some of the gaps left in the copyright provisions of the Intellectual Property Code enacted in 1997. The new law provides a potent legal tool for use against online piracy. The key, of course, will be whether it is aggressively implemented and whether the courts do, in fact, impose deterrent penalties on violators.

The new law also contains a limitation on the liability of certain telecommunications service providers for, among other things, infringement of the exclusive rights of copyright owners and the neighboring rights of producers of sound recordings that are carried out over their systems. In early versions of the legislation, these provisions were quite problematic. For example, key terms were not adequately defined, and the availability of injunctive relief in all cases was not spelled out. However, some of these deficiencies were addressed before the legislation was adopted. As enacted, section 30 of R.A. 8792 explicitly preserves the power of courts to order service providers to cut off access to infringing sites or to preserve evidence of infringement. Nonetheless, the fundamental concern about this legislation remains: in a legal environment in which the exclusive rights of copyright owners are not clearly spelled out, any legislation immunizing service providers from liability for infringement of those rights is at best premature. For example, the Intellectual Property Code does not clearly recognize the exclusive right of sound recording producers to control the posting of their products online and the making available of recordings on demand. While section 33(b) of R.A. 8792 clearly makes a violation of these rights a criminal offense, the basis for civil liability remains murky.

It remains to be seen whether R.A. 8792 provides the legal framework that preserves incentives for the cooperation between service providers and right holders that is clearly needed in order to detect and deal with piracy in the online environment. One positive indicator in this regard is the signing in November 2000 of a memorandum of understanding between the Business Software Alliance and the Philippine Internet Services Organization, in which the parties agreed to establish a “notice and takedown” program to target Internet sites dealing in software piracy. PISO also agreed to move toward a code of conduct on intellectual property to which its member companies could adhere, and has begun similar discussions with other organizations representing copyright owners.

The Philippine legislature missed the opportunity to incorporate within the e-commerce legislation other provisions that would facilitate electronic commerce in materials protected by copyright and neighboring rights. In particular, key enabling technologies for this commerce -- such as electronic rights management systems, and technologies (like encryption or scrambling) that allow copyright owners to control and manage access to and use of protected materials -- need strong legal protection. The Philippines should be urged to enact provisions on these topics promptly, in order to bring its laws more closely into compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Back in 1997, the Philippines was one of the first countries in the world to amend its law to achieve partial implementation of these critical treaties. In 2001, the Philippines should strive to complete that job and to formally ratify both treaties as well.

OTHER LEGISLATIVE REFORM

The Philippines has other critical unfinished legislative business. Besides the need for comprehensive optical media production regulation, and for a strong law to regulate cable systems and crack down on cable piracy (see discussions above), the Philippines has yet to address the numerous gaps, omissions, and ambiguities that riddle the copyright provisions of the Intellectual Property Code as enacted. Many of these omissions and ambiguities may well have been inadvertent or drafting errors, which properly ought to be corrected in implementing rules and regulations. Unfortunately, both the Bureau of Patents, Trademarks and Technology Transfer (BPTTT), which was charged with preparing the implementing regulations in 1997, and its successor agency, the Intellectual Property Office (IPO) created by the code, have shirked this role. Nearly all the implementing rules and regulations that have been issued apply to purely procedural matters. As a result, none of the highly problematic provisions of the code have benefited from any administrative clarification.

The refusal to address these problems has squandered a valuable opportunity and prevented the Philippines from reaping the full benefit of its long and arduous copyright law reform effort. It has also prevented the Philippines from achieving full compliance with its obligations under the WTO TRIPS Agreement, which became fully applicable to the Philippines on January 1, 2000. The U.S. government should insist that, to the extent possible, the process of issuing implementing rules and regulations should be used to clarify the ambiguities and correct the mistakes that currently block the Philippines from fulfilling its bilateral and multilateral copyright law reform obligations. To the extent that these problems are not amenable to administrative clarification, appropriate amendatory legislation should be quickly enacted.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

RUSSIA

EXECUTIVE SUMMARY

On January 10, 2001, then U.S. Trade Representative Barshefsky announced that the U.S. government had accepted IIPA's petition to examine whether Russia continues to be eligible to receive duty-free trade benefits under the Generalized System of Preferences program. For the first 11 months of 2000, Russia exported goods valued at \$486.3 million to the U.S. which received preferential duty-free treatment under the GSP program, a 26.8% increase over the same period in 1999. At the same time, losses to U.S. industries from copyright piracy in Russia amounted to \$672.4 million, not including losses suffered by the entertainment software industry, which are not yet available.

These massive losses are accompanied by estimated piracy levels in all copyright sectors, except for the recording industry at 70% which exceed 89% of the market, and are as high as 94% in one industry.¹ Since 1999 the powerful and organized criminal syndicates which control much of the pirate market in Russia have continued to increase in strength and wealth.

Russia optical media piracy problem also continues to grow. It has both domestic production (though not yet on the scale of its neighbor Ukraine) and is a major destination and transshipment point for pirate optical media product from Asia and from Ukraine and other markets.

Raiding by the police and the municipal authorities is continuing but without follow-up and while there have been some deterrent sentences, all were voided by the general amnesty in May 2000. Without a major change in the imposition of deterrent penalties, it will be almost impossible for Russia to keep up with the piracy problem.

The major problem in Russia continues to be the lack of deterrence in the system, with low penalties meted out and currently only a small number of jail sentences for piracy, with at least two of those voided by the amnesty. IIPA again outlines its enforcement benchmarks – steps it believes necessary to start piracy levels on a downward trend.

Russia's legal regime is still deficient, despite a good copyright law. Retroactive protection is still not provided for U.S. sound recordings (or for pre-1973 "works"). IIPA notes with optimism, however, that ROSPATENT, the agency put in charge of copyright matters in 2000, has drafted amendments which solve the retroactivity problem and has proposed many new

¹In an article in the IPR strategic Business information Database, dated July 23, 2000, Lieutenant-General Magomed Abdurazakov, deputy chief of the Main Department for Public Order in Russia, is stated to have estimated that in the case of videocassettes, audio products and computer software, the piracy rate is 90%. He called it one of the most profitable criminal businesses in Russia.

changes that seek to implement the new WIPO "Internet" treaties. Unfortunately, these amendments appear embroiled in the usual interministerial controversies that have often defeated reform attempts.

A number of amendments to the criminal, civil and administrative codes are necessary, and apparently pending, to improve enforcement. With one exception, these efforts have apparently languished in the Duma; the government has given them no support. The threat of deleterious amendments to the Civil Code remains, though the IPR provisions have now been broken off into Part IV of the Civil Code, which may improve the opportunity to defeat, or at least significantly improve and shorten, the current deficient and dangerous draft. All in all, Russia's copyright regime remains TRIPS-incompatible both substantively and with respect to enforcement.

Moscow City needs to repeal its stamp tax and Russia as a whole must adopt effective optical media regulations if it wants any chance to control growing pirate productions and imports.

For these reasons, IIPA recommends that the Russian Federation remain on the Priority Watch List and that the U.S. engage, through both the Special 301 and GSP process, much more aggressively to obtain enforcement as well as legislative reforms.²

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Sound Recordings / Musical Compositions	250.0	70%	200.0	70%	170.0	75%	165.0	65%	170.0	70%	180.0	73%
Business Software Applications ³	124.4	89%	134.5	89%	196.1	92%	174.5	89%	298.2	91%	216.9	94%
Entertainment Software ⁴	NA	%	241.1	95%	240.8	97%	225.8	95%	223.0	93%	189.9	91%
Books	48.0	NA	48.0	NA	45.0	NA	45.0	NA	45.0	NA	45.0	NA
TOTALS	672.4		873.6		963.9		922.3		1048.2		943.8	

²For a history of Russia's involvement in the Special 301 process, see Appendix E.

³BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not available. New figures were made available in May 2000. That figure appears above; the total losses for 1999 have been increased accordingly.

⁴ IDSA estimates for 2000 are preliminary.

COPYRIGHT PIRACY IN RUSSIA

Optical Media Production Grows

Since IIPA's 1999 submission, the capacity to produce pirate optical media product (music CDs, videogames, VCDs and, increasingly-DVDs) has grown significantly. It is now estimated that the 13 Russian plants have at least a 150-million-unit capacity. Russia is also one of the largest destination points for pirate optical media product – most smuggled in from neighboring states like Ukraine and from pirate operations throughout Southeast Asia (Malaysia, Thailand, Hong Kong, Macau, etc.).

Large seizures of pirate optical media product continued in 2000. In January 2000, the Ministry of the Interior's Economic Crime Unit raided a plant in Moscow operated by the "Storm" company and seized music CDs and other pirate optical media product and 2 million inlay cards destined for the domestic market and for export. As described below in the enforcement section, it is unlikely that this case will result in a criminal conviction.

In early September 2000, the film industry's anti-piracy organization, RAPO, seized 62,000 CD-ROMS containing titles in MPEG4 format (ripped from DVDs) at various Moscow metro stations. Since then, the program has been seizing between 5,000 and 10,000 such discs per week. The last raid was in December 2000, when RAPO seized 110,000 CD-ROM with MPEG4 titles. RAPO has recently identified two major CD plants suspected of producing these discs, one in Zelenograd near Moscow and the other in the Urals, Siberia. These CD-ROM are also now finding their way to the Baltics. The quality of this product is excellent and the discs sell for between 50 and 75 rubles (\$1.75-\$2.65). The titles have a voice-over in Russian, and appeal to PC users in Moscow, in particular. The investigation of these plants is in process; it is not yet clear that a criminal case will be commenced.

In its 2000 submission IIPA reported that in September 1999 the recording industry, assisted by the Ministry of the Interior and other agencies, seized over 12,000 mostly music CDs on the Belorussian border which were destined for shipment to Poland. This then led to the first-ever raid on a CD plant, Disk Press MSK, located in the Moscow region, that had begun operations in 1998 without the required license. This plant's production capacity was then about 5 million units annually. The investigation had started with a raid on a large distributor, CD Haus, where 5,000 music CDs and 2000 CD-ROMs with pirated software and games were seized. This led to the discovery that the product was manufactured by DPMSK. The search conducted at the plant netted over 100,000 pirate music and other CDs, 9 large containers with polycarbonate and ink and 500 stampers of popular U.S. and other musical artists. Two members of the reported "criminal gang" responsible were arrested. While IIPA reported this development in a positive light last year, the investigation is still continuing after over a year and five months, without the present prospect of an actual prosecution. The DPMSK owners have also been discovered to have connections to distributors of pirate product in both Poland and the Czech Republic.

Piracy of videogames in console and PC optical media formats continues to be rampant and the vigorous enforcement attempts and large seizures noted in IIPA's 2000 submission concerning activities in 1999 diminished due to the dangerous condition brought about by organized criminal elements controlling videogame piracy. However, RASPA, the Russian anti-piracy organization for the entertainment software industry, undertook many raids per month in the Gorbushka, Mitino and other markets as well as throughout Moscow's metro stations. RASPA

succeeded in seizing hundreds of thousands of Sony Playstation® and PC-based pirate games over the course of the year. IIPA has no further information on court actions but some were brought as a result of these raids. Nevertheless, follow-up and court action with deterrent penalties also continues as a core problem, the same as with piracy of other copyrighted products. The piracy rates in the area of videogames remains at an estimated 95%. Russian pirates take advantage of company localization of games into Russian and sell pirate copies throughout Russia. They also export a large quantity of the videogames localized in the Russian language to Israel.

While the majority of pirate optical media product continues to be smuggled, domestic Russian pirate production, which increased by 60 million units between 1999 and 2000, is reaching dangerous proportions. Illegal VCD, DVD and CD-R product is showing up in markets with increasing regularity. The VCDs are of the prerelease variety, which is typical in Asia. More troublesome are the pirate DVDs which have been “ripped” and Russian language tracks inserted and the appearance last year of large quantities of CD-ROM containing U.S. films in MPEG4 format. This process points to sophisticated clandestine mastering facilities operating in, or targeting, the Russian market. While these seizures from major distributors of optical media product and the CD plant are a positive sign, they must be followed by a vigorous campaign accompanied by convictions with deterrent penalties as well as an effective regulatory regime to control further pirate production.

Other Piracy Problems and Piracy Levels

Video piracy around Moscow is down to an estimated 50%. But piracy outside Moscow ranges from 70% to 90%. Organized criminal gangs control the duplication and initial distribution of pirate videos. Distribution occurs through selected wholesalers that operate in large outdoor markets and through private “stores” that act as warehouses to replenish retail stock in a defined territory.

More progress has been made at the Gorbushka market; the piracy rate there is now estimated at 20%. However, both markets continue to remain major sale centers for nonvideo pirate product. Furthermore, as we reported in the 2000 submission, the increased availability of legitimate videos has resulted in demand for higher quality video product and counterfeits of good quality have begun circulation in Moscow. Prices of this product come close to legitimate prices. Continued raiding has moved retail pirate video distribution underground, but both this market and the Mitino market remain centers for distribution to other retailers in Moscow.

In 1999, IIPA reported that MPA’s anti-piracy organization, RAPO, discovered pirate DVDs in the markets, with Mitino market the primary point of distribution. RAPO investigated and initiated a criminal case against the pirate distributors. Several people were arrested in different cities and about 3,500 pirate DVDs of 15 MPA member company titles were confiscated. The results are discussed below under the section on enforcement.

In Briansk, in August 2000, RAPO seized 100 VCRs and 8,000 cassettes in raids on three apartments. In September, 42 VCRs were seized from a flat in Moscow along with 3,400 cassettes from a truck. In Ekaterinburg, 60 VCRs and 12,800 cassettes were seized from a lab, storage premises and two shops. In eight months, this pirate produced over 200,000 cassettes evidenced by documents seized at the premises. He is being prosecuted by the tax and economic crime police but the results are not known. In early November, in Zelenograd, RAPO seized 42 VCRs and over 5,000 pirate cassettes from a pirate known to the program for about three years. The

raid was done with Dept R of the Ministry of the Interior, since the pirate had alleged close connections with the local economic crime police. In December 2000, RAPO found 294 VCRs and 30,000 pirate cassettes at a lab in St. Petersburg. Finally, in February 2001, RAPO and the Moscow Economic Police seized 180 VCRs, and about 7,000 cassettes from a lab and storage facility in the city. From the above, it is clear that raiding activity remains substantial. However, significant piracy rate reductions will only come with criminal prosecutions and deterrent penalties.

Significant progress has been made in controlling broadcast piracy and the Ministry of Press, Television and Mass Media (formerly the Federal Service for Television and Radio [FSTR]) has been receptive to requests for assistance from RAPO. Problems of liaison have been corrected for the most part and RAPO now institutes two to three regulatory actions per month, and has initiated several criminal actions.

Cable piracy has all but disappeared in the Moscow region due to good cooperation between the Moscow TV Commission and RAPO, which is a member.

Although the recording industry conducted around 500 raids against music pirates in 1999 and seized about 1 million CDs and 2 million inlay cards and equipment with a total value of around \$11.3 million, music CD and audiocassette piracy levels hover at around 70%, despite this major raiding activity and the expenditure of major resources by IFPI. As reported also for 1999, Moscow and its region are accountable for over 60% of the nation's pirate market and constitute a key transshipment point. Audiocassettes are still the dominant format, but the CD market is rapidly growing. The prices of pirate audiocassettes are now practically the same as prices for legitimate product. In the market for local music the price of pirate CDs is close to the legitimate price; however, for international repertoire, there is still a price differential between pirate and legitimate product.

As noted above, the piracy level for entertainment software is 94% of the market. We have no information this year regarding software piracy in Russia.

Because of the growing penetration of computers and the Internet in Russia, online piracy of music and sound recording in the MP-3 format is growing, as is online piracy of games. There is also a large number of hacker rings in Russia that have caused problems, particularly for the videogame industry.

Book piracy continues to flourish in the difficult Russian economy. While bestsellers were the target of the pirates in the early 90's, they have now turned to reference works and textbooks, a large market in Russia. U.S. textbooks are the victims of unauthorized translation and reproduction. Targets include books on computer science, medicine and law. As reported by Itar-Tass in September 2000, pirate reference works and textbooks were even being sold around the Moscow Book Fair. It reported that 100,000 pirate copies of one reference book, *Countries of the World*, were sold in Moscow.

Increasingly, the pirate book business is controlled by the Russia Mafia. The "hidden print run" or "overrun" problem, where printers of legitimate editions deliver additional unauthorized copies to Mafia distributors before delivering books to legitimate publishers remains. Pirate books and translations continue to be imported into Russia from Ukraine.

COPYRIGHT ENFORCEMENT

Criminal and Administrative Enforcement

Inadequate criminal enforcement cutting across all copyright industries remains the most glaring deficiency in the Russian copyright system. It is this lack of effective criminal enforcement that has kept piracy levels at unprecedented high levels (see the trade loss and piracy rate chart above). The federal police and the new IP unit plus Unit "R" in the Ministry of the Interior have generally been cooperative in running raids against major pirates. At the retail level, however, it is now clear that antipiracy actions must be conducted by municipal authorities and in these cases pirates are subject to administrative, not criminal, remedies.

To assist in combating piracy, an Alliance for IP Protection was formed in early 2000 with IFPI Moscow, RAPO, BSA and RASPA (representing the videogame industry) joining together. The activities of this organization have been limited to training activities.

Growing out of the 1999 raids that resulted in the seizure of 3500 DVDs of 15 MPA member titles, two of the accused were sentenced, in November 2000, to three years' imprisonment by the Meschansky District Court in Moscow, but were able to avail themselves of the amnesty proclaimed by the state Duma in May of 2000 and were released. It is hoped that these lengthy sentences are indicative of a change in attitude toward piracy by the Russian courts and judges.

The local antipiracy organization for the film industry, RAPO, conducted a total of 1,949 raids in 2000, seizing over 655,000 pirate videocassettes and over 171,000 pirate CD-ROMs containing films in MPEG4 format.

In 2000, RAPO initiated police raids on 98 clandestine video and optical disc duplication labs and distribution centers. These raids resulted in the seizure of hundreds of VCRs and tens of thousands of illegal cassettes, optical discs, sleeves and false holograms. 85% of the titles concerned were MPA titles. In addition, hundreds of VCRs and thousands of pirate cassettes have been seized by the police (mostly outside Moscow) without the direct assistance of RAPO.

In 2000, RAPO has more than doubled the number of decisions obtained in criminal cases to a total of 80. It has organized an average of two to four raids every week and, since the beginning of the 2000, has initiated 197 criminal cases under Article 146 (copyright infringement) and – article 171 (illegal business) of the Criminal Code. To date, there have been approximately 57 decisions resulting primarily in the confiscation of the illegal product and criminal fines. Despite a higher level of raids and criminal actions commenced, however, prosecutors continue to regard copyright offenses as minor crimes. On far too many occasions, they dismiss cases citing a lack of public interest, particularly when RAPO is not directly involved. This is likely to continue until the copyright law can be amended and copyright offenses can be listed as serious crimes.

RAPO has sought to develop closer relationships with police and prosecutors in 2000. This strategy has been successful to date and includes victories in 14 cases, mostly in Moscow and the Moscow region, where pirates were charged under Article 146 of the Criminal Code and the sentences were from one to three years in prison. However, some of these cases were subject to the May 2000 amnesty but at least the judges imposed the longer sentences

Large-scale raids by the recording industry also were conducted in and outside of Moscow. Activities in Moscow and other cities in Russia resulted in closing 11 recording studios, 11 wholesale outlets and warehouses, and around 44 retail outlets. Some actions were initiated regionally. In March 2000, the tax authorities and other enforcement agencies conducted a number of raids in the Rostov region. Altogether more than 50,000 audiocassettes, 12,000 videos and 90,000 inlay cards were seized. The director of the RonEeS audiocassette manufacturing plant was arrested and a criminal case begun. The recording industry also assisted authorities in 180 investigations resulting in 20 criminal cases. The industry reports, however, that most of these cases were later dismissed or were turned into administrative cases with *de minimis* fines.

Through RASPA, many IDSA member companies also undertook raids of larger targets looking to criminal prosecutions. However, most raids involved seizing product in the local markets in cooperation with Department R of the Ministry of the Interior and the Economic Crimes Unit. IIPA has no statistics on the total number of seizures or on cases commenced and convictions obtained.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS

2000

ACTIONS	MPA	IFPI	TOTAL
Number of Raids conducted	1949	514	2463
Number of indictments filed	197	773	970
Number of defendants convicted (including guilty pleas)	57	54	111
Ratio of convictions to the number of raids conducted	2.9%	10.5%	4.5%
Ratio of convictions to the number of indictments	28.9%	7%	11.4%
Total number of cases resulting in jail time	NA	NA	NA
1 to 12 months			
13 to 24 months			
25 to 36 months			
37 to 60 months			
Over 61 months			
Number of cases resulting in criminal fines	NA	NA	NA
Total amount of fines levied			
US\$0-\$1,000			
\$1,001-\$5,000			
\$5,001-\$10,000			
\$10,000 and above			
Total amount of restitution ordered) in how many cases (e.g. \$XXX in Y cases)	NA	\$7.7 million	\$7.7 million

Clearly, these results will not succeed in significantly reducing piracy levels in Russia for some time. Any reduction that does occur will be achieved only through the massive use of resources to take product off the streets through raiding activity without the concomitant deterrence of prosecutions and deterrent penalties.

Administrative Enforcement

Retail cases are increasingly handled under administrative machinery, resulting in very small fines, or none at all. While pirate product is generally confiscated, shop operators are normally not the owners and the latter seldom get caught and fined. The recording industry and the motion picture industry continue to report that, as in 1999, administrative raids have been positive and in 2000, RAPO is able to average three to four Administrative Court decisions against pirate retailers that order illegal product to be confiscated and that impose small fines. This has resulted in a reduction in the video piracy level in the Gorbushka market to 20%. However, this has involved the employment of huge resources, since administrative penalties remain totally inadequate to deter over the long term. Statistics below show the significant number of cases but the *de minimis* penalties.

In a hopefully positive development, Moscow Mayor Lushkov announced prior to the 2000 end-of-year holidays that he was going to close the Gorbushka market altogether. However, following protests, he withdrew this threat, at least temporarily, allowing for a boom in sales of pirate product at year's end. Recent reports are that he is seeking input on how to rid the market of pirate product by restructuring it. Needless to say, the industry is only cautiously optimistic.

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS 2000

ACTIONS	MPA	IFPI	TOTAL
Number of raids/searches conducted	NA	514	
Number of administrative cases brought by agency	1367	259	1626
Number of defendants found liable (including admissions/pleas of guilt)	1462	259	1721
Ratio of convictions to the number of raids conducted	NA	38.1%	
Ratio of convictions to the number of cases brought	NA	75.7%	
Number of cases resulting in administrative fines	NA	159	
Total amount of fines levied		\$2,500	
US\$0-\$1,000		159	
\$1,001-\$5,000			
\$5,001-\$10,000			
\$10,000 and above			
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	NA		NA

Civil Enforcement

RAPO has brought and won a few civil cases in 2000 (civil add-ons to criminal prosecution), including one case in Nizny Novgorod where 160 VCRs were given to RAPO for distribution among its members. A second victory in St. Petersburg against a major duplicator and distributor resulted in a damage award of U.S.\$80,000. This latter case was particularly important because it involved an interpretation of a poorly written provision in the copyright law. RAPO filed a second criminal case against this individual who was subsequently arrested, had all of his equipment confiscated (including 1,500 VCRs), and is now in prison awaiting trial.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2000

ACTIONS	MPA
Number of civil raids/searches conducted	17
Post Search Action	NA
Cases Dropped	NA
Cases Settled	NA
Cases Adjudicated	5
Value of loss as determined by Court (\$USD)	NA
Judgment Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)	NA
US\$0-\$1,000	
\$1,001-\$5,000	
\$5,001-\$10,000	
\$10,001-\$20,000	
\$20,001-\$50,000	
\$50,001-\$100,000	
\$100,000 and above	
Settlement Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)	NA

IIPA and IIPA Member Enforcement Objectives and Benchmarks

In the submissions of the last four years, IIPA outlined a series of benchmarks which the USG has periodically provided to the Russian government on improvements needed in Russia's enforcement system. To date, these have not been implemented but would go far to moving the enforcement regime forward.

In addition to taking more forceful and consistent enforcement actions in 2001, the Russian government needs to take a number of structural and political steps to make progress against the massive levels of piracy threatening the very existence of their own copyright industries. The following recommendations were made in 1997-2000. While the Russian government has not seen fit to implement any of these obvious measures which remain fully valid today, it is hoped, given the incentive of a strong bilateral engagement under Special 301 as well as the GSP process, Russia can be persuaded to move this agenda forward:

The President and the Prime Minister should issue a decree or internal directive making copyright enforcement a high priority.

A newly formed Interministerial Task Force (the previous one is now moribund) and all enforcement agencies must be directed to treat commercial copyright infringement as a serious crime that should be dealt with *ex officio* by all enforcement authorities. Customs should be taking actions to enforce copyright laws at the border. The Public Prosecutor's Office must be tasked to vigorously prosecute copyright offenses; this is critical, since police officials often refuse raiding requests on the grounds that prosecutors will not followup with prosecutions. Such directives should be issued by the President and/or Prime Minister in order to obtain the attention of the various ministries.

The Supreme Court and Supreme Arbitration Court should issue an explanatory instruction to the lower courts concerning copyright enforcement.

The Supreme Court and Supreme Arbitration Court should base such instruction on their review and analysis of existing court practice in the area of IPR enforcement. The instruction should contain clarifications of certain points of law that are currently subject to debate among judges, prosecutors and law enforcement officials. Judges should be instructed to consider infringements of copyright and neighboring rights as serious crimes.

A permanent interministerial task force on enforcement should adopt a binding plan to coordinate nationwide enforcement by all relevant agencies.

There are currently no clear governmental strategies and no clear lines of authority for copyright enforcement in Russia. The Ministry of the Interior already has the lead responsibility as the major criminal enforcement agency in Russia, working with other agencies, like the Anti-Monopoly Ministry, Customs, and the Ministry of Justice, playing their appropriate roles. The Task Force should meet at least once per month and deal separately with copyright matters focusing on those issues causing the largest losses for Russian and foreign right holders. It should be headed by one of the deputy prime ministers.

Enforcement (police and customs) and prosecutorial pools should be established in each major city and region.

Piracy enforcement requires specialized knowledge and focused resources. Piracy rings are sophisticated and often have international connections. Only organized enforcement authorities can successfully curb the illicit activities of organized crime syndicates. Antipiracy actions targeted at the Russian Mafia could boost government and public confidence that economic crime can be dealt with. For example, the Economic Crime Units (at both the militia and federal levels, i.e., Interior Ministry) specializing in IPR cases should be properly manned and counterparts should be set up in other major cities outside Moscow. Customs should also be involved. In addition, IIPA recommends that prosecutors be brought fully into this system; it is imperative that prosecutors develop more specialized knowledge about IPR cases.⁵ Without

⁵We are told that because prosecutors and judges are not part of the executive branch of government, they do not normally participate in any groups or pools with police, Customs, etc.

deterrent financial penalties and imprisonment, experience shows that piracy, indeed economic crime in general, cannot be brought under control.

A plan should be formulated and commenced for the training of judges, prosecutors, magistrates, and police as a regular part of ongoing enforcement efforts.

The U.S. and EU governments and the private sector, including IIPA members, stand ready to assist in this objective. A comprehensive training program has been proposed by the U.S. government to the Russian government and one or two sessions have been held in past years. This program, which also relies on IIPA members, must be continued and more training undertaken if the full benefits of these initial training programs are to be realized.

GENERALIZED SYSTEM OF PREFERENCES (GSP) PROGRAM

Even with piracy rates among the highest in the world, Russia continues to receive significant trade benefits through the GSP program. The U.S. creative industries and the U.S. economy have also lost almost \$5 billion in the last five years (averaging near \$1 billion annually). Meanwhile, progress has been frustratingly slow. To bring other tools to bear on the problem, IIPA has twice petitioned the U.S. to deny, limit or suspend some or all of Russia's GSP benefits, which petitions were not accepted. Fortunately, on January 10, 2001, the U.S. government finally accepted IIPA's August 2000 petition to determine whether Russia continued to be eligible to receive these unilateral duty-free benefits amounting to close to 8% of Russia's total imports to the U.S.. In 1999, \$417.1 million of Russia's imports to the United States benefited from the GSP program, accounting for 7.3% of its total imports to the U.S. For the first 11 months of 2000, \$486.3 million of Russian goods entered the U.S. under the duty-free GSP code, representing a 26.8% increase over the same period last year. At the same time, losses to U.S. industries from copyright piracy in Russia amounted to at least 672.4 million in 2000, even without the entertainment software industry losses which are not yet available.

DEFICIENCIES IN THE STATUTORY AND REGULATORY REGIME

Copyright Law and Enforcement Provisions

While adoption of the criminal code amendments in 1996 (and discussed in previous submissions) was a critical step forward, these amendments were not altogether satisfactory and further amendments are necessary. Furthermore, it is critical that Russia extend full retroactive protection to all sound recordings and works and adopt civil *ex parte* search procedures. These are clear TRIPS requirements.

In its 1997-2000 submissions, IIPA reported on amendments to Russia's copyright law, and to the criminal code, criminal procedure code and its administrative codes that increased penalties for copyright infringement and added some improved enforcement procedures. However, some of these provisions are not TRIPS compatible. After many years, it appears that there may be some progress in achieving amendments to correct these deficiencies.

The most positive development has been the placing of responsibility for copyright matters under ROSPATENT, which also has the portfolio for patent and trademark matters. The agency then sought the help of WIPO and others and has now released a draft amendment to the copyright law which would correct the retroactivity deficiencies, make a few other changes and add provisions directed at implementing the WIPO treaties. Russia has also announced that it wants to join the WTO by the end of 2001, which will necessitate a major legislative push, both on the copyright law as well as on enforcement-related laws.

Recent reports are that the ROSPATENT draft is now being discussed in the Committee on Culture of the Duma and that some controversies have developed. The ROSPATENT draft contained the following new provisions:

- a. Retroactivity provisions appear to be satisfactory, though the transition period is too long;
- b. There is a new “making available” right for works and phonograms;
- c. The term of protection for works is extended to life plus 70 years, but left at 50 years for phonograms;
- d. There is some improvement in the computer program decompilation provision.

However, there were no provisions governing technological protection measures (TPMs) or rights management information (RMI), both WIPO treaties requirements. Protection for temporary copies was not clarified either.

This draft was introduced into the Duma and a new draft based on this prepared under the auspices of Mr. Komissarov, with the drafting assistance of RAO and ROMS, was also tabled. Mr. Komissarov is not a member of the Culture Committee and reports are that the ROSPATENT draft and this new draft are acquiring a number of opponents in other ministries and committees. The Komissarov draft, which has not been reviewed by IIPA, includes provisions on both TPMs and RMIs and may be sufficient to implement the WIPO treaties. However, it appears to contain other provisions that might be troublesome for IIPA members. At last report, the Committee on Culture may be creating a yet third draft.

While excellent news, there is still opposition within certain quarters of the Putin Administration and the Duma. The USG should engage closely with both bodies to ensure that the law passes both quickly and with provisions that repair all substantive TRIPS deficiencies and correctly implement the WIPO treaties. On the negative side, however, none of the long-pending amendments to the Criminal and related Procedure and Administrative Codes has been pursued.⁶

The following details once again some of the history and the enforcement-related amendments that must be passed:

In the December 1996 amendments to the Criminal Procedure Code (CPC), certain amendments were added that proved troublesome. These were supposed to be technical amendments to align the CPC with the June amendments to the Criminal Code, but the

⁶ New amendments to the Administrative Offenses Code were passed in 2000 effective March 1, 2001. It does not get at the critical deficiencies but does increase the penalties for legal entities

amendments changed two key provisions, making enforcement more difficult. In 1995, the CPC was amended to place copyright violations under police jurisdiction (Article 126) and to provide for *ex officio* copyright infringement actions (Article 27). The 1996 revisions returned primary jurisdiction to investigate copyright infringement to the prosecutor's office, and required a formal complaint by the copyright owner to initiate a case. The former change will limit copyright enforcement because prosecutors have fewer resources than police and because copyright enforcement will now depend on the different priority given to infringement by each district's prosecutor. The latter change will limit copyright infringement complaints to the number that copyright owners can make and follow up, a number unlikely to be sufficient to address the magnitude of the piracy problem. Enforcement outside Moscow will be difficult where copyright owners do not have representatives. Industry and the U.S. government must press to reinstate the 1995 provisions of the CPC.

Amendments proposed in the past to the Criminal Code and the Criminal Procedure Code should now be adopted, in addition to the Copyright law amendments:

Current Article 146 of the criminal code deals with infringement of copyright and neighboring rights. It provides for fines (200 to 400 times the minimum wage, or U.S.\$700 to U.S.\$1400) or two to four months of the defendant's income, correctional labor (from 180 to 240 hours), or imprisonment (of up to two years) for unlawful acts which cause "grave harm"/"significant damage." Fines and jail terms are higher (doubling the fines, and up to five years) when the infringing acts are committed repeatedly or by an organized group. These fines and jail terms entered into effect on January 1, 1997. The following amendments should now be retabled and adopted in 2001:

1. *Adopt amendments to define the standard of "significant damage"/"grave harm" in Article 146.*

This standard must be defined to cover all cases in which the retail value of the pirated works exceeds a minimum amount. IIPA is told that other articles in the criminal code contain a "significant damage" standard and a monetary amount defining the standard is provided expressly. For example, the general theft provision in the new criminal code defines "significant damage" as 500 times the minimum wage (about US\$1,750). IIPA believes this general threshold is too high for copyright piracy and should be much lower. Not only is such a low threshold important for identifying infringing acts under the criminal law, it also provides critical guidance for the police when they are conducting the initial raids and must assess the situation and determine whether the case should be brought under the criminal code or the administrative code. There have also been proposal to further lower the threshold to 50 times the minimum wage, or US\$175, but we have heard no reports of this amendment pending.

In July 1995, Russia adopted administrative measures to enforce the copyright law. However, Article 150-4 of the administrative code also contains a reference to the "significant damage"/"grave harm" standard found in Article 146 of the Criminal Code. The uncertainty around this standard must be resolved if both criminal and administrative enforcement is to be effectively implemented in Russia.

2. Introduce and adopt amendments to add specific substantive and procedural provisions to the criminal code which would grant police the authority and legal basis to confiscate infringing goods, materials, and the equipment used to produce such items.

Before passage of the criminal code amendments, the copyright industries lobbied to include a provision on confiscation in the IPR provision of the criminal code; this was supported by a number of Russian enforcement agencies, including the Ministry of Interior. Legislators felt that because no other criminal code article contained such a specific confiscation provision, it was not possible to add it to Article 146.

There are general provisions in the Russian Criminal Procedure Code providing that the "objects (or tools) of crimes" can be destroyed by court order or by the decision of the investigator only when the criminal case is closed (often the investigator is entitled to do so only with the approval of the prosecutor). The criminal code also provides for the confiscation of personal property of a convicted defendant as a type of sanction. However, copies of infringing works or sound recordings very often do not constitute the personal property of a convicted person. As a result, confiscation of personal property as a sanction under the criminal code does not cover illegal copies. The 1995 amendments to the administrative code also provide for the seizure of pirate goods and equipment, but these seizures are only available for administrative offenses. Amendments made in July 1995 to the 1993 Copyright Law required mandatory confiscation of infringing works and sound recordings (Article 49) and allowed confiscation of equipment and materials used for their production. There do not appear to be any procedures or guidelines in effect on how to treat goods once seized. Both the civil and criminal laws need to provide procedures for police, prosecutors, and courts to hold onto confiscated goods for use at trial. IIPA is unaware of any amendments pending on these issues.

3. Introduce and adopt amendments to increase levels of fines because they are too low and therefore inadequate to deter commercial piracy.

For example, the cost of a single business application program for engineers (AutoCAD) costs approximately \$4,000. A commercial pirate of such a program will view low fines as a cost of doing business. These amendments must provide for increased penalties for copyright infringement. IIPA was told last year that the Duma's IP Working Group was considering amendments to increase the maximum jail term to seven years and to make copyright infringement a "most serious crime," which purportedly would trigger special attention by the enforcement authorities. We have no updated information but urge the U.S. to press for such provisions and for increased fines as well.

4. Introduce and adopt an amendment to the Criminal Procedure Code to return jurisdiction over criminal violations to the police authorities from the prosecutors.

The June 1996 amendment to the Criminal Procedure Code (in effect after December 25, 1996) was a serious setback to copyright enforcement. The 1995 amendments put criminal violations under police jurisdiction. The 1996 amendments returned jurisdiction to the prosecutors; the police may no longer be able to act *ex officio* without the consent of the prosecutors. Furthermore, the amendment removed from the category of a public crime any copyright offense other than that conducted by an organized group, necessitating a formal complaint. Again, last year it was reported that the Duma's IP Working Group was considering

legislation that would delete from Article 27 of the Criminal Procedure Code the reference to copyright crimes, resulting in the repeal of a requirement that a private complaint be filed before a criminal case can begin. IIPA has no more recent information. Also needing amendment is Article 126 of the CPC, which allows actions once taken directly by the police not to be subject to prosecutorial authorization. The U.S. should press for passage of these changes.

Two other procedural or enforcement-related amendments are needed:

First, the Russian government and Duma must introduce and adopt amendments to the Civil Procedure Code or Arbitration Procedure Code or the copyright law to provide *ex parte* search authority. While the current Civil Procedure Code in Article 134 and 136 appears to permit imposition of liens on property to secure potential future enforcement of rights, there is no *ex parte* relief available under current law. This is a critical deficiency, particularly for the software industry. Russia must correct this omission to permit right holders to obtain civil *ex parte* searches against suspected infringers if Russia is to accede to the WTO. The availability of civil *ex parte* searches is required by Article 50 of the TRIPS Agreement. Amending this provision is not, and should be, a topic being considered in the Duma's IP Working Group.

Second, they must introduce and adopt amendments to the Customs Code to ensure full authority to seize pirate product at the border and to bring Russia's border controls at least into compliance with Articles 51-60 of TRIPS. Imports of pirate optical media product continue from Eastern Europe (Czech Republic), from other countries of the CIS with production capacity (Ukraine and Moldova), and from Asia. Recent reports are that the State Customs Committee is working on a draft of a new Customs Code with the assistance of the Ministry of Economic Development and Trade. Apparently, some broad provisions have already been approved, but IIPA does not know whether anything has been accomplished on IPR and Customs enforcement. We understand the Russian government is seeking WTO acceptance to broad principles in conjunction with its WTO application. The U.S. government should resist any effort for Russia to join the WTO until a full TRIPS-compatible Customs Code is in place.

Civil Code

The effort to include detailed copyright provisions as part of comprehensive civil code reform remains a continuing threat. The most recent report is that the IPR provisions of the Civil Code are very much alive, and supported by many entities both within and without the Russian government. Fortunately, however, the controversy surrounding this issue has resulted in a decision to place the IPR issue into Part IV of the Civil Code where it can be dealt with independently. It is imperative that the copyright provisions in the latest draft IIPA has seen not be adopted. The draft IIPA continues to contain numerous provisions incompatible with the bilateral Trade Agreement, Berne and TRIPS. At a minimum, Russia should do what Belarus has done, merely referring to the existing statutory law in its (brief) IP civil code section.

If adopted, these Civil Code amendments would create significant ambiguities and risks, as courts would attempt to determine which of two competing and inconsistent laws governs. The draft being proffered would also seriously undermine Russia's already faulty enforcement regime. The U.S. government has always vigorously opposed these dangerous and Berne-incompatible amendments, and must continue to do so.

Stamp Tax

In January 1999, the Moscow City Government adopted Ordinance No. 33, requiring all video and audiocassettes, optical discs and computerized information carriers to have a "protective identification mark" (i.e., a stamp tax). Audiovisual products were required to have the stamp as of July 1, 1999; audio and business software products were required to affix the stamp by December 1, 1999.

Administered by "Informzaschita" (a state-owned company established to administer the tax), the cost of the stamp is 3.5 rubles per cassette. While the cost is not prohibitive, it is an additional cost that the legal video distributors have to endure in the face of high rates of piracy, the 70% tax on video rental profits and difficult economic conditions.

The stamps bear no relation to copyright ownership, yet purport to legalize video product in the market. City authorities use government facilities to enforce the sticker, removing unstickered product from the market. Counterfeit stamps are also widely available.

Following appeals by the industries arguing that the Stamp Tax was illegal and unconstitutional, the Russian Procurator General's Office recently instructed the Moscow Procurator's Office to protest against the Stamp Tax. The Moscow Procurator's Office subsequently filed a protest with Mayor Luzhkov, requiring that he revoke a number of the provisions of Ordinance No. 33, and that he also revoke his decree of March 23, 1998, which requires vendors to obtain separate licenses to sell video and audio carriers. The provisions of Ordinance No. 33 disputed by the Procurator's Office included those establishing mandatory payments for the stamps and transferring those payments to the account of Informzaschita. However, the introduction of the stamp as such was not disputed by the Procurator's Office, and further efforts by industry may be required to secure the abolition of the entire stamp system.

Mayor Luzhkov reportedly informed the Moscow Procurator's Office that its protests would be honored and instructed the Moscow Communications and Media Committee to prepare the necessary documents. The Mayor subsequently repealed his decree of March 23, 1998. However, it remains unclear whether this repeal of the 1998 decree affects the mandatory stamping of audio and video products for the purposes of their sale in Moscow. RAPO has requested the Moscow Procurator's Office to explain the situation and, if necessary, to take additional measures to secure the repeal of the Stamp Tax. One videogame company reports that pirates who do not use the stamps merely pay a small fine and then gets all the pirate goods back.

70% Tax on Video Rental Profits

In 1992, Russia imposed a 70% profit tax on revenue from video rentals, along with other "vice" activities such as gambling. This tax has effectively barred legitimate companies from entering and developing a video rental market in Russia, thereby protecting and promoting pirate activity. The video rental market in Russia has the potential to generate hundreds of millions of dollars per year.

Typically, legitimate home video releases are distributed by way of rental when first entering a new market. However, in Russia, companies have been forced to enter the video market (if at all) with sell-through product only, which essentially can reach only those consumers

who can afford higher-end entertainment. Particularly after the 1998 economic crisis in Russia, buying a video is beyond the means of the average Russian consumer; however, renting a video is not.

At this point, there is broad-based support within the Russian audiovisual industry for elimination of this anachronistic tax. The Russian and U.S. film industries have been pushing together for years to get this tax eliminated. However, they have been confronted with new governments that did not understand the problem, and a Duma which has been slow to act on needed tax reform.

The new Tax Code under consideration by the Duma reportedly would eliminate the 70% tax on video rental profits (although we have not yet seen the relevant provision). The U.S. Government has taken up this issue with the Russian government in the past. Continued USG pressure on this issue could be vitally important to ensure its elimination in the foreseeable future.

Optical Media Regulation

There are reportedly 13 CD plants in Russia, including one underground plant. With the reduction in the availability of pirate product from Bulgaria, China (and hopefully soon from Ukraine), these plants have been, and will be increasingly, involved in producing for pirates. As reported last year, Russia is one of those countries which have become a haven for CD pirates.

A new licensing law, which President Yeltsin signed on October 3, 1998, would require any plant manufacturing audio or video product on CD to obtain an operating license. Unfortunately, the scope of this provision extends to all optical media but not all copyrightable subject matter. IIPA and its members urge the U.S. to press Russia to implement an overall optical media regulation program, following those being proposed for many Asian and other Eastern European countries. This should be done quickly; IIPA understands that the Ministry of Justice is now in the process of considering implementing regulations to this 1998 law. The elements of this plan are:

- Centralized licensing of all optical media mastering or manufacturing facilities. In most cases, the government should implement a comprehensive licensing scheme on the basis of existing statutory authority in the field of business licensing.
- Centralized licensing of importation, exportation, and internal transfer of optical disc mastering or manufacturing equipment and machinery. An automatic licensing regime consistent with WTO requirements would generally be sufficient to create needed transparency. In most cases, it should be possible to utilize existing customs or import/export laws as a statutory basis for much of the regulatory regime in this field.
- Centralized licensing of importation of optical grade polycarbonate, the key raw material used in the production of optical media products. Here too, the licensing regime could be an implementation of existing customs laws, and an automatic licensing system would generally be sufficient.
- Requirement for the placement of a secure unique identifier (such as source identification [SID] code or its successor) on all masters (stampers) and finished products produced within the country, indicating the source of manufacture.

- Recordkeeping requirements, including full information on all orders placed at and fulfilled by the optical disk manufacturing facility, and documentation of the order placer's right to commission reproduction of the material. Records must be preserved for a stated period; order documentation should be accompanied by a sample of the product produced pursuant to the order. These requirements create the transparency which is essential to the success of the entire regime.
- Plenary inspection authority by an enforcement agency for the examination of all records, search of all facilities, etc., for the purpose of ensuring compliance with all the preceding requirements. Surprise, off-hours inspections should be explicitly authorized. Public inspection (e.g., by rightholder organizations) should also be authorized as appropriate.
- Violation of any significant aspect of this regime should be criminally punishable and lead to license revocation. Offenses should include: conducting manufacturing or mastering operations without a license; importation, exportation or trafficking in manufacturing equipment or optical grade polycarbonate without a license; production of masters or finished products without a secure identification code; failure to maintain or to permit immediate inspection of records, including orders; or interference with an inspection, search, or other official action undertaken to enforce the regime. The regulatory agency or agencies should also be granted emergency authority to immediately shut down the operations of an unlicensed facility or one otherwise shown to be operating in violation of the regulatory regime.

While the framework outlined above should be implemented in all countries posing an optical media piracy threat, additional measures may be needed in Russia (and for selected copyright industry sectors) in order to bring optical media piracy fully under control. These additional measures could include:

- Title verification requirements, under which producers of optical discs must clear orders for certain products with relevant representatives of right holders before beginning production;
- Imposition of controls similar to those outlined above on the importation, in-country distribution, and/or exportation of certain finished optical disc products (in addition to production equipment and raw materials).

WIPO Treaties and Electronic Commerce

IIPA is most please to see that Russia is making progress toward correcting some TRIPS deficiencies such as lack of full retroactivity as well as considering amendments that would implement the WIPO treaties. Russia should waste no time adopting legislation that fully implements the treaties; it is critical to Russia's future in the new world of e-commerce.

IIPA also understands that there is a federal draft law "On Electronic Trade" which was submitted to the Duma in November 2000. IIPA has not reviewed this draft law but it should be carefully watched by the industries and the U.S. government to ensure that e-commerce is not overregulated and that liability issues for copyright infringement on the Internet are dealt with in a manner to ensure that rightholder's can vindicate their rights. The DMCA and the EU's E-Commerce Directive are the models.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

SAUDI ARABIA

EXECUTIVE SUMMARY¹

IIPA recommends that Saudi Arabia be elevated to the Priority Watch List.

Piracy, lack of transparency (and deterrence) in enforcement actions carried out by the government, lack of effective coordination between the Ministry of Information and the police in raiding sources of piracy other than retail outlets, and a TRIPS-incompatible copyright law, have characterized the situation in Saudi Arabia for years. The year 2000 witnessed some increased resources being devoted and some internal reorganization by the Ministry of Information, resulting in some increased raiding. Nonetheless, cases brought against pirates raided and the results in those cases remain shrouded in mystery in Saudi Arabia. Piracy rates remain too high, indicating a lack of effective deterrence. The result: one of the copyright industries' largest potential markets in the Middle East is largely closed off due to piracy.

The piracy situation in Saudi Arabia should not be this difficult to address. If the government has the willingness to work in cooperation with industry, there is no doubt that sustained, publicized raids and the regular meting out of deterrent penalties and fines and (where appropriate, and assuming a change in the current inadequate penalty provisions of the copyright law, or the application of a separate provision in the laws) imprisonment on commercial pirates (also publicized) will begin to carve away at high piracy rates and drive piracy underground or out of Saudi Arabia altogether.

Finally, Saudi Arabia must revise its intellectual property laws (at least) to bring them into conformity with the TRIPS Agreement prior to WTO accession.

Trade losses in Saudi Arabia are estimated at \$118.0 million for 2000.

¹ For more details on Saudi Arabia's Special 301 history, see IIPA's "History" Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	65%	40.0	65%	32.0	50%	32.0	50%	41.0	50%	41.0	60%
Sound Recordings / Musical Compositions ²	8.0	40%	12.0	45%	12.0	45%	15.0	45%	17.0	40%	17.0	41%
Business Software Applications ³	28.8	62%	31.8	64%	30.9	73%	17.0	74%	28.0	74%	19.3	77%
Entertainment Software ⁴	28.0	NA	20.2	59%	21.4	68%	21.3	70%	20.0	64%	21.0	62%
Books	14.0	NA	14.0	NA	9.0	NA	9.0	NA	9.0	NA	9.0	NA
TOTALS	118.0		118.0 ⁵		105.3		94.3		115.0		107.3	

COPYRIGHT PIRACY AND ENFORCEMENT IN SAUDI ARABIA

Piracy Phenomena

Saudi Arabia remains the largest potential market for all of the copyright industries in the Middle East; however, it also continues to be one of the markets hardest hit by copyright piracy. Piracy concerns include the following:

- **Retail Piracy.** Retail piracy of optical media (including audio CDs, VCDs, CD-ROMs and CD-Rs), audiocassettes and videocassettes, books and photocopied pirate copies, continues to exist at piracy levels that indicate a lack of deterrence and result in the closure of the market to legitimate products. For example:
 - Copies of pirate (retail) optical media are available in Saudi markets, mainly imported from other parts of the Middle East as well as parts of Asia, including Taiwan, Indonesia

² The 2000 losses due to piracy of sound recordings and musical compositions are for U.S. repertoire only. The 2000 level of piracy referred to is that for overall piracy. The piracy of international repertoire is 55%.

³ BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not yet available. These numbers were finalized in mid-2000, and are reflected above.

⁴ IDSA estimates for 2000 are preliminary.

⁵ In IIPA's 2000 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Saudi Arabia were \$86.2 million. Because of the adjustment to reflect BSA's final 1999 statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Saudi Arabia in 1999 are raised to \$118.0 million.

and Malaysia. Although the Saudi government has seized over a million illegal CDs at the points of entry in 2000, pirated interactive games are still openly sold in the markets in mass quantities. A consumer can also readily purchase an illegal CD in most retail interactive game stores. Relatively small quantities of pirate music CDs are available in both the CD-Audio and CD-R configurations. In many stores such as the Jeddah Commercial Center illegal interactive games are openly displayed on the shelves. Furthermore, pirated interactive games that are not openly sold over the counter can quickly be retrieved by the sales staff upon request. The illegal CDs are often stored in nearby locations (private residences or warehouses) in which the Ministry of Information does not have the authority to inspect (see discussion below).

- **Audiocassette and videocassette piracy** remain major causes of economic harm to the copyright industries in Saudi Arabia. Given the Kingdom's size and prohibition against cinemas, the home video market has considerable potential, but piracy is a major impediment to the development of the legitimate market. The overall video piracy rate remains high (at 65%), with exceptionally high piracy rates for popular new titles (over 90%), often appearing in pirate versions months ahead of the legitimate release date. While most visible piracy has disappeared from video shop shelves on the "main" streets in Jeddah and Riyadh (the cleanest markets in Saudi Arabia), substantial counterfeiting and under-the-counter sales continue to exist. The situation is dire in many outlying neighborhoods, especially in regional cities like Medina, Mecca, Hofuf, Abha, and Dahrn, and pirate duplication sites in private villas and warehouses remain untouched. Pirate audiocassettes continue to account for almost all of pirate unit sales. Another reason videocassette piracy continues unabated is due to the lack of effective and sustained cooperation between the Ministry of Information and the police against sources of piracy outside of the retail outlets. The pirates have continued to engage in the illegal duplication and distribution of pirated cassettes from private residences and empty storage areas near the retail outlets. The illegal cassettes are easily retrieved from the residences within minutes.
- **Industry representatives** have noted an increase in the amount of book piracy in Saudi Arabia in the past two years. University departments have even been known to encourage the piracy of textbooks when the books ordered do not arrive on time, and shops in and around the universities continue to thrive off the sale of illegally photocopied books. Pirate texts also continue to be imported from Lebanon, and some commercial piracy of English language and teaching (ELT) materials continued in 2000. Some of the new higher education institutions reportedly are encouraging the use of legitimate books.
- **Smart Card and CAM Piracy.** Saudi Arabia has not effectively addressed wide-scale smart card and CAM ("Conditional Access Module") piracy in which end-users buying the smart cards may watch popular satellite channels without a legal subscription. Pirates in Saudi Arabia openly sell illegally hacked smart cards and CAMs in the satellite stores at severely discounted prices, giving illegal access to premium channels for as little as 200 SR (around \$53). These pirates engage in sophisticated hacking techniques, using computers, smart mice, specialized computer programs, and select websites, in order to upload onto smart cards the circumvention keys necessary to provide illegal access to premium channels. The entire process takes as little as four minutes and customers literally line up in queues to

receive the illegal subscription. The pirates also openly sell hacked CAMs that allow consumers to view all of the premium movie channels without paying a subscription price. Revenues for the satellite broadcast platforms have fallen drastically, resulting in losses of millions of dollars. The problems of smart card and CAM piracy can be sent underground if the government of Saudi Arabia has the willingness to attack these brands of piracy. Also, it would be helpful if the Ministry of Information obtained jurisdiction over the licensing of satellite stores. The government should take care of this problem: the pirates are well known and are not hiding from the authorities; and the activities they engage in are clearly illegal.

- **Pirate Production of Videocassettes on Villas or Through Private Warehouses.** A significant amount of piracy occurs on private villas or through private warehouses, enforcement against which is governed by the Saudi Ministry of Interior. The lack of coordination between the police and the Ministry of Information remains a critical deficiency to effective enforcement by the Saudi government. There is currently no formalized medium or structure of sharing intelligence regarding piracy operations between the police and Ministry of Information. However, the large staff of professional investigators from the police could easily dovetail with the Ministry of Information against these known sources of piracy if a permanent and sustained mechanism was established.
- **Unencrypted Pirated Broadcasts Violate Territorial License.** Transmission by the Saudi government television station of programs via ARABSAT continues, reaching viewers outside Saudi Arabia, in violation of license grants as to the content of the broadcasts. The motion picture industry licenses its programming in Saudi Arabia to the state-owned TV broadcaster for terrestrial distribution in Saudi Arabia. The state-owned broadcaster then uplinks the programming to ARABSAT (most likely with the intent of bouncing the signals off the satellite to remote terrestrial broadcast towers in Saudi Arabia to ensure that the terrestrial signal can be received in remote areas of Saudi Arabia). However, the broadcaster fails to encrypt its broadcast signal before uplinking it to ARABSAT, so the programming, which has been licensed only for distribution in Saudi Arabia, becomes available free of charge throughout the entire region outside of Saudi Arabia, to places in Europe, the Middle East and parts of Africa. This problem needs to be resolved by Saudi authorities.
- **Unlicensed Use of Software by Government.** Government unlicensed usage of software continues within Saudi ministries. In 1999, certain government ministries legalized their software use. Unfortunately, legalization efforts on a government-wide basis continue to move at a snail's pace. As of December 2000, it is estimated that the Saudi Government had approximately 80,000 personal computers set up, many of which run on pirated software.

Some Enforcement Actions Taken in 2000

The Ministry of Information engaged in some reorganization (improving resources available to fight piracy) and some raiding in 2000. Raids on end-user infringers (business engaged in the unauthorized use of software), retail establishments engaged in the sale of pirated books, CDs, VCDs, video game software, audiocassettes and videocassettes (248 shops raided, with seven of those being closed, and total fines of U.S.\$280,000) and computer shops engaged in the sale of pirate software (37 shops with total fines meted out of U.S.\$65,000), training centers and Internet cafes, and some video duplication sites (in conjunction with the Police), have made some inroads

against day-to-day piratical operations. There have also been some large seizures of illegal CDs through the points of entry into the Kingdom. During 2000, the Ministry of Information reportedly confiscated 3,725,707 pieces of CD media (including business software, video game software, audio CDs and VCDs), 56,824 other illegal works (including books, videocassettes and audiocassettes), and, in one raid, illicit smart cards and other pirate television paraphernalia. Generally, the seized goods are destroyed immediately, and some press reports in Saudi Arabia during 2000 publicized this fact. Raids against end-users included training centers (4 out of 28 found to be using unlicensed software), Internet cafes (21 out of 24 found to be using unlicensed software) and companies (60 out of 110 found to be using unlicensed software, no penalties meted out). No fines were imposed in any of the 85 cases where unlicensed software was found.

In other positive developments, the government created around 30 new jobs for the intellectual copyright protection department in the Ministry of Information during 2000. In addition, the Ministry of Information worked with the software industry on a public relations campaign expected to run during 2001. Finally, the government has remained receptive to participation in conferences with private sector representatives, including conferences under the sponsorship of international organizations.

Unfortunately, the failures in the system, such as the lack of transparency in copyright cases, outweigh incremental gains in 2000. For example, renewed initiative by the leadership within the Ministry of Information at all levels has led to sporadic raids throughout the Kingdom on stores and duplication sites (including private homes and villas with the cooperation of the police), but the actual outcomes of copyright cases remain shrouded in mystery. The Ministry of Information, upon a successful raid, will serve notice to the shop of violation of the copyright law and a case is prepared in which the alleged pirate is able to make its case and the inspector states the facts accordingly. The case is then forwarded for a decision to a court within the Ministry of Information. The exact constitution of the court and its appointed members and the outcome of each case are kept secret. Copyright owners sometimes learn that a store has been fined, but only the store itself knows the size of the fine (rumored to be in the range of no fine to a maximum of 10,000 SR (U.S.\$2,666) per violation, a totally non-deterrent amount). Copyright owners whose rights are trampled have no access to the courts to plead cases and also has no mechanism in practice for appealing any outcome. The government has taken countless raids, but the industries have no idea about the individual results in those raids (in only 25% of cases is it known that fines were meted out).

Another important side-effect from the lack of transparency in copyright cases (in addition to the resultant inability on the part of copyright owners to know about or appeal decisions made by the courts) is the lack of deterrent effect in the market. IIPA does note that some press regarding copyright enforcement in Saudi Arabia was forthcoming in 2000. For example, press reports have highlighted the fact that the Saudi government generated for its Exchequer a revenue stream of SR1.5 million (U.S. \$400,000) from fines paid by copyright infringers in 1999. The same press report indicated that 120 people were subjected to penalties in 1999 for piracy, including, as noted above, fines of up to SR10,000 (U.S.\$2,666), temporary closures of the concerned shops, and permanent closures of repeated violators' shops.

Another abiding problem is the lack of sufficient coordination and cooperation among the various enforcement Saudi authorities in attacking the substantial underground pirate industry that exists. Underground pirate operations often involve duplication sites located in such places as private residences and warehouses. These sites are outside the jurisdiction of the Ministry of

Information (which only has administrative authority over retail shops), and therefore must be dealt with by the Ministry of Interior (police) and others. In 2000, the Ministry of Information initiated cooperation with the police in raiding certain duplication sites in Jeddah, Dammam, and Al Khobar, in which thousands of pirated cassettes and a number of VCR machines have been confiscated from homes that were being used for a pirate industry. However, these actions have been limited and the Saudi government has yet to establish regular coordination between the Ministry of Information and police. There is no formalized sharing of information or an orchestrated task force approach between the ministries for an effective and systematic implementation of the copyright law. The result is bureaucratic gridlock. In order to obtain a raid, the Ministry of Information, upon discovering a duplication site outside a retail outlet, must formally write a request to the Governor for police assistance. The Governor then forwards the request to the police, but the operational arrangements for the raid against the known pirate do not happen for weeks or even months. The result: pirate storage areas (homes or warehouses) near the retail outlets thrive in Saudi Arabia. Without an inter-ministerial approach to enforcement, the pirates will not stop what they perceive to be a profitable, albeit illegal, business. There should be a formal task force established between the police and the Ministry of Information to cross-reference their piracy intelligence. The task force should be decentralized and have the ability to immediately conduct raids against all sources without being hampered by bureaucracy.

A separate problem already alluded to is that most enforcement actions are confined to Jeddah and occasionally Riyadh, but little has been accomplished in regional cities like Medina, Mecca, Hofuf, Abha, and Dahrhan, and as already noted, much of the pirate video duplication occurs in private homes and villas.

Because of the deficiencies in enforcement against copyright infringement, the audiovisual industry in particular must continue to rely on Saudi Arabia's successful publication approval system to secure limited anti-piracy protection. The motion picture industry representative submits authorized licensee certificates for copyright owners' product in Saudi Arabia to the Director General of Publications (DGOP), which enforces against unapproved titles under the Ministry of Information. These certificates raise a presumption of copyright ownership and distribution authorization for licensees of the copyright owner's titles and heighten requirements for others attempting to obtain approval to distribute those titles. This procedure has discouraged piracy and has made it easier for the Ministry of Information to detect unauthorized product. Enforcement actions by Ministry of Information and Ministry of Interior authorities over the last few years have forced many pirate activities "under-the-counter" in Jeddah and Riyadh.

Decree Issued to Require Legitimate Software Usage by Businesses

One extremely positive step in 2000 is that the Ministry of Information issued a decree requiring media companies to submit their software licensing documentation in order to register to do business. The Ministry has also conducted a nation-wide campaign, sending letters to end-users all over Saudi Arabia, announcing the decree and urging them to ensure that all software used is legal. The campaign has attracted significant attention in the market, and has resulted in an immediate increase in the use of legal software. IIPA applauds the government of Saudi Arabia for this initiative. Saudi Arabia is the first government that we know of that has conditioned the renewal of a business license on the legal use of software. We would encourage the Saudi government to expand this excellent program to other industry sectors.

SAUDI ARABIA'S LAWS REMAIN OUT OF SYNC WITH INTERNATIONAL STANDARDS

IIPA understands that a new draft copyright law is being reviewed by the Council of Ministers in Saudi Arabia for final approval. IIPA has not seen the draft, and therefore cannot comment on whether it is an improvement over the 1990 copyright law. However, IIPA understands that organizations such as WIPO have seen the draft and provided detailed comments, so it is hoped that many of the TRIPS deficiencies and other problems with the 1990 law have been addressed. Needless to say, Saudi Arabia must amend its copyright law to make it TRIPS-compatible before being admitted to the World Trade Organization (WTO).

The copyright law of Saudi Arabia (effective January 12, 1990) protects foreign works (and, according to assertions made by Saudi government officials, foreign sound recordings) by virtue of Saudi Arabia's accession to the Universal Copyright Convention (UCC) on July 1, 1994.

Amendments needed for the Saudi copyright law to provide TRIPS-level protection include the following:

- Protection for foreign works needs to be clarified; at present, the Saudi government claims that the UCC is "self-executing" in the Kingdom; an amendment expressly including eligibility by treaty would remove all legal doubts.
- The duration provisions for protection of "sound . . . works" and "audiovisual . . . works" need to be brought up to TRIPS-level standards; the current law states that the author's rights in the case of "sound . . . works" are protected for 25 years, which is TRIPS-incompatible.
- Adequate retroactive protection in Saudi Arabia in line with international standards depends on proper application of the principle of national treatment, as well as the extension of Article 25 of the law (which states that the law shall apply to "works that exist at the time" of its entry into force) to all foreign works and sound recordings. The retroactivity provisions should be read, once the term in Saudi Arabia's law is amended to be TRIPS-compatible, so that sound recordings and audiovisual works relegated to the public domain in Saudi Arabia as a result of the short term of protection afforded under the current law (only 25 years) are recaptured into copyright for the remainder of the term required by TRIPS. The Ministry of Information has informed industry that it is applying the law now so as to provide, in effect, a full 50 years of protection for pre-existing works and sound recordings; while this is heartening, an amendment expressly providing for such protection would remove all doubts.
- The copyright law should be amended expressly to include all the Berne Article 11bis rights (broadcasting, rebroadcasting, retransmission by cable, communication of the work to the public) and all types of broadcasting via satellite.

- The very broad personal use exemption (Article 8a) must be replaced by a Berne- and TRIPS-compatible provision. Any personal use exception must be narrowly tailored in line with Article 9(2) of the Berne Convention, specifically with regard to computer programs or to other works in digital format. A personal use exception must be limited to special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. The current law of Saudi Arabia does not even limit the personal use exception to one copy for personal and private use.
- The compulsory license (Article 10) permitting the publication and reproduction of any work for educational, school, cultural or scientific purposes within a period of three years of the date of first publication under certain circumstances is a Berne/TRIPS violation, and should be deleted (or curtailed significantly so that it comports with the Berne Appendix).
- The copyright law should be amended to clarify that original compilations of unprotected facts and data are protected (TRIPS Article 10.2).
- The copyright law does not, as required by TRIPS, provide point of attachment or protection to performers (TRIPS Article 14.1).
- Penalties for copyright infringement are totally inadequate to deter piracy; copyright infringement is supposed to be subject to fines of up to 10,000 riyals (approximately U.S.\$2,666) and/or closure of the enterprise for up to 15 days, and in the case of subsequent offenses, a double fine and/or closure of the enterprise for up to 90 days. However, the law does not provide for imprisonment or any larger fines needed to deter piracy.

In addition to the above changes, which invoke the Berne Convention and TRIPS directly, Saudi Arabia should also join the Geneva Phonograms Convention.

Because the Gulf States look to Saudi Arabia for legal reform, changes to the copyright law to make it TRIPS-compatible should be made immediately. The amendments recommended above are straightforward and uncontroversial. In addition, Saudi Arabia, with a growing computer base and information technology industry, must now consider a spate of legislation to deal with issues involving commerce over digital networks. Saudi Arabia should not, in its current round of legislative changes, miss the opportunity to make the few necessary changes in its law to implement the latest WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The WIPO treaties require effective legal remedies against the circumvention of technical measures used by content owners to protect their property from theft and mutilation. This legal framework that permits content owners to provide for the security of their property online is essential for successful electronic commerce.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY¹

The crisis that has gripped enforcement against business software piracy in Korea over the past two years shows little sign of easing. Both administrative enforcement as carried out through the Ministry of Information and Communications (MOIC) and criminal enforcement through prosecutors are hobbled by a complete lack of transparency, refusal to coordinate with the private sector, lack of sustained effort, and disturbing evidence of bias against foreign copyright owners. The current system lacks all deterrent value and must be significantly revamped in order to become effective. The same is true of efforts to promote good software asset management practices in government. Internet-based piracy is a growing problem, especially for the recording industry, in this second largest Asian online market, and the government should mobilize to meet this challenge. The overall enforcement picture is mixed; authorities often do not pay enough attention to widespread and increasingly sophisticated book piracy, and U.S. sound recording copyright owners are largely excluded from the enforcement process; but the government remains responsive and cooperative in fighting videocassette piracy, although there is little concrete evidence that it is making much progress recently. While some of the problems created by the January 2000 amendments to the Computer Program Protection Act (CPPA) have been addressed, this legislation still needs to be strengthened in order to meet world standards, as does the Copyright Act, both with respect to old norms (TRIPS) and new ones (the WIPO Copyright Treaty). Finally, screen quotas remain as an unjustified market access barrier for theatrical exhibition of films. The failure to achieve significant progress on a number of these critical enforcement and law reform issues justifies maintaining South Korea on the Special 301 Priority Watch List for 2001.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	20.0	20%	20.0	20%	20.0	20%	16.0	13%	18.0	15%	17.0	15%
Sound Recordings / Musical Compositions	7.0	23%	10.0	20%	10.0	15%	10.0	15%	6.0	10%	6.0	18%
Business Software Applications ²	102.3	52%	118.9	50%	115.7	64%	274.6	67%	193.2	70%	294.0	76%
Entertainment Software ³	157.0	90%	119.0	63%	122.1	65%	145.8	62%	186.0	65%	173.6	66%
Books	39.0	NA	39.0	NA	35.0	NA	30.0	NA	30.0	NA	25.0	NA
TOTALS	325.3		306.9		302.8		476.4		433.2		515.6	

¹For more details on Korea's Special 301 history, see "History" Appendix to filing.

²BSA loss numbers for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary. Changes from previous years reflect in part changes in methodology, aimed at obtaining a more accurate estimate.

COPYRIGHT PROTECTION FOR BUSINESS SOFTWARE APPLICATIONS IN KOREA: THE CRISIS CONTINUES

As IIPA reported last year, piracy of business software applications remains a serious threat to the ability of the software industry to survive and prosper in the Korean market. The Business Software Alliance (BSA) estimates that piracy inflicted losses totaling \$102.3 million on U.S. companies in 2000. The majority of these losses are due to end-user piracy in businesses, government agencies, and other institutions. Such piracy remains the greatest impediment to the development of the Korean software industry and to Korea's goal of becoming a worldwide software power.

Enforcement: Deficiencies Must be Corrected

Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years. In 1997, Korean law enforcement responded aggressively to business software piracy with raids and prosecutions. By contrast, in 1998, enforcement was extremely disappointing, with far fewer raids, most of them targeted on very small companies of little economic significance. Pursuant to President Kim's March 1999 call for increased efforts against copyright piracy, Korean police and prosecutors stepped up their efforts against corporate end-user pirates during the first half of 1999. Unfortunately, beginning in the middle of 1999, these enforcement actions dropped off precipitously, and enforcement against end-user piracy has never recovered. Perhaps even more troubling is the fact that the enforcement operations of the government agency most directly responsible for enforcing the Computer Program Protection Act against end-users – the Ministry of Information and Communications MOIC – became entirely opaque to the U.S. and Korean software industries, and have remained virtually hidden ever since.

MOIC's enforcement activities since mid-1999 have been flawed in a number of ways that significantly undercut their effectiveness. Some examples:

- First, certain types of software primarily produced by U.S. and other non-Korean companies (e.g., operating systems, design software, and spreadsheets) are deliberately excluded from the inspections carried out by some enforcement teams.
- Second, in a break with past practice in Korea, representatives of the software industry (through the Software Property Council, or SPC), who used to accompany the raiding parties in order to provide technical assistance, are now excluded. Korean officials claim that private sector participation is no longer needed because enough government investigators have now been trained to carry out the raids – or, as MOIC now prefers to call them, “inspections.” However, this policy has eliminated transparency from the enforcement process and raised serious doubts about whether the inspections are really thorough and comprehensive.
- Third, no efforts are made to consult with industry concerning optimal targets for the inspections. Generally, the most promising targets, where industry sources may have gathered some evidence of piracy, are ignored. At the same time, MOIC provides advance notice of inspections to the companies and government institutions concerned, so they have ample opportunity to purge their systems of unauthorized copies of programs, which can then be reinstalled afterwards.

- Fourth, instead of a sustained, continuous enforcement program, MOIC concentrates its efforts in preannounced campaigns of limited duration; this greatly undercuts the deterrent impact of the raids, since pirates know that enforcement efforts are likely to lie dormant for several months. Companies that place orders for legitimate software during enforcement periods withdraw them when the danger of enforcement is past.
- Finally, MOIC refuses to communicate to industry any information about the results of the raids, or even what targets were raided. This lack of transparency makes it extremely difficult for companies to follow up raiding with the formal complaints that are necessary, under the Korean system, to initiate criminal prosecutions, or to file civil actions based on the results of the raids.

The 1999 amendments to the Computer Program Protection Act (CPPA), which took effect July 1, 2000, gave MOIC statutory authority to take administrative enforcement actions against end-user software pirates. IIPA proposed specific provisions for inclusion in implementing regulations to make sure that this new enforcement authority would be exercised in a transparent manner, and that the outcome of inspections would be made available to Korean and U.S. copyright owners so that civil or criminal enforcement actions could be initiated. These proposals were all rejected. The MOIC inspection system remains not only entirely ineffective, but counterproductive. Due to its shortcomings, it generates evidence of microscopic levels of end-user piracy. These do not match up with the reality of widespread infringement within Korean businesses and government, and when Korean officials trumpet them, they undermine their own efforts to promote respect for intellectual property rights.

The software industry's experience with Korean prosecutors has been similarly frustrating. Indeed, virtually all the shortcomings in MOIC enforcement policies identified above apply as well to prosecutors.⁴ In addition, Korean prosecutors are now requiring much stronger evidence of copyright infringement – in effect, conclusive proof -- before they will even investigate corporate end-user software piracy. Since complete proof of infringement is rarely available until after raids have been carried out, this new policy has had the effect of significantly slowing the pace of enforcement action against institutional end-user pirates. While the Korean government claims that nearly 1,500 enforcement actions were carried out for software piracy in 2000, resulting in some 37 arrests, the software industry played no role in any of these cases. Indeed, neither the Business Software Alliance nor its Korean local counterpart group, the SPC, and was even advised of raids that had occurred. This made it impossible for them to file the formal complaints that are the pre-requisite to criminal prosecution under the CPPA. By contrast, to BSA and SPC's knowledge, not one of the hundreds of complaints they filed in 2000 was acted upon by prosecutors until December, 2000, when two significant targets were raided.

In addition, the long-standing shortcomings of the Korean enforcement effort against software piracy have not been satisfactorily addressed. Enforcement continues to be hampered by a lack of transparency in the system, which makes it difficult, for example, to track the outcomes of prosecutions. Penalties that are imposed on pirates are rarely publicized, thus undercutting the deterrent value of the sentence. Indeed, prosecutors actively discourage SPC from publicizing enforcement results. Rightholders and the public will never appreciate the government's commitment to reduce software piracy, and the penalties associated with such piracy, unless Korea's criminal justice system is fundamentally altered to increase transparency substantially. Concerns about the privacy of convicted criminals should not be a barrier to releasing information about judgments.

⁴ The sole exception is that prosecutors do not give advance notice to targets before launching a raid. However, leaks of targeting information from the police have often occurred.

In these circumstances, software industry organizations have been reduced to asking individual police stations to carry out raids, with no real expectation that prosecution or punishment will follow. Some of these raids have produced dramatic evidence of the scope of software piracy in Korea. For example, police actions in the Techno Mart and Yongsan electronics markets in Seoul in October showed that 96 percent of the 390 vendors inspected were illegally loading operating systems on computers they sold, and that 80 percent of them were doing the same with applications programs.⁵ However, these ad hoc enforcement efforts are no substitute for a sustained and coordinated national effort to enforce the CPPA against end-user piracy.

Enforcement also suffers from shortcomings in Korea's civil procedure laws and practices that make it difficult to obtain *ex parte* provisional relief, a key enforcement tool against end-user piracy and one whose availability is required under articles 41 and 50 of the TRIPS Agreement. It typically takes three to seven months to obtain a preliminary injunction in an IPR case in Korea, and *ex parte* injunctions are considered a highly unusual form of relief (in part because the judge actually supervises them in person) and are rarely granted. When it takes months to obtain *ex parte* relief against ongoing end-user piracy, while the pirate can destroy all evidence of that piracy at the touch of a button, the compatibility of the Korean system with the requirements of the TRIPS Agreement is open to serious question.

In short, the Korean enforcement system against end-user piracy needs to be fundamentally revamped. Some of the needed fixes would restore more effective past practices that have been abandoned in the past few years; others would be new. Korean authorities should be urged to resume an active level of inspection and raiding of institutions suspected of end-user piracy; quantitative targets for raiding activity should be set and met. Such enforcement should be given high priority, and adequate resources should be devoted to the campaign. Enforcement should take place year round, rather than sporadically or seasonally, as has been the case over the past several years; if a special enforcement period is declared, it should have no set expiration date. Raiding should be based on targeting information supplied by industry investigators. No institution, including government entities and Korea's powerful *chaebols*, should be immune from raids, and advance notice must not be provided. Enforcement officials should resume allowing industry representatives to accompany law enforcement on the raids, or else should provide complete reports to representatives of rightholders immediately after raids are completed. If the requirement of a formal complaint for a criminal prosecution is not abolished, then the threshold level of evidence needed to file such a complaint should be specified as "reasonable suspicion." The prosecutorial and judicial process following the raid must also be made more transparent, with information on case status, disposition, imprisonment and fine payment all readily available.

While structural and statutory changes, outlined below, are also needed to the CPPA and its implementing regulations, the menu summarized above, if adopted, would represent a significant improvement in the deficient enforcement policies that Korea currently employs. A consistently higher level of enforcement, targeted against economically significant players, is needed if Korea is to make headway against its persistent end-user software piracy problem, and thereby increase tax revenue, promote investment and technology transfer and, most important, improve the prospects for its struggling domestic software industry, which piracy has driven to the brink of extinction.

⁵ "Software Piracy Costs Developers 2 Billion Won," Korea Herald, November 22, 2000.

The CPPA Must Be Strengthened to Meet Global Standards

In last year's Special 301 filing, IIPA summarized the serious problems with the amendments to the CPPA that were enacted by Korea's National Assembly and signed into law in January 2000, without any public debate or meaningful opportunity for industry input. After extensive dialogue with Korean government officials, some of these problems were ameliorated through implementing regulations that took effect in July 2000. Others appear to have been at least partially corrected in legislation that was approved by the National Assembly on December 15, 2000 and that will come into force on July 17, 2001. However, a number of other serious shortcomings in the CPPA remain to be addressed.

First, the January 2000 amendments created a broad new exception to copyright protection for computer programs, allowing programs to be copied without authorization when "necessary" for "the verification, analysis, research and education of the program algorithm or other particular elements." In effect, these amendments gave Korean law one of the most sweeping decompilation exceptions of any copyright law in the world, one that was not limited to reproductions that are needed in order to achieve interoperability. Fortunately, between the implementing regulations and the new set of amendments, the limited scope of this exception was somewhat clarified. However, the stated goal of the Korean government – to fashion a regime of exclusive rights and exceptions regarding computer programs that is within the mainstream of world intellectual property law trends, as exemplified by the European Union's computer programs directive – has not yet been achieved.

The most significant gap is Korea's continued failure to provide specifically for the copyright owner's control over temporary copying of a computer program, an increasingly common mode of commercial exploitation of these copyrighted works. Unless the copyright owner's right to control the making of these temporary copies is clearly spelled out, the economic value of the copyright in a computer program will be sharply diminished. Additionally, temporary copying must be included within the scope of the exclusive reproduction right in order to bring the CPPA in line with Article 4(a) of the EU Directive, as well as with the requirements of Article 9.1 of the Berne Convention (incorporated into the TRIPS Agreement). Korea should be urged to plug this gaping loophole in the CPPA as promptly as possible.

The second main area of concern with the new CPPA amendments was their treatment of circumvention of technological protection measures (TPMs), such as encryption, that are applied to computer programs. While it is commendable that Korea has sought to implement this aspect of the WIPO Copyright Treaty with respect to computer programs (it has not yet even proposed to do so with respect to other kinds of copyrighted works), this particular implementation raised many questions. Once again, the amendments approved by the National Assembly in December 2000 have resolved some of these, but others remain. Korea should be encouraged to make the following changes to the TPM provisions of the CPPA, as well as to extend similar protections (with these changes) to all other copyrighted works:

- The provision should specifically apply to TPMs that control access to a computer program;
- The exception that allows circumvention for the purpose of "revising or updating" a program must be eliminated, and the scope of the exception for encryption research activities (newly introduced in the December 2000 amendments) should be narrowed to require, among other things, a good faith attempt to obtain the authorization of the copyright owner;
- The provision should specifically outlaw the offering of services that circumvent a TPM;

- Civil enforcement of the prohibition should be explicitly provided for.

Finally, the CPPA requires a number of other amendments in order to bring Korea into full compliance with its TRIPS obligation and otherwise to facilitate effective enforcement against software piracy. These issues, none of which were addressed in the most recent set of amendments, should be given expeditious and favorable consideration:

- Elimination or relaxation of the formal criminal complaint requirement (i.e., piracy should be treated as a “public offense”);
- Preset statutory damages for infringement, at a level sufficient to provide an effective deterrent, should be available at the option of the rightholder;
- Criminal penalties should be increased to fully deterrent levels;
- Expedited provisional remedies to prevent infringement or to preserve evidence should be made available on an *ex parte* basis;
- Administrative enforcement by MOIC should be made transparent;
- The requirement for registration of exclusive licenses should be eliminated.

Government Software Asset Management

It is critically important that the Korean government act as a role model for the private sector in terms of the importance of using only authorized copies of software and the adoption of proper software asset management practices. Although the government has taken steps in this regard, much remains to be done. The announcement by the Ministry of Information and Communication in mid-1999 that it would inspect the software usage in government departments, agencies and government-owned companies was welcomed by the entire software industry in Korea. However, the industry was disappointed when it learned that the government would not reveal which entities were inspected, the extent of the illegal software usage discovered, or the steps that would be taken to legalize underlicensed entities. This has necessarily called into question the thoroughness of the inspections and the incredible claims that piracy has been brought down to about four percent in these entities. While the stated government policies on use of legal software are welcome, they mean nothing unless enforced and carried out in a transparent manner. The Korean government should set up an internal monitoring system; make the procurement process far more transparent; and extend the ban on use of unauthorized software to government contractors, as has been done in the United States. In addition, software asset management practices adopted by the government should be made public and, wherever possible, included on government entities’ Websites. MOIC has thus far spurned SPC’s offer to provide agencies with training in software asset management; it should accept this offer. The government can and must act as a leader in the adoption of software asset management practices throughout Korean society.

THE INTERNET PRESENTS A NEW CHALLENGE IN FIGHTING PIRACY

Korea is the second biggest Internet market in all of Asia, with some 16 million Koreans online. It is not surprising, therefore, that the use of the Internet to disseminate copyrighted materials is more advanced in Korea than in many other markets. Unfortunately, the increase in legitimate ecommerce in copyrighted materials in Korea has been more than matched by a burgeoning level of Internet-based piracy, which Korean law and enforcement practices are not well situated to combat. Technological advances are increasing the opportunities for piracy, and pirates are taking advantage of them.

A remarkable number of Internet sites hosted in Korea are engaged in the unauthorized distribution of sound recordings in the MP3 format without the authorization of the record producer. Many of the sites that make infringing MP3 recordings available for download are for-profit businesses which either charge users for downloading or are supported by advertising on the site. Many of the customers for these sites are college students, and IFPI has even discovered a number of sites located on the servers of Korean colleges. Internet-based music piracy can be expected to worsen unless the government devotes more attention to enforcement actions in the online environment, as well as to the education of network users in respect for intellectual property.

Korea must also strengthen its legal protections against Internet piracy. For example, although recent legislation gives owners of copyright the exclusive right to control the making available of their works online (through the new “right of transmission”), the same level of control is denied to the producers of sound recordings. This inequity must be corrected as rapidly as possible if the legitimate market for digital delivery of sound recordings is to have a chance of holding its own against surging level of Internet piracy.

A particularly troubling question involves the responsibility of Korea’s 60 or so Internet Service Providers (ISPs) to cooperate with rightholders to detect and deal with piracy online. The few court decisions that have touched on this question so far are disturbing. In one, the Seoul district court enjoined an ISP from disabling access to MP3 files identified by the rightholder as infringing, ruling that such a “takedown” breached the contract between the ISP and its customers. By discouraging ISPs from taking down sites even if they know them to be infringing, this ruling sends exactly the wrong signal about Korea’s commitment to the healthy growth of e-commerce in copyrighted materials. Korea’s government should move promptly to take whatever steps are needed to clarify an ISP’s legal responsibilities and to provide the proper incentives for cooperation in anti-piracy efforts. It should also clarify that the act of uploading copyrighted materials to an Internet site without authorization constitutes infringement. Such moves would demonstrate a commitment by the Korean government to fighting Internet-based piracy.

COPYRIGHT ENFORCEMENT: A MIXED PICTURE

Apart from the problems experienced by the business software sector and the shortcomings regarding Internet enforcement, the rest of the enforcement picture for U.S. copyright industries in Korea is decidedly mixed.

Book Piracy: Enforcement Still Does Not Measure Up to the Problem

The situation faced by U.S. book publishers continues to deteriorate, as we have reported for the past few years. The losses to U.S. publishers inflicted by book piracy in the Korean market in 2000 are estimated at \$39 million, unchanged from 1999 but a 56% increase from 1995. In only two other Pacific Rim countries (the Philippines and China) do publishers report greater losses.

One alarming new trend involves the appearance in the market of unusually high quality counterfeit copies of trade (i.e., mass market) U.S. books. Increasingly, book publishers must call in forensic experts to perform technical analyses on ink and paper in order to demonstrate the pirate character of these books. In this context, the rule invalidating any formal complaint filed

more than six months after sale of the pirate product presents a significant obstacle to criminal enforcement, since the results of the forensic analysis need to be included to meet the standards for a formal complaint, and these studies take time to complete.

This growing incidence of trade book piracy adds to the chronic problem of unauthorized mass photocopying and binding of college textbooks, which sharply reduces legitimate sales by U.S. publishers in Korea. There are more than 30 universities in Seoul, concentrated into three main areas. Around the start of the academic terms (i.e., March and September), when students acquire their course materials, these areas become hotbeds of piracy. Photocopies are made in photocopy shops, and in some cases in vans which station themselves around campuses. Sometimes the copier builds up stocks of infringing copies; others make them only to order. The universities take no steps to prevent these piratical activities, nor does the Ministry of Education. During 2000, publishers found evidence that these pirate textbooks were being sold, not only on Korean college campuses, but also on U.S. military bases in Korea, to service members and their families. In addition, pirated editions of other U.S. books -- especially reference books and encyclopedias, and scientific, technical and medical works -- appear in shops in the Seoul area within a few months of their authorized publication. The problem is worse outside Seoul. Unauthorized translation of U.S. works also remains a serious problem.

The response of Korean enforcement authorities to this resurgent piracy problem leaves much to be desired. Piracy is carried out by a decentralized network of small, independent shops which do not make attractive enforcement targets. Stocks of pirate copies are generally low, since books are often copied to order. When a raid turns up few pirate copies at these shops, authorities tend to treat the infraction as minor. Enforcement scarcely occurs outside the Seoul area.

Even when book pirates are arrested, prosecuted, and convicted, the Korean judicial system is all too often unable to deliver deterrent sentencing. Jail terms are routinely suspended, and no effort is made to supervise the activities of convicted defendants. Thus, even if a pirate who receives a suspended sentence commits another piracy offense, this does not cause the earlier jail term to take effect. Korea's courts also lack any system for identifying repeat offenders, so pirates can expect to receive repeated suspended sentences for multiple crimes. These problems make it all the more newsworthy when, as in June 2000, a convicted book pirate was actually sentenced to a one-year prison term, which he is reportedly serving. This case involved three weeks of surveillance and a raid that confiscated twelve tons of pirate books from four different warehouses. While it is far from clear that this sentence will be sufficient to deter other pirates, it is the heaviest penalty handed down in a book piracy case in recent years. If it is followed by similar sentences in future cases, and if these results are widely publicized by the government, the likelihood of deterrence will certainly increase.

In short, Korean authorities -- including police, prosecutors, and judges -- too often fail to take book piracy seriously as a commercial crime. U.S. publishers are likely to suffer increasing losses until this attitude is changed. In addition, the education ministry and other agencies must take a proactive role in discouraging book piracy within the educational institutions for which they are responsible. Enforcement efforts must be stepped up, and deterrent penalties imposed, if further deterioration of the Korean book market is to be avoided.

Music Piracy: Fairness and Transparency in Enforcement Are Needed

Enforcement against music piracy in Korea is hampered chiefly by three problems. First, U.S. and other foreign record producers are largely excluded from participating effectively in the enforcement process. The Ministry of Culture recognizes only one industry association as authorized to assist in raids and seizures, and this grouping is limited to Korean recording companies. U.S. and multinational producers must work on their own with individual prosecutors' offices in order to obtain raids and seizures or to give their targeting advice. This discriminatory treatment of foreign rightholders is inconsistent with TRIPS and must end.

Second, as with most other copyright industries, recording companies find the Korean prosecutorial and court systems extremely opaque. It is very difficult to learn the status of an investigation. There were over 200 raids against music pirates during 2000, but only 26 indictments; it is nearly impossible to find out why nearly 90% of the cases did not make it to court. Rightholders are virtually never advised of court dates in these cases, and only with difficulty can they learn of the outcome of a prosecution.

Finally, based on the evidence that the recording industry has been able to accumulate, sentencing practices fall far short of deterrent levels. The average fine imposed on pirate music retailers in criminal cases was less than US\$1000, and it does not appear that any of them were sentenced to jail. Under these circumstances, even though official Korean government statistics indicate that there have been a high number of raids, it is not surprising that there has been little concrete progress against music piracy of international repertoire in the Korean market. The estimated rate of piracy increased from 20% in 1999 to 23% in 2000, with estimated trade losses totaling \$7 million.⁶

Video Piracy: Sustained Enforcement, but Persistent Piracy

Video piracy in Korea remains at the relatively elevated level noted in last year's submission. Overall, annual losses to the U.S. motion picture industry due to piracy in South Korea during 2000 are estimated at \$20 million, reflecting a video piracy level of 20%.

Unlike most other Asian markets, the home video medium of choice in Korea remains the VHS videocassette, and this is the locus of video piracy in the country. High-quality unauthorized VHS copies of U.S. motion pictures appear on the market within days after the legitimate video release of the titles in Korea. The producers of pirate product seem to have broken up the huge underground video labs detected in 1999 into smaller units, consisting of only 25-40 linked VCRs, which are harder to detect and represent a smaller risk for the pirate manufacturer. Much of the pirate product from these labs takes the form of well produced counterfeits, which vie for retail shelf space with the legitimate product. Other pirate production is distributed through less conventional means, notably door-to-door sales of English language "educational packages." Sales of pirate product through all distribution channels have increased.

Korean authorities continue their aggressive enforcement of the laws against video piracy. Police and prosecutors react quickly to complaints from MPA, and Korean courts generally issue appropriate sentences for video piracy offenses. Imprisonment is not uncommon

⁶ The decrease in estimated losses from \$10 million in 1999 is due in part to a drop in the unit price of pirate CDs.

for recidivists, distributors and manufacturers. MPA has encountered little delay in the judicial process and there is no appreciable backlog in the court system.

None of this has succeeded in reducing the volume of pirate product in the market over the past few years. The increased sophistication of pirate production facilities, and the more advanced packaging and distribution techniques now in use, strongly suggest a growing role of organized criminal elements in the video piracy trade. Korean authorities must respond to this trend. Intensified enforcement activity, including an increased intelligence component to track resale of duplicating equipment, will be needed to cope with the increased level of video piracy now being encountered. More aggressive use of the police's seizure powers — for example, to confiscate the vehicles used in the door-to-door distribution of pirate videos under the guise of English language education — has been helpful, and should be continued. And more enforcement resources must be devoted to pirate audiovisual products in the optical disc formats (VCDs and DVDs), which are beginning to appear nationwide in night markets, computer outlets and retail stores. While the volume of this piracy is low at present, authorities should be vigilant to ensure that it does not grow into a major problem, as has occurred in other Asian countries.

The U.S. motion picture industry continues to encounter some problems in enforcement of "Home Use Only" video product licenses. There are frequent free showings of "Home Use Only" videos of U.S. titles in government-run community centers and universities, which severely undercuts the ability to distribute these videos through commercial channels. Draft amendments to Korea's copyright law would have tightened up somewhat on an exception to protection that is sometimes relied upon to justify these unauthorized public performances; unfortunately, that provision did not survive the legislative process and the law remains unchanged. Korean authorities should revisit these issues and take into account the complaints of industry executives to ensure that these uncompensated public performances of copyrighted audiovisual materials do not unreasonably conflict with normal commercial exploitation of these works.

The Korean Ministry of Culture and Tourism monitors a very successful system of import title screening. As a result, the former practice of submitting authentic-looking documentation to support fraudulent registration and importation of MPA member company titles has all but disappeared. However, independent film studios have sometimes found it difficult to obtain deregistration of a title whose Korean distributor has defaulted on its license obligations. This delay in deregistration allows the defaulting distributor to continue to profit, while obstructing the producer's efforts to arrange for distribution through other channels.

MARKET ACCESS: SCREEN QUOTAS SHOULD BE PHASED OUT

For many years, the U.S. motion picture industry has been frustrated by a substantial legal barrier to the theatrical exhibition market in Korea. Under Article 19 of the Motion Picture Promotion Implementing Decree, cinemas are required to show Korean films 146 days per year on each screen, which amounts to 40% of the time. While this screen quota can be lowered to 126 days if cinemas exhibit local films during four specified holiday periods, or under other circumstances if determined by the Ministry of Culture, even at this lower level the quota is an unjustified market entry obstacle which also discourages investment in modernization of Korea's screening facilities. It should be phased out quickly.

When this issue was under active negotiation as part of the US-Korea BIT negotiations, the Korean side indicated that it anticipated reducing the quotas as soon as the Korean film industry started to recover from its deep slump. That recovery is in full swing; Korean titles are doing well at the box office and have a fast-growing share of the Korean theatrical market. The time to begin sharply reducing the screen quota is now, so that U.S. motion picture producers will begin to enjoy fairer and more equitable market access in Korea.

COPYRIGHT LAW AMENDMENTS CREATE NEW TRIPS PROBLEMS AND FAIL TO ADDRESS OLD ONES

Library Exception

New amendments to Korea's Copyright Act took effect on July 1, 2000. They include an extremely problematic provision that dramatically expands the scope of exceptions pertaining to libraries and similar institutions.

Article 28(1) allows libraries and similar institutions to digitize entire works or sound recordings without permission, and to give copies to patrons who may remove them from the premises. Even worse, Article 28(2) allows libraries and similar institutions to transmit the works they have digitized over networks, not only within their own premises, but also over interlibrary networks. Furthermore, a proviso in the 1999 draft amendments which forbade the use of such a transmitted copy outside the library (thus preventing libraries from carrying out unauthorized dissemination of protected materials by linking their internal networks to the Internet or other extramural networks) was dropped in the final text as enacted. These extraordinary exceptions for unauthorized digitization and networked distribution by libraries apply without regard to whether digitized copies, or licenses for networked distribution, are available in the legitimate commercial marketplace. The exceptions also remain in force regardless of the impact of unauthorized digitization and networked distribution on the "normal exploitation" of the protected subject matter. With the expansion of the exception to cover interlibrary digital networks, an intolerable impact is highly likely. Such a sweeping exception cannot satisfy the well established international standards governing exceptions or limitations on protection, contained in Berne Article 9(2) and TRIPS Article 13.

Korea had an opportunity to narrow the broad scope of this new exception in the implementing regulations which were prepared in early 2000 and which took effect on July 1, but it did not take full advantage of this chance to conform its law to international standards. Under the implementing regulations as adopted, the new exception for unauthorized digitization of works applies only to "national libraries" (we understand that about 50 public libraries throughout Korea meet this definition) and four named libraries that are specified in other statutes. However, the Ministry of Culture and Tourism apparently ignored suggestions, not only from IIPA but also from the Korean publishing association, for further narrowing interpretations, including: a) specifying more clearly the technical measures that libraries must implement in order to take advantage of the new exceptions, and requiring such implementation to be certified by the Ministry; (b) clarifying that Article 28(2) applies only to copies of works that are already in a library's collection and that are not otherwise available in digital formats; and (c) excluding all transmissions outside a library's premises, including transmissions to another library, from the scope of the exception. Until the statute or the implementing regulation is revised to incorporate such limitations, the amended Article 28 is vulnerable to attack as inconsistent with TRIPS. The implementation of the new legislation must be closely monitored.

Protection of Existing Older Works (Retroactivity)

The copyright law amendments also did nothing to cure a clear and long-standing discrepancy between Korean law and the requirements of the TRIPS Agreement. South Korea remains in violation of its TRIPS obligations with regard to protection of pre-existing works and sound recordings (Berne Article 18 and TRIPS Article 14.6). These international standards require that existing works and sound recordings not previously protected in a WTO member country must be protected retroactively for the full term of protection (50 years, or life plus 50 years) if the work or sound recording has not fallen into the public domain in the country of origin through the expiration of the term of protection. In the Uruguay Round Agreements Act, the U.S. extended full protection to foreign works and sound recordings that fell into this class. South Korea has not properly done so, however.

Under the 1995 amendments to Korea's Copyright Act, sound recordings and works whose term is measured from publication are only protected back to 1957, rather than back to 1950, as would now be required in order to afford all affected works a full Berne/TRIPS term of protection. For other works whose term is measured by the life of the author, foreign works whose authors died before 1957 will remain totally unprotected in South Korea. South Korea's transition rules also fail to comply with TRIPS. For example, producers of pre-1995 derivative works (e.g., translations) of newly protected foreign works were allowed to reproduce and sell those works until the end of 1999 without paying any compensation to the owner of the restored work. This is incompatible with the transition rules contained in Article 18(3) of Berne, which would permit continued exploitation but only on payment of compensation to the rightholder.⁷ (It is noteworthy that even though this TRIPS-violative transition period has now expired, there do not appear to have been any cases in which any compensation has been paid to a U.S. copyright owner for continued exploitation of an unauthorized translation prepared before 1995; nor is there any clearly prescribed submission for doing so.)

South Korea's position with regard to protection of pre-existing works and sound recordings is virtually indistinguishable from the position taken by Japan with respect to pre-1971 sound recordings, up until the time that the U.S. (later seconded by the European Union) invoked the WTO dispute settlement process to challenge this clear violation of Japan's TRIPS obligations. Japan ultimately amended its law to come into full compliance with TRIPS. South Korea should do the same, by providing a full term of protection to works and sound recordings dating from 1950 or later, and works by authors who died in 1950 or thereafter, as the case may be.

It is crucial to note here that South Korea is already under a separate, bilateral obligation, stemming from the 1986 U.S.-South Korea "Record of Understanding," to vigorously protect pre-existing sound recordings and audiovisual works against piracy, even if they remain unprotected under the copyright law due to inadequate fulfillment of South Korea's obligations under Article 18 of Berne and Articles 9 and 14.6 of TRIPS. Since this bilateral agreement entered into force, South Korea has fulfilled this obligation under laws other than copyright (currently, the Audio and Video Works Act, or AVWA), and the administrative guidance issued thereunder. Any

⁷South Korea's full TRIPS compliance could also be questioned with regard to enforcement procedures and deterrent penalties (TRIPS Part III, specifically Articles 41, 44, 49, 50 and 61), some of which are noted in the text of this report (e.g., inadequate damages to constitute a "deterrent to further infringements" (TRIPS Article 41.1); judicial authorities do not in practice order prompt and effective provisional measures, including measures *ex parte* (TRIPS Article 50); lack of transparency in tracking criminal prosecutions (TRIPS Articles 41.3 and 61); failure to apply criminal penalties for copyright piracy on a commercial scale by refusing to treat software piracy as a "public offense" (TRIPS Article 61); etc.).

move to dismantle this essential element of the South Korean antipiracy apparatus must be swiftly and forcefully opposed by the U.S.

WIPO Treaties Implementation

Korea has already taken some steps to implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), as befits a technologically advanced nation seeking to participate more actively in global electronic commerce. Significant obligations under those treaties remain unimplemented in Korean law, however, and, as noted above, the recent attempt to implement (in the CPPA) the WCT requirements regarding noncircumvention of technological measures used to control access to and use of computer programs fell short of the mark. Korea should be encouraged to dedicate itself to completing the task of implementation of the WCT and WPPT during 2001, and to depositing its instrument of accession to both treaties with WIPO this year.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY¹

IIPA recommends that Taiwan be elevated to the Special 301 Priority Watch List due to the failure to enact and effectively implement comprehensive regulations to control and curtail the illegal manufacture of optical media goods in Taiwan, and the failure of the Taiwan government authorities to shut down known commercial pirates and curtail growing online piracy. For the third straight year, trade losses to the U.S. copyright industries due to piracy grew enormously in 2000, to an estimated \$557.1 million. Piracy rates for most of the copyright industries increased or remained too high.

Despite commendable raiding and seizing of large quantities of pirated product, followed by indictments and several convictions of pirate distributors, these efforts obviously did not have a deterrent effect in 2000, as Taiwan became one of the world's worst pirate exporters of optical media. Worsening developments in 2000 included: the continuation of domestic overproduction of optical media products, including the pirate manufacture of all kinds of CDs and CD-Rs, including audio CDs, VCDs and even DVDs; the failure to enact and enforce adequate laws or regulations controlling optical media plants, including the machinery and the raw materials used to produce pirate copies; the failure of Taiwan authorities to shut down known commercial pirates, including optical media pirates; and the troubling rise of Internet piracy. The Taiwan government should be commended for considering draft amendments to the copyright law intended to implement the WIPO "Internet" treaties; however, the draft fails in crucial respects to meet the standards of the treaties or otherwise to comply with international standards, so Taiwan authorities must revise the draft to ensure that it properly implements the treaties and meets well-established international norms.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 – 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	30%	20.0	20%	15.0	10%	15.0	10%	17.0	10%	29.0	15%
Sound Recordings / Musical Compositions	60.5	40%	60.0	35% ²	55.0	20%	10.0	12%	8.0	8%	5.0	13%
Business Software Applications* ³	127.3	53%	97.6	54%	112.1	59%	104.6	63%	111.7	72%	115.2	70%
Entertainment Software* ⁴	319.3	90%	115.7	68%	103.2	65%	102.6	65%	109.0	69%	105.4	69%
Books	20.0	NA	21.0	NA	19.0	NA	5.0	NA	5.0	NA	6.0	NA
TOTALS	557.1		314.3		304.3		237.2		250.7		260.6	

¹ For more details on Taiwan's Special 301 history, see IIPA's "History" Appendix to filing.

² The recording industry initially reported 25% piracy levels for 1999; this number was adjusted and reported above.

³ BSA loss numbers for 2000 are preliminary.

⁴ IDSA estimates for 2000 are preliminary.

SELECTED ENFORCEMENT STATISTICS IN TAIWAN

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 1999			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	TOTALS
Number of Raids conducted	430	96	526
Number of cases commenced	53	46	99
Number of defendants convicted (including guilty pleas)	25	48	73
Acquittals and Dismissals	4	14	18
Number of Cases Pending	24	49	73
Total number of cases resulting in jail time	24	46	70
Suspended Prison Terms	10	41	51
Maximum 6 months	0	0	0
Over 6 months	2	0	2
Over 1 year	8	41	49
Total Suspended Prison Terms	150 months	804months	
Prison Terms Served (not suspended)	14	7	21
Maximum 6 months	4	2	6
Over 6 months	3	2	5
Over 1 year	7	3	10
Other Penalty Assessed (not suspended)	1 ⁵		1
Total Prison Terms Served (not suspended)	209 months		
Number of cases resulting in criminal fines	8	5	13
Up to \$1,000	1	0	1
\$1,000 to \$5,000	5	0	5
Over \$5,000	2	5	7
Total amount of fines levied (in US \$)	39,696	292,332	332,028

⁵ One case was brought in 1999 against a juvenile offender, involving piracy against motion picture titles. The offender was convicted, but since he was a juvenile, he received as punishment a reprimand and accepted reformatory education by probation officers until the age of 20.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS					
2000					
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	BOOKS	TOTALS
Number of Raids conducted	283	144	1460	NA	1887
Number of cases commenced	150	39	1343	NA	1532
Number of defendants convicted (including guilty pleas)	69	10	746	1	826
Ratio of convictions to the number of raids conducted	NA	NA	51.1%	NA	NA
Ratio of convictions to the number of indictments	NA	NA	80.7%	NA	NA
Acquittals and Dismissals	4	7	NA	NA	11
Number of Cases Pending	77	42	NA	NA	119
Total number of cases resulting in jail time	57	9	403	1	470
Suspended Prison Terms	18	6	NA	NA	24
Maximum 6 months	3	0	NA	NA	3
Over 6 months	4	0	219 ⁶	NA	223
Over 1 year	11	6	184	NA	201
Total Suspended Prison Terms (in months)	226	216	403	NA	845
Prison Terms Served (not suspended)	39	3	NA	NA	42
Maximum 6 months	7	0	NA	NA	7
Over 6 months	3	3	NA	NA	6
Over 1 year	29	0	NA	NA	29
Other Penalty Assessed (not suspended)	12 ⁷	NA	NA	NA	12
Total Prison Terms Served (not suspended) (in months)	291	NA	NA	NA	291
Number of cases resulting in criminal fines	6	6	25	NA	37
Up to \$1,000	1	0	5	NA	6
\$1,000 to \$5,000	4	1	20	NA	25
Over \$5,000	1	5	NA	NA	6
Total amount of fines levied (in US \$)	23,030	446,667	49,906	NA	519,603

COPYRIGHT PIRACY TRENDS AND ENFORCEMENT EFFORTS

Over-Capacity of Pirate Optical Media Production in Taiwan Threatens the Global Market

As reported last year, a growing number of optical media plants in Taiwan now engage in the unauthorized manufacture of optical media products. Most recently, the evidence points to the existence of illegal CD, CD-ROM, console-based videogame (on CD), DVD and VCD manufacture in Taiwan, both in finished products (DVD/VCD) and production facilities (DVD and VCD

⁶ These suspended sentences range in time from one to twelve months, but most were over six months.

⁷ Twelve cases were brought in 2000 against juvenile offenders, involving piracy against motion picture titles. The offenders were all convicted, but since they were juveniles, they received as punishment reprimands and accepted reformatory education by probation officers until the age of 20.

production lines), for domestic consumption as well as for export to other Asian countries such as mainland China, the Philippines and Macau. Two cases related to finished products were detected by Taiwan authorities in September and December 1999 and three cases related to optical disc production lines were detected by mainland Chinese authorities in July, October and November 2000. According to statistics from the Taiwan government, there are now 62 registered optical disc factories in Taiwan (although IIPA knows of three further unregistered plants, and reports indicate that several of those may have ceased operations as of January 2001, possibly bringing the actual number in operation into the 50s). 21 factories have DVD replication facilities. The government also continues to claim that except for CD-R factories, all registered factories in Taiwan carry SID codes on their discs; however, this is inconsistent with the copyright industries' investigations, which indicate that there are at least two registered factories (Li Chuan Optical Disc and Taiwan Disc) that did not have SID codes embossed on their products. In addition to those two registered plants that do not use SID code, IIPA knows of at least four unregistered optical media production facilities that produce copies without SID codes on them.

With respect to VCD/CD/CD-R figures, as noted above, there are at most, 65 registered and underground optical disc factories in operation as of February 2001, with 307 replication lines including 99 DVD lines and 208 VCD/CD lines. Total production capacity of the plants (not including the CD-R capacity) is an astounding 1.854 billion discs per annum, dwarfing any possible legitimate domestic demand (only about 40 million units) for Taiwan's 22 million people. This overwhelming over-capacity for optical media production help drive ever-increasing piracy rates. While for some industries these rates are still low by regional standards, they threaten to return Taiwan to its notorious past as a piracy haven. Console-based videogame piracy levels now stand at greater than 90% across the board (for some platforms, 95%). Piracy levels have risen for most other industry sectors, including video piracy (from 20% in 1999 to 30% in 2000).

It is particularly troubling that so much optical media piracy produced in Taiwan is destined for export. Taiwan is now arguably the world's worst exporter of pirate optical media goods. Taiwan was number one in the value of media seizures by U.S. Customs at the borders in 1999, and continued to rank high in 2000.⁸ Other anecdotes demonstrating this phenomenon are raids of domestic production plants (for example, ten of eighteen raids against optical disc factories uncovered pirate DVD/VCD production), seizures by Taiwan Customs, and seizures in far-away places of Taiwan-made pirate product. Through the end of December 2000, at least 1.5 million, mostly, console-based video game software, had been seized, while motion picture industry representatives, in conducting 283 raids on optical disc piracy and production facilities, had seized 40,227 pirated DVDs (higher than the government-reported number of 27,218) and 79,587 pirated VCDs. The Taiwan government has reported the seizure of 163,375 music CDs, 50,865 CD-ROMs containing business software, 1,426 CDs containing MP3 piracy, 64,451 game cartridges and 51,843 music cassettes. The Taiwan government is proud of its achievement in devoting the limited resources it has to date to obtain these seizures, but these seizure statistics indicate that piracy is out of control in Taiwan, requiring much more effort to achieve deterrence in the market, both as to pirate production and distribution.

In addition to large-scale pirate optical media production, CD-R (recordable) production now dwarfs legitimate domestic demand. Compilations of MP3 audio files, computer programs, console-based games, etc. flood the domestic market in Taiwan. Pirate optical media production continues to decimate legitimate markets in Taiwan and destroy legitimate markets in other regions around the world.

⁸ The category of "media" as defined by U.S. Customs includes motion pictures on tape, laser disc, VC and DVD, interactive and computer software on CD-ROM, CD-R, and/or floppy disc; and music on CD or tape.

Taiwan Must Enact and Enforce Adequate Laws and/or Regulations Controlling Optical Media Plants, Equipment and Raw Materials

The problem of export pirate optical media production and export demands a comprehensive solution. Taiwan must put into place effective measures to defeat optical media piracy by enacting and implementing regulations to control optical media plants, equipment and raw materials. Such comprehensive regulations will not only provide the needed tools, but, if implemented correctly, should permit Taiwan to tackle the problem while preserving precious governmental resources to devote to other problems with the copyright system.⁹ The regulations must include a licensing system to provide transparency in the movement of optical media manufacturing equipment, raw materials used in the manufacture of pirate CDs, pirate masters, and stampers. Once the regulations are in place, authorities need the power to enforce them, including by verifying copyright authorization for production runs, and inspecting to ensure that the Commodity Labeling Law's (CLL) provision mandating use of SID code is being complied with (similar to the Optical Disc Factory Inspection Unit in the Intellectual Property Investigation Bureau of Hong Kong Customs).¹⁰ Comprehensive regulations would permit authorities to perform surprise raids on unauthorized, unlicensed, or otherwise non-compliant plants, to seize non-compliant equipment and raw materials, as well as the output of those machines, and to shut down for good those plants that do not comply with the license provisions. Rather than devote enormous and precious resources to enforcement, a comprehensive set of optical media regulations would actually free up resources to fight piracy in other ways.

IIPA noted in last year's report that many plant-owners in Taiwan signed a voluntary "pledge" in February 1999, promising not to engage in piracy or take orders from known pirates. However, this voluntary pledge only had little effect, and has been ignored by at least three of the plants that signed it (Friendly CD Tek – raided on January 27, 2000; Nine Friends – raided in November 1999; and Digi Gold, the raid against which is discussed below).

The Failure of Taiwan Authorities to Use the Copyright Law (or Other Laws or Regulations) to Shut Down Known Commercial Pirates Immediately

It is inexplicable that Taiwan authorities have not demonstrated the will to raid all known commercial pirates immediately, seizing all pirated copies, as well as materials and implements used in the production of piracy. Examples abound, including the disturbing multiple raids against the same optical media plant (Digi Gold)¹¹ during 2000, with the cooperation of three different police groups. The Digi Gold raids each initially resulted in seizures of pirated copies and the sealing of optical media equipment (after the first two raids), but yielded no follow-up actions (such as prosecutions). Most alarmingly, the plant re-opened for massive pirate production within days of

⁹ It also remains critically important that the Taiwan government retain its system to verify copyright authorization/SID code for the export of VCDs and DVDs, even if Taiwan does adopt comprehensive optical disc legislation.

¹⁰ The Commodity Inspection Law (CIL) authorizes officers from the Bureau of Commodity Inspection and Quarantine (BCIQ) to inspect plants for compliance with the Commodity Labeling Law (CLL). However, many optical discs with or without falsified SID codes were found in the market throughout the year. According to IFPI's figures, at least 650,000 pieces of Taiwan-made pirated optical discs were seized from the local market.

¹¹ Digi Gold, is one of the few optical disc manufacturers in Taiwan that has the full range of production capabilities, from mastering to replication to printing. It has a daily production capacity of 30 DVD/VCD stampers, 60,000 VCDs and 30,000 DVDs. It is estimated that the annual production of the plant running at full capacity would be 10,800 DVD/VCD stampers, 21.6 million VCDs and 10.8 million DVDs.

each raid (including the wanton removal of the seals).¹² No charges of infringement have been filed; the factory manager has only been charged with removal of the seal (a penalty which carries a maximum fine of NT\$90,000 (approximately US\$2,750) or a jail term of not more than one year). In addition, while the law permits the authorities to seize and destroy (or render unfit for use) the equipment, they have failed to do so, claiming they have no storage facility, and claiming (without foundation) that they could be held liable if the seizure does not lead to a conviction.

The Taiwan government's response to complaints about the handling of this case has been unacceptable. The Intellectual Property Office (IPO) has indicated that the Digi Gold case is under scrutiny through an inter-agency process, and Taiwan Judicial branch representatives have also promised to pay special attention to the case. Officials have also reportedly said that the Digi Gold case is "unique", complicated by the fact that the police "do not know how to seal optical production machinery." In fact, the Digi Gold case is not unique and the problem of commercial piracy in Taiwan will not be solved by isolating the case or subjecting it to special scrutiny. Rather, the problem in the Digi Gold case is symptomatic of a systemic failure in Taiwan to enforce against optical media piracy.¹³ The very failure of enforcement authorities to quickly dispose of the Digi Gold case (without the need for inter-agency scrutiny, special attention, or special training of police in "sealing" techniques) is a particularly damning example of how badly Taiwan is handling the problem of optical media pirate production.

The failure to enforce against optical media piracy is just one of many recurrent enforcement problems in Taiwan. The following is a non-exhaustive list of some of the actions the Taiwan government must take to indicate its willingness to tackle the piracy problems there:

- Raids on unauthorized optical media plants must commence immediately, with seizures of infringing copies and machinery, followed by prosecutions, resulting in criminal penalties meted out on the pirates.¹⁴

¹² In September 1999, Taiwan Customs officials in Keelung seized 54,000 pirated DVDs and 67,900 pirated VCDs stored in a container waiting to be exported to Hong Kong. Another shipment of 225,000 pirated DVDs, this time in a boat off the coast of Fujian, China, was seized in December 1999 by the same port authorities. Intelligence gathered from these seizures raised probable cause that Digi Gold was involved in the pirate production, and Digi Gold was raided by the Aviation Police on January 14, 2000. The raid led to the seizure of 24 stampers and the sealing of two DVD replication lines, three VCD replication lines and one mastering line. Digi Gold was raided the second time by the Hsinchu Police (local constabulary) on March 10, 2000, leading to the seizure of 33 stampers, 36 VCDs, 3,000 DVDs, 30,000 pornographic VCDs, 557 CDs and 3,540 CD-ROMs. The authorities sealed off one mastering line, two DVD replication lines, three VCD replication lines, one offset printing machine and one silk screen printing machine. The Second Security Police conducted a countrywide enforcement operation from October 2-4, 2000, targeting eleven replication facilities, packaging facilities and distribution centers. Based on investigations conducted in the past several months and intelligence gathered from a recent raid in Macau, Digi Gold was one of the plants raided.

¹³ The recent Chungtek case in October 2000 is indicative of a more systematic problem. Chungtek was engaged in embossing fake mold codes on the pirate discs. But this piratical activity, which could have been detected and eradicated easily if comprehensive optical media regulations governed, was not detected until industry representatives convinced the Second Security Police to raid the factory on October 2, 2000.

¹⁴ Part of an adequate optical media regime would include allocating proper powers to conduct regular and "surprise" checks on CD plants. Such authority could be given to the Industrial Development Bureau (IDB) under the Ministry of Economic Affairs (MOEA), which is currently in charge of managing production equipment of optical disks. The enforcement bodies should also be given the authority to raid and seize manufacturing equipment as well as infringing products, unfinished or finished. In November 1999, the plant "Nine Friends" was raided for using another plant's SID code, and on January 30, 2000, the prosecutor confirmed that the case had been forwarded to the court to set a hearing date; however, no date has been set after the passage of over one year, and no reason has been given by prosecutors for the delay.

- All factory pirates must be deemed as “vocational” copyright infringers, which will allow prosecutions without the need for a complaint from a copyright owner. In addition, there should be mandatory forfeiture of any equipment used for infringement.
- The existing administrative prohibition on export of video product that would be illegal in the destination country should apply to optical media product, especially sound recordings. (A huge volume of unauthorized CDs of Latin repertoire is currently being manufactured in Taiwan and then shipped to Latin markets, where all of it is illegal).¹⁵
- A *permanent* enforcement body must be established,¹⁶ perhaps headed by a special prosecutor, to carry out sustained, island-wide enforcement, including against illegal *Ta-Bu-Tieh* or CD-R (CD-recordable) compilations of MP3 audio files, and of computer programs and games, in the domestic market. This permanent enforcement body or task force should take sustained action at the retail, distribution and manufacturing levels until criminal enterprises can be rooted out. This task force should be mandated to make a significant impact on optical disc piracy over the next year by undertaking a series of sustained actions against key markets. The task force should carry out market sweeps in major cities at least once a month to keep the pressure up. IIPA is pleased that the previous government had established a “K Plan” and that the current government had in late 2000 indicated its intent to start up enforcement again, but is disturbed that such a force has never been adequately resourced to do its job.
- The government must address the distribution of pirate CD-Rs on school and college campuses by students acting on their own or on behalf of criminal gangs. Ideally, over the course of the next year, this task force would seize hundreds of thousands of CD-ROMs and CD-Rs, and hundreds of machines.
- Copyright piracy should be made a “public crime.” This would substantially expand Taiwan authorities’ ability to tackle the problem. More serious acts of commercial piracy should be classified as “organized crime”, subjecting criminals engaging in such behavior to stricter penalties and granting the police broader investigatory powers.
- Concerted and coordinated efforts by many Taiwan government agencies are needed to combat organized criminal activity, including white-collar criminal activities. For example, pirate companies engage in elusive behavior (e.g., name and address changes, convoluted paper trails of piratical and investment activities in “Greater China” and in Latin America,

¹⁵ Government Information Office (GIO) is currently tasked with approving all exports of VCD/DVDs if there are 200 or more discs in a given shipment. GIO is supposed to check for the SID code and copyright authorization. The shipments may originate from optical disc factories or from distributors. Either way, shipments of 200 or more VCD/DVDs need GIO approval. IIPA understands that the Intellectual Property Office (IPO) is planning to take over the administration of this system in January 2001. The implementation of this changeover should be carefully monitored to ensure its effectiveness.

¹⁶ The “K Plan” to assemble a police task force to combat piracy was initiated in January 2000 by the Intellectual Property Office (IPO), as part of Taiwan’s due diligence efforts for Special 301. The Ministry of Economic Affairs assigned a 200-person police corps from the Ministry of the Interior for this crackdown. This police corps (*Bao Er*) is usually responsible for security at state-owned companies. The task force ceased operations at the end of June 2000 when the new government came into power, but was reinstated in September 2000 after industry representatives urged President Chen to take action against piracy. Unfortunately, actions under this plan ceased in December 2000, due mainly to lack of manpower. In mid-March 2000, *Bao Er* also focused on illegal business software in a series of market sweeps in four major cities island-wide. There was good press coverage on this crackdown by the government.

etc.) and sometimes even violent behavior¹⁷. IIPA urges pressure on Taiwan government officials to coordinate among government ministries that specialize in copyright and white-collar crime to improve the government's ability to keep track of evasive efforts of pirates. Taiwan authorities are also encouraged to identify the training needs which must be filled in order to enhance their ability to investigate and pursue sophisticated criminal networks engaged in cross-border pirate operations, so that foreign governments, international organizations and industry can cooperate to help fill those needs.

- Taiwan must enhance the legal tools available to crack down on the burgeoning cross-border trade in pirated products.¹⁸ Such enhancements must include serious efforts by Taiwan to control pirate imports and exports at the borders. Hong Kong, for example, has recognized that its law must have some extraterritorial reach if it is to fulfill its TRIPS obligation to combat "copyright piracy on a commercial scale." Accordingly, it enacted new criminal offenses aimed at authorizing enforcement in Hong Kong against pirate networks whose operations cross the territory's border. Taiwan should consider the approach taken in Hong Kong to fashion legislation against cross-straits piracy. IIPA is particularly troubled by the fact that, since April 2000, Taiwan Customs has ceased referring suspected pirate exports of music CDs to recording industry representatives in Taiwan for verification.
- Taiwan authorities must eradicate illegal photocopying and publishing of academic textbooks at universities. This is most prevalent in Taipei and other major cities, including around prestigious campuses such as the National University in Hsin-Chu. In 1999, six copy shops were found copying textbooks, and three were raided. In particular, recent investigations have shown that students and businesses engage in high-volume infringing activities. Local photocopy shops actively carry out photocopying and binding services mainly for students and teachers at schools and universities. On one positive note, the publishing industry reports a conviction of a pirate engaged in commercial piracy of books. Prosecutors had previously refused to bring a case against a well-documented commercial book pirate, but finally brought the case in 2000, although the result was a disappointing seven-month sentence, suspended for an unreasonably long three years.
- The police, the Ministry of Justice Investigation Bureau (MJIB), and the Prosecutor's Office must adequately follow up and prosecute pirate retailers and night market vendors where warranted. There are reportedly 200 night-market vendors regularly selling both pirated and counterfeit products throughout Taiwan. For the sound recording/music industry, between January and August 1999, 44 cases against night-market vendors were lodged. Thirty-nine cases (involving 40 defendants) were prosecuted, with 27 cases resulting in convictions, and one case resulting in an acquittal. Motion picture industry representatives conducted 104 raids in 2000 against street vendors in the night markets; 63 raids were

¹⁷ In 1999, several incidents in which industry representatives were the victims of violent attacks were documented; in the course of 2000, there were numerous incidents involving damage to industry representatives' property.

¹⁸ One success story involving cross-border piracy was the infringement finding by the Taiwan High Court on May 25, 2000, ruling that Chung Ti Technology Co. must pay Microsoft Corp. NT\$242.32 million (US\$7.87 million) for pirating Windows 95 and other software. The court said Chung Ti had exported infringing Microsoft products and made illegal profits. However, even this case indicates the inefficiencies of seeking judicial redress for copyright infringement. It took more than four years to reach a decision in the case, which began with a 1996 police raid of Chung Ti's warehouse in Taipei, yielding 58,000 copies of pirated English software, including 30,000 copies of Windows 95 and 28,000 copies of Office 4.3. The compensation awarded is the highest amount a local company has ever been fined for infringing intellectual property rights. In a separate case, Chung Ti's owner Hu Chung-lin was sentenced to two years in jail, plus a fine of NT\$400,000 (US\$12,900) for copyright infringement.

successful (11 of them involving 500 or more pirate optical discs), resulting in total seizures of 25,019 pirated VCD/DVD.

- Enforcement authorities must act to defeat unauthorized public performances of copyrighted movies in "MTVs" (minitheaters) and late at night on cable systems (especially in the rural areas). More enforcement is needed in rural areas, at night and on weekends and holidays, when unauthorized product is more likely to be used by MTVs. Some restaurants also use movies to attract clients.
- The Taiwan government should delegate authority (perhaps to an agency within the Ministry of Economic Affairs) to conduct regular inspections of all computer shops/stores to detect and seize computers in which "hard disk loading piracy has occurred" (this is the loading of unauthorized copies of software onto the hard drives of computers that are then given away "for free" when sold).

All these recommendations for actions to make inroads into devastating piratical activity in Taiwan were made in IIPA's report in early 2000. It is discouraging that so little has been accomplished in the intervening year to address these well documented and long-standing problems.

The Troubling Rise of Internet Piracy

The problem of the distribution of pirate works in the Internet environment is a growing phenomenon in Taiwan, and will devastate legitimate copyright owners unless Taiwan authorities begin to address it immediately. The growing Internet distribution from schools of pirate recordings (including MP3's), videogames in all formats, business software and motion pictures (back-to-back copies of VCDs, CD-Rs or even DVDs) is disturbing, and must be addressed by the Ministry of Education as well as law enforcement authorities. CD-R sales over the Internet and downloads from hack-sites located in Taiwan are on the rise. The videogame industry reports, for example, that up to 30% of all videogame piracy may be Internet-related (both CD on-demand burning and downloading from websites such as "WAREZ" sites). These piracy rackets are being run by organized groups located in Taiwan but also elsewhere in Greater China, such as Hong Kong, making it more difficult for Taiwan authorities to tackle the problem. These groups are now increasingly turning to a model based on e-mail harvesting/spam/Internet burning. Taiwan authorities must devise techniques that will be effective in monitoring and enforcing against such activities (whether related to piracy or other crimes). Meanwhile, as noted below, ISPs refuse to shut down pirate sites, and have refused thus far to cooperate with copyright owners seeking to enforce their legitimate rights.

Raiding activity in Taiwan regarding cyber-crime has concentrated on pornography. However, the Taiwan government, beginning to recognize the magnitude of the problem, has begun taking actions against the distribution of *Ta-Bu-Tieh* (compilation) CDs as well as pirated VCDs and DVDs through online marketing, with some encouraging results in 2000. For example, through the end of December 2000, the motion picture industry had conducted 41 raids against pirates selling infringing copies via the Internet, resulting in the seizure of 29,616 pirated VCD/DVD and the arrest of 44 pirates. These raids were conducted by the Telecommunications Police, the Criminal Investigation Bureau and the local police. Prosecutions followed, resulting in nine convictions. Two defendants were imprisoned immediately for nine months and 14 months, respectively, and seven defendants were given suspended sentences with jail times ranging from seven to 20 months, and probation periods ranging from two to four years. Similar campaigns on a national level were conducted against pirate websites in March 2000, resulting in seizures and arrests. Most of the pirate websites identified in this set of raids offered Windows 2000 Chinese

version after it was officially released on March 7, 2000. IIPA looks to the Taiwan government to sustain such raiding and the subsequent prosecutions, and commends the government for having mobilized the various agencies and investigative bureaus to work together to begin tackling this problem.

Meanwhile, MP3 piracy is thriving, particularly in schools, and shows no signs of decreasing, despite some legal actions taken in the past couple of years. Illicit Websites located on Taiwan college and university campus servers make illegal files available for downloading, or the operators of illicit websites will copy the files onto blank CD-Rs and sell them. The resulting pirate CD-Rs sometimes include up to ten albums worth of songs (100 to 120 titles), and sell for less than US\$5. While these CD-Rs were originally distributed only within colleges, they are now showing up in night markets. Of the 30 cases filed in 1999 by the recording industry in Taiwan with the Criminal Investigation Bureau of the Ministry of Interior, 21 have been prosecuted, resulting in 15 convictions (involving 19 defendants); of the 13 cases filed in 1998, six have been prosecuted, resulting in four convictions (involving five defendants); and all five cases filed in 1997 were prosecuted, resulting in four convictions (involving 5 defendants).

IIPA hoped for positive results from the Ministry of Education's (MOE) agreement (after intense industry pressure) to conduct monthly checks to monitor Internet servers of educational institutions, starting in November 2000, and to check websites containing infringing works upon receiving information from industry regarding such websites. Unfortunately, no information from the Taiwan government is forthcoming, even after the recording industry provided the Ministry with detailed information of illegal MP3 web sites in Taiwanese colleges and universities. As of January 2001, there were still 14 web sites located on nine schools' servers providing illegal MP3 files for download or linking to other web sites containing illegal MP3 files. IIPA continues to call upon various government agencies, including the Computer Crime Prevention Center, the Advisory Coordination Committee and the Criminal Investigation Bureau of the Ministry of Interior, to coordinate a joint effort to enforce against all forms of Internet piracy, including MP3 piracy. The Ministry of Education sent a letter dated December 13, 2000 (similar to one it sent dated November 8, 1999) to educational bureaus, county and municipal governments, and educational institutions, directing them to regularly inspect their websites and computer classrooms in order to delete any illegal software and to strengthen awareness of intellectual property rights, anti-piracy and procurement of legal software. However, no statistics or other information relating to Internet piracy in educational settings has been forthcoming from the Taiwan government. While IIPA remains appreciative of the Ministry of Education's December 2000 letter, it hopes that the Ministry will be steadfast in ensuring that the letter's directive is carried forward in a meaningful and transparent way.

Unfortunately, laws regarding Internet service providers (ISPs) are ambiguous and inadequate. Industry has had difficulties getting ISPs to cooperate with its investigations against Internet piracy. The Taiwan government should immediately enact regulations providing incentives to ISPs to cooperate with copyright owners investigating piracy on the Internet, or have ISPs adopt a code of ethics achieving the same result. IIPA notes that the recently-formed Taiwan Intellectual Property Alliance (TIPA) (with core members from the motion picture, recording, and software industries)¹⁹ got assurances from the Ministry of Telecommunications and Transportation (MOTT)

¹⁹ Though not the primary focus of this report, IIPA member associations are active in pushing intellectual property rights policy with, and in providing technical assistance and training for, the Taiwan government. In one training seminar held in October 2000, the Minister of Justice, President of the Judicial Yuan and Director of the American Institute of Taiwan (AIT) kicked off the first-ever inter-agency intellectual property rights training for judges, prosecutors and officials from Customs, Board of Foreign Trade, the National Police Administration, and other agencies. The training from October 30-November 8, 2000 was a two day rolling seminar for seven small groups and featured speakers from the U.S. government.

that it would arrange a meeting between ISPs and TIPA in February 2001 to discuss a code of conduct for ISPs.²⁰ IIPA is pleased to see the Taiwan government back such an approach; this will be needed to get Taiwan ISPs and Internet auction sites to adopt such a code. IIPA also recognizes some recent efforts of the National Police Administration to forge stronger cooperation with top ISPs in enforcement matters.

However, as discussed below, IIPA is deeply disappointed with initial draft copyright amendments that include provisions that fail both to preserve appropriate incentives for service providers to cooperate with right holders and to avoid a blanket immunity/exemption that may violate international norms and diminish incentives for cooperation. Without substantial rethinking, Taiwan's proposed draft on the liability of service providers will take Taiwan away from full compliance with its coming WTO/TRIPS and Berne obligations, and will make it that much more difficult for Taiwan to effectively enforce against growing Internet piracy.

Procedural Hurdles That Result In Ineffective Enforcement Of Copyright

Several procedural hurdles continue to make it more difficult for right holders to enforce their rights and bring cases in the courts. One alarming development (the transfer of power to issue search warrants from prosecutors to the courts) potentially could be devastating to the copyright industries' enforcement efforts in Taiwan. The following highlight some of the difficulties right holders face in Taiwan due to procedural hurdles:

- **Transfer of Power for Issuance of Search Warrants from Prosecutors to Courts.** The Legislative Yuan has reportedly passed an amendment transferring the power to issue search warrants from prosecutors to the courts effective on July 1, 2001. This development potentially could devastate the copyright industries' enforcement efforts in Taiwan. The system prior to the amendment worked well (although increased instances of denials of search warrants in 2000 did raise some concerns), because prosecutors could issue warrants immediately upon request and were familiar with the timing needs and operational difficulties encountered during raids by enforcement authorities. Under the new law, all applications are reportedly to be reviewed and approved by a judge, resulting in slow-downs in obtaining warrants, and potentially, loss of evidence. It is a practical reality that judges hearing requests for warrants are less experienced than prosecutors in terms of the technicalities of a raid, and it is feared that judges will, for example, impose new burdens on copyright owners seeking search warrants. The new law will especially harm cases involving pirate wholesalers or warehouses; evidence which moves in a matter of days will be lost if warrants take weeks or over a month to issue. Any kind of tip-off or suspicion of a raid would lead to massive disposal by the suspect of the evidence prior to the raid. If this shift results in courts not issuing search warrants to run copyright enforcement actions with the speed and efficiency of the current system, it will have a devastating effect on the copyright industries' enforcement programs in Taiwan. IIPA will be monitoring this situation closely over the coming months, and looks to the courts to permit copyright owners to carry out expedient and effective searches (including *ex parte* civil searches which must be available under TRIPS) under this new procedure.

²⁰ On November 3, 2000, the National Police Administration hosted a conference with the top 26 Taiwan ISPs on how to strengthen Internet piracy enforcement and cooperation. TIPA participated to show its support for the policies of the National Police Administration. It was acknowledged at this event that Internet crime/piracy is a serious problem and that cooperation of ISPs is key to enforcement work by the Police. The Police requested comments from ISPs on such issues as keeping a log file for a minimum of three months, identifying users' information, and streamlining the exchange of documents/information between ISPs and the Police.

- Powers of Attorney (POAs) in Court Cases.** In years past, judges, prosecutors or defendants challenged POAs granted to right holders' court representatives because the documents were not signed by the CEO of the right-holder company, were not consularized, were not translated into Chinese, were too old (more than six months), or because the Chinese translation was not signed by the CEO. In some of these cases, the failure to meet these burdensome procedural hurdles (which run contrary to general international practice and U.S. law) led to the dismissal of open-and-shut cases against blatant pirates. Two recent Supreme Court cases, in February 1999, and in January 2000, demonstrated progress toward resolving these problems, as the courts held that the validity of a POA is to be determined in accordance with the law of the country from which the POA holder comes. In the most recent case, the court determined that according to Article 6 of the "Treaty of Friendship, Commerce and Navigation with the Accompanying Protocol" between the U.S. and Taiwan, the authority and qualification of a person to represent a U.S. corporation in a litigation proceeding shall be determined by the laws applicable in the U.S. While these cases must be deemed "precedential" by the Supreme Judicial Yuan in order to have any binding effect on lower courts, reports indicate that instances of judges and prosecutors challenging foreign POAs waned in 2000. Nonetheless, courts are still requiring that POAs be legalized and consularized (only notarization should be required), thus imposing burdensome requirements and costs on right holders to exercise and enforce their rights in Taiwan. We also continue to receive reports that several prosecutors and judges have insisted that the chairman of the foreign company participating in the case personally sign the complaint and the POA authorizing the industry representative to initiate the case. The Supreme Judicial Yuan should act quickly to make its decisions in 1999 and 2000 precedential, so that this problem can be solved throughout Taiwan.
- Powers of Attorney (POAs) in Raids.** A separate but related problem for the recording industry and others involves the ad hoc requirements imposed by police involved in raids on distributors and warehouses of massive numbers of pirated copies of copyrighted works (many intended for export). In some instances, police require POAs from copyright owners for every work seized, and other onerous proof requirements in order for the authorities to seize suspected pirate goods. The effectiveness of such raids necessarily depends on the authorities seizing all suspected pirated copies as well as materials and implements used in the infringement, applying presumptions of ownership in line with international practice.
- All Products Infringing Copyright Should be Seized in Raids.** One console-based video game software maker reports that Taiwan authorities sometimes fail to seize games containing pirate 'initialization code' (the copyright for which is owned by the maker of the consoles). If Taiwan authorities find pirate CDs containing games with illegally copied initialization code, those should be seized, whether or not the copyright in the game itself is owned by the maker of the console or not. It is totally unreasonable to require all right holders in the software to participate in the raid. Taiwan authorities must not leave in the hands of the pirates software found in raids that include pirate initialization code.
- Tip-Offs of Pirates Must Cease.** IIPA continues to be concerned by prosecutorial decisions in some reported cases (though fewer than in 1999, apparently) to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids. This practice violates Article 228 of the Criminal Procedure Code, which discourages the issuance of such summonses.

Legalized Use by Governments, Businesses and Schools of Copyrighted Materials/Goods

Once a problem mainly for the business software industry, all the copyright industries increasingly are concerned about the unauthorized use of copies of copyrighted works in businesses and by the government. The Taiwan government must become more active in ensuring that businesses are using copyrighted works legally, and must take specific actions, many of which have been promised but not carried through, to ensure that its own agencies are using legal copies of copyrighted works.

IIPA appreciates that the Intellectual Property Office sent out a letter dated October 30 to the Chinese National Federation of Industries (CNFI) and the General Chamber of Commerce of the R.O.C. (ROCCOC) urging their member organizations/associations to use genuine software. This single letter cannot change public attitudes, however. Further actions of this type are necessary. IIPA looks forward to the Taiwan government taking the lead in public educational campaigns on corporate end-user piracy by sending letters directly to general managers of companies, as the Malaysian and Hong Kong Governments did in 2000. IIPA also recognizes the cooperation of the Minister of Education in sending out a letter dated December 13 (similar to one sent out in November 1999) to educational bureaus, county/municipal governments and educational institutions, directing them to regularly inspect websites and computer classrooms to delete any illegal software, as well as to strengthen awareness of intellectual property rights, anti-piracy and procurement of legal software.

IIPA was further heartened by Premier Chang's positive comments in a meeting with the business software industry on December 1, in which the Premier indicated the Taiwan government's commitment to develop a strong and healthy local software industry. IIPA believes that the first necessary step to creation of a strong local software industry is the issuance of a new executive order at the Premier's level, mandating that all government offices and government vendors use only authorized software.²¹ The Taiwan government's effort to systematically implement this decree in a transparent manner should be the bases of a public education campaign on proper software asset management. Proper software asset management within government will involve amending the current Directorate General for Budget, Accounting & Statistics (DGBAS) "Operating Guidelines for the Management of Computer Software in Government Agencies" (effective November 25, 1997) along the lines of the U.S. Federal Government's "Model Guidelines [for] Implementing the Executive Order on Computer Software Piracy" (March 17, 1999) or the Hong Kong Government's "Implementing Procedures for the Proper Use and Management of Software." Thorough measures like training for civil servants and mandatory periodic software audits in all government agencies in the revised Operating Guidelines will at least help to implement the Executive Yuan Directive (February 8, 1999) directing government agencies to use "legally obtained software." IIPA also recommends that the Taiwan government convene a cross-ministerial meeting to discuss implementation of the above as requested in the December 1 meeting with Premier Chang.

²¹ The business software industry engaged the Directorate General for Budget, Accounting & Statistics (DGBAS) to have government agencies in Taiwan fill out a questionnaire on software asset management (SAM). The results indicated that as of November 1999, roughly 30% of agencies did not purchase software through a central office and 55% of agencies did not maintain all software registration and license information in a centrally located system. More than half of the agencies had, according to the survey, educated their workforce on SAM, and DGBAS did agree that there was room for improvement. Perhaps more importantly, DGBAS agreed to include questions on SAM practices in the 2000 government survey on computer use, with new and different questions to address specific issues.

Failure of the Export Monitoring System (EMS) to Defeat Export Piracy

As noted already, Taiwan is now one of the world's worst pirate exporters. All of the mechanisms that have been put in place to catch pirated exports at the borders (before they leave Taiwan) are failing. Customs has referred suspected pirate exports of CDs to industry representatives for verification, but this practice slowed considerably in 2000. The Customs department stopped referring cases of export of various industry-sector piracy to their respective associations for verification. One industry group reports that they were summoned to the airport to inspect 3,000 pieces in January 2001. Such sparse seizures and minimal use of the system is by no means what was intended. The EMS was established in 1993 as a result of U.S. pressure, and was aimed at intercepting pirated products. At that time, the focus was on video games and computer operating systems, but now, with the surge in pirated optical media production for export, the EMS could potentially be used as an effective tool to curb pirated exports of optical media as well. At the time, IIPA viewed this as an innovative and important approach to fighting piracy, but has always expressed concern and disappointment over the system's ineffectiveness. In 1998, the government published and implemented a new set of EMS regulations. Those regs did not improve the system.

The Taiwan government has raised the question of whether the EMS should be abolished since, in their view, it has not been effective. IIPA agrees that the EMS is badly broken, primarily through the failure of the Taiwan government to implement it properly. IIPA agrees that the EMS can be abolished if the following two priority actions are achieved:

- the adoption, implementation and enforcement of comprehensive "optical media" regulations that control copyright piracy at the manufacturing source by strictly regulating optical disc manufacturers (as discussed above);
- the retention by the Government Information Office/IPO of its responsibility to verify copyright authorization/SID code for the export of VCDs and DVDs; and

Taiwan Authorities Permit Massive Transshipment of Pirated Goods Through Taiwan

In view of the critical role that Taiwan plays as a transshipment point for counterfeit goods, it is essential that Taiwan increase the enforcement authority of Customs agents in Taiwan to identify and prosecute the transshipment of infringing products. Pirated and unauthorized products regularly pass through Taiwan ports on their way to other destinations. Not only has Taiwan Customs been unable to curb pirate exports effectively through the export monitoring system (EMS) instituted in 1993, but it has remained inactive in the area of monitoring for illegal items in transit. The Taiwan government's initial response to industry on this issue has been to evade it, either by claiming that pirate items in transit are not the responsibility of the Taiwan government. The government, by allowing massive shipments to transit through Taiwan, tacitly accepts this practice of the worldwide movement of pirate product through Taiwan. This is unacceptable. IIPA urges that pressure be applied on Taiwan to take swift action on the enforcement level to make inroads into this problem plaguing Taiwan.

COPYRIGHT-RELATED LEGAL REFORM IN TAIWAN

Issuance of Draft Copyright Law Amendments That Fail to Adequately Implement the WIPO “Internet” Treaties, and Contain Other Deficiencies

IIPA was pleased that the Taiwan government released for public comment Proposed Draft Amendments to the Copyright Law of Taiwan (the “Draft”) in August 2000, that include attempted implementation in Taiwan of several key requirements of the new WIPO “Internet” Treaties. The Draft includes legal safeguards for technological protection measures used by rights owners; a broad “public transmission” right, including making available of works (including sound recordings) for on-demand dissemination to individual members of the public; and legal protections for the integrity of rights management information associated with protected works (including sound recordings) and performances. IIPA strongly supports Taiwan’s goal to implement the Treaties provisions now as part of its development strategy and before online piracy levels become acute. We applaud the Taiwan government for moving forward on this path.

IIPA commented on the Draft in September 2000. While there are many positive aspects of the Draft, we believe that the implementation proposed in the Draft for several important Treaties issues (including technological protection measures, a new right of “public transmission,” and rights management information) needs further revision in order to fulfill the requirements of the Treaties. In addition, IIPA believes that certain issues not addressed in the Draft require attention. (These include the reproduction right, the distribution right, the definition of computer programs, retroactivity, limitations on exclusive rights, terms of protection, and certain enforcement provisions). The goal is compliance with the requirements of the Treaties or other international standards of copyright protection. Finally, while not required to implement the WCT and WPPT, Taiwan has chosen to address the issue of the liability of online service providers in a way that, without substantial rethinking, will move Taiwan away from full compliance with WTO/TRIPS standards. IIPA is deeply concerned that Taiwan’s approach to the issue of online service providers fails to preserve appropriate incentives for service providers to cooperate with right holders. It also creates a blanket immunity/exemption that may violate international norms and diminish incentives for cooperation.

The following list, while not exhaustive of possible concerns, summarizes IIPA’s difficulties and recommendations for changes that must be made to the August 2000 Draft:

Reproduction Right

In its current formulation, Article 3(5) of the Taiwan Copyright Law is unclear as to whether temporary or permanent storage of works in digital form is considered “reproduction” that falls within the scope of the reproduction right. This is a serious shortcoming. In the digital, networked environment of the Internet works will increasingly be exploited through the creation of temporary copies of software, music and sound recordings, for example, in the random access memory (RAM) of computers or other devices. In these cases a permanent reproduction will not be needed, and the full value of the work will be exploited through the creation of temporary reproductions. To ensure that right holders are able to control significant exploitations of their works in the digital environment, Article 3(5) must be amended to clarify that permanent and temporary copies in digital form fall within the definition of “reproduction,” and thus with the reproduction right. This clarification is also required under the Berne Convention, the TRIPS Agreement, the WCT and the WPPT. The Taiwan Copyright Law’s use of the term “tangible copy” and its failure to set out that any kind of copy will constitute a reproduction under the Law would at best be confusing, and at

worst take it out of compliance with international standards of protection. To ensure that Taiwan unambiguously meets international standards of protection, IIPA strongly urges Taiwan to clarify in the definition of “reproduction” that it includes ‘direct or indirect, temporary or permanent reproductions, by any means and in any form, in whole or in part, including any permanent or temporary storage of a work in electronic form.’ In view of the needed generality of the definition and its technological neutrality, IIPA also urges deleting any references to specific means of reproduction now contained in the current formulation. Director Chang of the IPO Mr. Chang has indicated that temporary reproductions are already covered under the reproduction right.

Technological Protection Measures

Taiwan’s copyright law must ensure that copyright owners (which under Taiwan’s law includes performers and producers of sound recordings) have the ability to use and protect technological measures designed to prevent or deter unauthorized uses, including unauthorized access. To achieve this, parties must be prevented from making or distributing devices, or components thereof, that are principally designed, marketed or used to circumvent such technological measures. Unfortunately, on this crucial aspect of implementation of the WIPO Treaties, Taiwan’s Draft solution fails to meet the requirements of the Treaties in several important respects. Article 11 of the WCT requires Contracting Parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.” Article 18 of the WPPT contains, *mutatis mutandis*, practically the same provision as Article 11 of the WCT, although as discussed further below, performances and sound recordings are treated as works and should be properly subject to the provisions of the WCT, not the WPPT.

The implementation of these obligations by Taiwan in the definition of “technological protection measures” in Article 3(15) and in Article 92*bis* of the Draft falls far short of meeting the adequate and effective standard, because:

- while spelling out the criteria by which the business of providing certain circumvention tools would be outlawed, the Draft fails to outlaw the act of defeating a technological protection measure;
- while technologies that control the exercise of exclusive rights under copyright are outlawed in the Draft, technologies that control access to copyrighted materials are not (since the definition of “technological protection measures” leaves out measures that control access);
- the Draft employs what appears to be an overly narrow ‘sole purpose’ test, and does not permit direct or indirect methods to prove a circumvention purpose (for example, by proving that a device or service has no commercially significant purpose or use other than to circumvent) (although we have recently heard that Director Chang of the IPO has indicated that the term “sole purpose” may have been a “typographical error”);
- the definition of ‘technological protection measures’ provides an exception that threatens to eviscerate the rule, namely, technological protection measures do “not include measures to restrict legally permitted exploitation of such works by other persons.” In other words, it appears that a measure that has the capability of restricting a legally permitted use as well as

infringing uses is not considered a ‘technological protection measure’ at all. The ambiguity in the definition of ‘technological protection measures’ must be clarified;

- the Draft requires proof of “intent” that equipment, services, or information will be used to infringe copyrights of other persons, a test that finds no basis in the Treaties and that would, as a practical matter, make enforcement virtually impossible;
- while services and complete devices are covered, components of devices are not explicitly covered;
- civil remedies, including injunctive relief (extremely important to deter this illegal commercial activity), are not available against those who engage in circumventing technological protection measures; and
- criminal penalties for circumventing, without proving that the defendant committed the crime “as a vocation,” are inadequate and even weaker than those applied for copyright infringements (thus, criminal remedies should be conformed so they are at least as severe as those imposed for copyright crimes).

Service Provider Liability Provisions

While not required to implement the WCT and WPPT, Taiwan has chosen to address the issue of the liability of online service providers. The drafters have introduced, in Article 87ter of the Draft, a blanket exemption to liability for copyright infringement for “a person providing electronic transmission network service or facilities” (ISP) with respect to third party infringements “using their service or facilities.” The exemption applies if either the work “made available to the public was uploaded by another person and the content was unknown to [the ISP],” provided that it was “objectively . . . unfeasible” or “technologically impossible” to prevent access to the work; or if the ISP “provides only the function of access by users to the content of works provided by other persons, including automatic and temporary storage of such works at the request of users.” In IIPA’s view, any legislation on this topic should preserve the basic principles of copyright law while advancing electronic commerce. These goals can be balanced in legislation that:

- avoids blanket immunities and other sweeping exemptions that violate international norms and diminish incentives for cooperation;
- preserves and strengthens incentives for cooperation between copyright owners and service providers in detecting and dealing with online theft;
- encourages marketplace solutions – licensing, contracts, indemnification, insurance — to the problem of preventing online piracy;
- respects the role of the courts in preventing infringement and preserving evidence; and
- fits within the framework of copyright law and thus promotes the production and dissemination of creative works.

Unfortunately, the provisions of the Taiwan Draft do not strike the right balance. They fail both to preserve appropriate incentives for service providers to cooperate with right holders and to avoid a blanket immunity/exemption that may violate international norms and diminish incentives for cooperation. In short, without substantial rethinking, Taiwan’s proposed Draft on the liability of

service providers will take Taiwan away from full compliance with its coming WTO/TRIPS and Berne obligations. The provisions fail to avoid the main pitfalls in legislating service provider liability provisions, by:

- conferring a blanket immunity on a service provider if it meets the criteria of the statute, rather than the much preferred solution – adopted in the U.S. and in similar form adopted in the EU – of limiting the remedies available to right holders; decreasing incentives for cooperation and limiting the role of courts in preventing infringement and preserving evidence;
- discouraging marketplace solutions by establishing a ‘shield’ of non-liability for service providers meeting the criteria (thereby providing no incentives to enter into licensing agreements with right holders, for example); and
- requiring actual knowledge of the third-party infringement under the first criterion, and, apparently exempting service providers coming under the second criterion even if they know full well the contents being stored on their networks are infringing.

Director Chang of IPO has acknowledged that Taiwan’s initial Draft approach may be viewed by some as not going far enough. He indicated that the drafters do not want the provisions to be complicated, and that they are inclined to follow the approach in the EU E-Commerce Directive.

New Right of “Public Transmission” and Limitations on Economic Rights

IIPA is pleased that the Taiwan government has taken the steps to amend its law to cover the rights in WCT Article 8 and WPPT Articles 10 and 14. It appears that the new right to “publicly transmit” works goes far toward satisfying the requirements of Article 8 of the WCT. As sound recordings are works under Taiwan law, they should be provided exactly the same treatment as accorded other works. Indeed, with the convergence of all subject matter in the online environment, there is no longer any excuse for treating subject matter differently. Taiwan has correctly made this judgment in its current copyright law. Therefore, Article 24 of the Draft (which limits economic rights as to the authors of sound recordings) should be deleted as unnecessary and out of kilter with treating sound recordings as any other protected work. Also, IIPA is concerned with Taiwan’s decision to replace “publicly broadcast” with “publicly transmit” in several Articles relating to limitations on economic rights (Articles 47, 50, 56, 56bis, and 61). These limitations, which would extend from the confines of public broadcast to digital media included in the definition of “public transmission,” arguably run afoul of the well-established WTO/TRIPS and Berne “tripartite” test for exceptions, and would unacceptably eviscerate the “public transmission” right afforded to right holders in the Draft, taking Taiwan out of compliance with the Treaties.

Distribution Right

The drafters have not proposed adding an exclusive distribution right, as required by WCT Article 6 and WPPT Article 12. The WIPO Treaties added a right of distribution in order to eliminate a gap in the Berne Convention (which does not provide for a right of distribution except for cinematographic works), and to provide such a right to performers and rightholders in sound recordings. Taiwan only provides (in Article 87 of the Law) that “infringement of copyright or plate rights will be deemed to have occurred” in the case of “[d]istribut[ion] . . . or possess[ion] with the intent to distribute . . . infringing articles that are known to infringe on copyright or plate rights,” thereby making those who engage in such infringement civilly liable. This does not expressly

provide the right holder in a work (which includes a sound recording and a performance) with an exclusive right to distribute it. IIPA urges Taiwan to add an exclusive right, both to authorize or prohibit the distribution to the public by sale or other transfer of the original or copies of a work (or sound recording or performance). On the issue of exhaustion, Taiwan has already adopted a national exhaustion approach, highly preferable in terms of providing incentives for creative activity, and part of Taiwan's obligations under the U.S.-Taiwan bilateral copyright agreement.

Rights Management Information

The Draft proposes to create legal protection for the integrity of "electronic copyright rights management information" (RMI) associated with the dissemination of copyrighted works and other protected materials. In particular, the new Draft provides civil and criminal relief for certain unauthorized acts related to the removal or alteration of RMI. Taiwan should be commended for proposing to legislate against inappropriate interference with this key enabling technology of electronic commerce. Enactment of the Draft provisions would go far, but apparently not all the way, toward bringing Taiwan's law into line with WIPO Treaties obligations (WCT Article 12 and WPPT Article 19). Several changes would be needed in order to achieve full Treaties compliance. IIPA urges Taiwan to make the following changes:

- the definition of "[e]lectronic copyright rights management information" (Article 3(16) of the Draft) should also include any numbers or codes that represent such information;
- it should be made clear that nothing in the prohibitions requires the owner of any right in the work to attach RMI to copies of it or to cause RMI to appear in connection with a communication of the work to the public ("public transmission");
- alteration or removal of RMI should also be a violation if it is unauthorized and regardless of its relation to an infringement of copyright. Included in the business activities deemed illegal under Article 87 should be "to distribute, import for distribution, export or publicly transmit;"
- at least with respect to civil remedies, it should only be required that a defendant altering or removing RMI have constructive knowledge that "such action would injure the rights of the copyright owner"; and
- as with the provisions on anti-circumvention, criminal remedies should be conformed so they are at least as severe as those imposed for copyright crimes.

Definition of Computer Programs

The drafters have not proposed adding a definition for computer programs in the Copyright Law. As it stands, the law does not expressly protect computer programs as literary works, and computer programs are not defined broadly to include, for example, all programs regardless of the mode of their expression. Protecting computer programs as literary works is a TRIPS requirement. Such protection is also required to implement Article 4 of the WCT, which clarifies that "[c]omputer programs are protected as literary works within the meaning of Article 2 of the Berne Convention," and that "[s]uch protection applies to computer programs, whatever may be the mode of their expression." IIPA urges Taiwan to take this opportunity to clarify that computer programs are protected as literary works, and that such protection applies to any mode or form of expression of a computer program.

Licensing

The drafters have proposed two alternative versions of Article 37(1), dealing with the scope of licenses granted with regard to as yet unknown technologies. Option A is preferable as it best preserves market forces. IIPA strongly believes that market forces should govern what parties to a contract agree to do with respect to new and even unknown technologies, and the ability to contract freely should not be legislated away. Particularly with rapid changes in technology, copyright owners must have the ability to license or reserve the licensing of technologies now known or hereafter developed.

Limitations or Exceptions to Protection

The Draft proposed replacement of “publicly broadcast” with “publicly transmit” in several Articles relating to limitations on economic rights (Articles 47, 50, 56, 56bis, and 61), as noted above, and the proposed extension of the exception in Article 49 to include “works that are seen and heard” by means of “computer network.” These changes may run afoul of the well-established WTO/TRIPS and Berne “tripartite” test for exceptions (under which exceptions must be limited to special cases, must not conflict with a normal exploitation of a work, and must not unreasonably prejudice the legitimate interests of right holders). In addition to the need to reevaluate the changes made to these provisions, other limitations must be reconsidered for Taiwan to meet international standards. In revising the limitations sections in the Copyright Law, IIPA urges Taiwan to keep the following specific points in mind:

- all of the exceptions in the Copyright Law should explicitly be made subject to the Berne tripartite test;
- the personal use copying exception in Article 51 must be narrowed so that it does not run afoul of the Berne tripartite test (this exception must at least be limited to reproduction in a single, analog copy of “a work that has been publicly released,” provided that such copying does not conflict with a normal exploitation of a work and does not unreasonably prejudice the legitimate interests of right holders);
- the Article 56bis exception (a free compulsory license to rebroadcast wireless transmissions via cable) amounts to a violation of Article 11bis of the Berne Convention, which grants the copyright owner the right to retransmit its works. While the Berne Convention/TRIPS does permit countries to determine conditions under which the right of broadcasting may be exercised, including the possibility of compulsory licenses, Article 56bis clearly does not pass this test; and
- the drafters need to reevaluate other limitations which in light of new technologies may need to be amended in order to meet the long-standing Berne tripartite test.

Confiscation of Infringing Articles and Implements Used to Infringe

Under the original 1992 Copyright Law, Article 98 provided, “[o]bjects that are produced from or used in committing the offenses set forth in Articles 91 through 95 shall be confiscated.” TRIPS requires criminal remedies that include the possibility of “seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.” Reinstating Article 98 would go a long way toward ensuring that Taiwan meets this standard. In particular, the application of this article in practice should permit the seizure of machines, regardless of claims by defendants that tools and

implements do not belong to them, or are owned by “staff” for their personal use. IIPA strongly urges Taiwan to reinstate Article 98. Director Chang has said that he would consider reinstating Article 98, that it was taken out of the copyright law because the government thought it would be covered under the criminal law, but the wording in the criminal law makes it difficult to use (that provision provides that equipment can be confiscated if it is ‘owned by the infringer’). IIPA urges the Ministry of Justice to agree that Article 98 must be reinstated.

IIPA understands that the Intellectual Property Office (IPO) held a series of public hearings on the proposed Draft in Taipei on September 29 and October 4, 2000. They will reportedly engage in internal consultations to consider the public comments, and the revised proposed amendments would then go to the Ministry of Economic Affairs by early 2001, after which time the revised draft will be released for public comment.

Criminalization of Corporate End-User Piracy

Business end-user piracy (the unauthorized use of software by businesses) causes the largest losses in monetary terms to the U.S. business software industry. Business end-user piracy takes place in some cases with the knowledge of management and in other cases because of lax software asset management practices. This problem will not be addressed unless the Taiwan government makes clear to the public that business end user piracy is illegal under Taiwan law and that the government will take action to stop it, followed by high profile steps to enforce the law against business pirates.

The current copyright law is ambiguous as to whether corporate end-user piracy is a criminal offense. Without such clarification or warnings from the Taiwan government, it is difficult to see how the Taiwan government can move forward an agenda to convince companies to use only legal software. The Hong Kong government recently amended its Copyright Ordinance to clarify that possession of an illegal copy of a protected work in a corporate environment is subject to criminal penalties. This provision will come into force on April 1, 2001, preceded by a public educational campaign launched by the Hong Kong Government. IIPA recommends that the Taiwan Government make a similar clarification under its law.

Two Year Grace Period After WTO Accession for Works to Be Protected Retroactively Amounts to Government-Sanctioned “Open Season” On Piracy

As reported for the past two years, under the copyright amendments of January 23, 1998, retroactive protection for works and sound recordings for their full Berne/TRIPS-compatible term of protection will only come into effect two years after Taiwan joins the WTO. Specifically, Article 106ter gives a person who has “begun the exploitation, or has made significant investment for the exploitation” of a work the ability to continue to exploit such works “during the two-year period” after Taiwan is accepted into the WTO (the provision does not expressly limit this two-year delay to existing copies). In practice, Article 106ter amounts to an overly long delay in providing full TRIPS-level protection upon Taiwan’s accession to the WTO, and will leave Taiwan in violation of TRIPS the moment Taiwan accedes. IIPA is very troubled by this two year “grace period”. It amounts to a governmentally sanctioned “open season” for continued unauthorized exploitation of valuable copyrights without any compensation to the owner. In addition, Article 106quater, besides granting a similar exemption for certain derivative works that would take effect two years following Taiwan’s entry to the WTO, amount to a TRIPS/Berne-inconsistent compulsory license. Both Articles 106ter and 106quater must be deleted for Taiwan to be in compliance with international obligations upon its accession to the WTO.

In the August 2000 Draft copyright law amendments, the drafters did not address the failure of the Copyright Law to provide full retroactive protection for all WTO members' works. IIPA notes that more than three years has passed since the passage of Article 106ter (giving those intended to benefit from the exemption ample time to make use of it already, and ample warning that Taiwan, in order to meet its TRIPS requirements, must protect all works including sound recordings retroactively for their TRIPS-compatible terms). Director Chang of the IPO has indicated that it will be difficult to repeal the two-year transition period, and asserts that right holders are protected as the burden will be on the infringer to prove that it had already begun to exploit a work or had made a significant investment in the work prior to the provision's entry into force. As already noted, such infringers have already had a grace period prior to Taiwan's joining the WTO, and should not be entitled to continue harming copyright owners past the date of accession.

Production for Export of Materials That Are "Legal" in Taiwan But Pirate in the Destination Country Must Be Prohibited

Several huge shipments destined for Latin America have been stopped at the Taiwan border (one in May 1998, and one in early 1999), only to be released, as the customs agents deemed the repertoire not protected in Taiwan (there is no bilateral arrangement between the alleged copyright owners' countries and Taiwan). Latin repertoire is being mass-produced without the authorization of the copyright owner for export to countries where such unauthorized reproductions would be illegal. IIPA calls upon the Taiwan authorities to implement a regulation (similar to the one implemented for pre-1965 motion picture titles) requiring companies exporting unauthorized reproductions of Latin titles to produce certificates from the importing country's local authority that such titles are legal in the importing country. Companies unable to produce such a certification should not be issued an export permit to ship the product from Taiwan. The government of Taiwan must adopt procedures that would require manufacturers and exporters to establish the legitimacy of their productions/exports in the country of destination.

The failure to address Latin music piracy also implicates the US-ROC bilateral, inasmuch as much Latin product is simultaneously released in the U.S., or owned by U.S. companies, thus triggering protection under the bilateral. According to the bilateral, Latin product that is first published in the U.S. or published in the U.S. within 30 days of its first publication elsewhere, shall be protected by Taiwan copyright law. In addition, Latin product that is first published in a country which belongs to a multilateral copyright convention to which the U.S. also accedes, and as to which a Taiwanese or American gets exclusive license within one year following the first publication of the work, shall be protected by Taiwan copyright law. The above-mentioned protection is not necessarily based on registration of copyright. Therefore, if the fact of first publication and/or the fact of acquiring exclusive right can be proved, the work must be protected according to the agreement.

Sentencing Enhancements Should be Applied to "Professional Pirates" to Achieve Deterrence

Finally, courts are still refusing to apply sentencing enhancement provisions applicable to "professional pirates," which would make imprisonment mandatory. As a result, persons engaged in the business of piracy often receive suspended and otherwise non-deterrent sentence.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

TURKEY

EXECUTIVE SUMMARY

IIPA recommends that Turkey remain on the Special 301 Priority Watch List. Optical media piracy has hit the Turkey markets. Estimated losses due to copyright piracy of U.S. copyrighted materials in Turkey have increased to \$266.5 million in 2000. The high levels of copyright piracy affecting most of the copyright industries are compounded by the inability of the Turkish criminal and civil legal systems to deter such theft. In late 1999 and early 2000, the Ministry of Culture made great progress in revising the copyright law amendments to improve its provisions upward to satisfy most international standards. Sadly, despite those positive steps, the Turkish General Assembly has not acted on the bill for almost a year. Turkey's current copyright law (distinct from any proposed amendments) fails to meet the substantive obligations of the TRIPS text. Furthermore, the Turkish criminal system has not proven to provide effective deterrence against copyright piracy. Significant barriers remain in particular for business software companies to pursue civil *ex parte* actions, a measure which is an integral part of that industry's anti-piracy campaigns in many countries. Levels of copyright piracy in Turkey remain high across most industry sectors.

Turkey has been under U.S. government scrutiny of its intellectual property rights regime for the last decade. Four years ago, the U.S. government, USTR outlined six benchmarks for progress in Turkey during its 1997 Special 301 cycle. These include the Turkish government: taking effective enforcement actions to their conclusions to address widespread piracy; passing copyright and patent law amendments to bring Turkey into compliance with its TRIPS and Berne obligations; amending the Cinema, Video and Music Works Law to include higher, nonsuspendable fines and jail terms; issuing a directive to all government agencies to legalize software; starting a public anti-piracy campaign about the software end-use problem; continuing training of enforcement officials so that the levels of piracy decline; and equalizing taxes on the showing of foreign and domestic films. The first four of these copyright-related goals have not been met.

In addition to bilateral attention under Special 301,¹ the U.S. government continues to investigate Turkey's IPR practices under the Generalized System of Preferences (GSP) program, a U.S. trade law which contains requirements of "adequate and effective" copyright protection. This review was initiated after IIPA filed a GSP petition against Turkey in June 1993, and Turkey remains under GSP review.² As a member of the World Trade Organization, Turkey is currently obligated to provide the standards of copyright protection found in the TRIPS Agreement.

¹ For further details on Turkey's history under Special 301 and GSP, see Appendices D and E of IIPA's 2001 Special 301 submission.

² USTR announced on January 16, 1998, that it would not consider any requests to expand the scope of preferential trade benefits Turkey receives under GSP. This means that no new products can be added and no additional competitive need waivers can be granted to Turkey. In 1999, \$335.3 million in Turkey's imports to the United States benefited from the GSP program, accounting for nearly 12.9% of its total imports to the U.S. For the first eleven months of 2000, \$403.2

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	50.0	50%	50.0	85%	59.0	95%	59.0	95%	59.0	95%	57.0	95%
Sound Recordings / Musical Compositions	4.0	40%	4.0	30%	4.0	30%	8.0	30%	7.0	30%	8.0	30%
Business Software Applications ³	68.3	69%	78.2	74%	44.5	87%	48.4	84%	85.7	87%	48.6	89%
Entertainment Software ⁴	116.2	96%	95.1	82%	92.3	80%	96.7	84%	98.0	89%	28.0	86%
Books	28.0	NA	32.0	NA	28.0	NA	20.0	NA	20.0	NA	18.0	NA
TOTALS	266.5		259.3		227.8		232.1		269.7		159.6	

COPYRIGHT PIRACY IN TURKEY

Pirate Optical Media Product Threatens the Legitimate Markets

More and more pirated digital product, including illegal copies of VCD (video compact discs), CD-ROMs (both entertainment and business software), music CDs and DVDs have entered the Turkish markets over the past three years. While much of this illicit product is produced primarily in Asia (Hong Kong, Macau, and Taiwan), pirate product shipped from Eastern Europe also enters the Turkish market. At last report, the activities of the three CD plants operating in Turkey have not given the industries cause to complain.

VCD (video CD) piracy in Turkey has become the most dangerous form of audiovisual piracy in Turkey. This involves infringing copies of prerelease feature films which are imported from Asia. Mass importation has been prevented by a government circular, but the pirates have creatively found alternative ways to import pirate VCDs. Locally produced product has also become a problem. According to MPA, Turkish viewers prefer to play VCDs on personal computers rather than on VCD players. In the past, audio CD players and PlayStation® consoles are also modified for multipurpose usages to include the playing of VCDs. This is not such a problem any more because original VCD players are now widely used and easily available through newspaper promotion campaigns and are sold for only U.S.\$70-80 in the market.

Several years ago, the main source of supply for pirate music CDs had been Bulgaria, but because of action taken by the Bulgarian government to control exports, imports of Bulgarian pirate product into Turkey have dropped. According to the recording industry, pirate CDs produced elsewhere in Eastern Europe are now entering the Turkish market, and are being sold on the street

million of Turkish goods entered the U.S. under the duty-free GSP program, representing a 32.6% increase over the same period last year.

³ BSA estimates for 2001 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not available. BSA's 2000 numbers were finalized in mid-2000, and are reflected above.

⁴ IDSA estimates for 2000 are preliminary.

for about U.S.\$3. Reports also indicate that pirate music CDs are being exported from Cyprus into Turkey. Some of these discs may be originated in Israel and/or Southeast Asia.

For the entertainment software industry, numerous pirate PC (personal computer) and CD game titles are available in Turkey, most of which appear to come from the Far East, primarily Malaysia, Hong Kong and Singapore. Imports from Russia are also reported. There was a slight resurgence in optical media out of Bulgaria, too. Pirate cartridge-based videogames manufactured in China and shipped through Hong Kong also flood the Turkish market. Most of the pirated videogames in the Turkish market are imported.

Copyright Piracy Continues to be Rampant in Turkey

The motion picture industry suffers from several forms of piracy in Turkey. Estimated losses due to motion picture piracy in Turkey remain at \$50 million in 2000. VCD piracy has emerged as the most significant form of piracy in Turkey, involving counterfeit copies of prerelease titles imported from Asia. Mass importation of pirate VCDs has been prevented through a government circular, but the pirates have now found alternative methods to obtain their supply of material, including carrying it in personal luggage. In addition to the existing pirate VCD imports problem, locally produced pirate VCDs have become a major hurdle in 2000. Pirates now duplicate VCD copies of prerelease titles with Turkish subtitles as well as make back-to-back copies of legitimate VCD titles with Turkish dubbing. Turkish viewers generally prefer to play VCDs on PCs rather than dedicated VCD players. Audio CD players and PlayStation consoles are also modified for multipurpose usage to include the playing of VCDs. Sales of VCD players are nonetheless on the rise and sell for as little as U.S.\$70-80. The number of VCD players is now estimated at 200,000-250,000, with an additional 400,000-500,000 CD-ROM drives on PCs.

Pirate VCDs are openly sold in retail stores and, increasingly, by street traders. Street traders are especially active in major cities and certain tourist locations. The average number of pirate VCDs varies between 200 to 800 per retailer, and 100 to 300 per street trader. All new titles are available prior to and/or together with their theatrical releases. They are also used as masters for producing pirate videos and for unauthorized public performances. The local motion picture anti-piracy organization, AMPEC, began to combat VCD piracy in late 1998. In 2000, AMPEC cooperated with the police to seize a total of 124,110 pirate VCDs in numerous raids against retail stores, street vendors and wholesale distributors. The Financial Police are also estimated to have seized an additional 200,000 VCDs through *ex officio* actions under the smuggling law. Although Customs has been told to stop mass importations of pirate VCDs, pirates continue to find ways to pass the borders. Importantly, domestic production of pirate VCDs is on the rise. The Turkish government (ministries, police and municipalities) continues to ignore the vast level and quantity of VCD piracy and its adverse impact on the legitimate motion picture industry. Anti-piracy actions taken are sporadic and do not reflect any concerted response to this serious problem. And finally, unauthorized parallel imports of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) now account for almost 50% of the total DVD market.

The rental of back-to-back VHS copies of released titles and of prerelease titles is still a problem. There remain around 150 to 200 video rental outlets in Turkey, with an average pirate copy stock of between 50 to 200. Pirate copies are generally produced individually by these shops for their own use. Mass production and distribution are nonexistent. Copies are generally poor quality, with typewritten or handwritten labels. Pirates use legitimate videos, imported VHS

cassettes, laser discs and especially pirate VCDs as masters. Occasionally, pay television broadcasts are used to produce pirate copies. The level of video piracy was 50% in 2000, a significant drop from 85% reported for 1999. Video piracy was replaced by increasing levels of VCD piracy, which explains why the estimated levels of losses remained constant between 1999 and 2000.

Broadcast television piracy has been a serious but declining problem in Turkey. It is now estimated that approximately 10% to 15% of the 230 local broadcast stations continue to engage in broadcast piracy, transmitting domestic and foreign films, including MPA members' titles, using home video cassettes and sometimes pirate products as masters. License overruns by some major television stations, which had been a recurring problem, have now become less frequent due to AMPEC and RTUK supervision. However, the short 20-year term of copyright protection in the old Turkish copyright law (prior to its 1995 amendments) means that these television stations show many still-valuable titles without authorization.

MPAA reports that unauthorized public performances of new and popular films on wide screen systems at schools, cafes and bars, cultural centers and unlicensed video theaters are frequently encountered. Certain intercity coach services also show video films during journeys. AMPEC identified and investigated nine public performance piracy cases in 1999 and 25 cases in the first half of 2000. The problem is steadily increasing.

For the entertainment software industry, most of the piracy in the Turkish market is due to pirate imports of pirated videogames, on all platforms. As mentioned above, numerous pirate PC (personal computer) and CD game titles are available in Turkey, most of which appear to come from the Far East (Malaysia, Hong and Singapore) as well as Russia. There was a slight resurgence in optical media out of Bulgaria, too. Pirate cartridge-based videogames manufactured in China and shipped through Hong Kong also flood the Turkish market. The estimated level of piracy increased very significantly over the past year, up to 96% in 2000. This means almost the entire videogame market in Turkey is composed of pirate product. IDSA reports that estimated losses due to entertainment software piracy in Turkey escalated to \$116.2 million in 2000.

Retail stores sell pirate software and game titles, with some pirate titles sold for as little as \$6. For example, one videogame company reports that 98% of their platform-based product in Turkey is pirate, and 98% of the PC products are pirate. All of this pirate CD product are silver CDs, meaning they have been produced at factories, and all imported from Malaysia, Thailand, Hong Kong and Singapore. There is no gold CD burning reported in Turkey. There is a highly organized and effective network used to distribute pirated product. To compound matters, Internet-based piracy of games has appeared. AMPEC, working in conjunction with Turkish police, seized 40,000 pirate game CDs during 2000.

U.S. book publishers continue to report that the book piracy situation in Turkey remains among the worst in the region. Illegal photocopying and unauthorized translations and offset reprints of science, technical and medical texts remain high. English as a Second Language (ESL) materials continue to flood the market. The education market is growing, as new private universities open. Photocopy shops are established outside the gates of most universities. Such photocopying also occurs on a semi-official basis, whereby a professor includes sections of books in his course notes and the bound notes are available for sale in the photocopy shop. Publishers report that the problem of unauthorized offset publications is declining. Bookstores mix both legitimate hardcover product on their shelves with pirate editions, and it is difficult to distinguish

the real from the piratical product. It is common practice in Turkey for bookstores to swap overstocked books without documentation, and as a result, this makes it very nearly impossible for the legitimate industry to bring actions against suspected stores because of the difficulties in tracking ownership of the suspect material. The main bookselling section in a shopping mall in downtown Ankara sells mainly legitimate titles, but there is a section nearby where pirate text and reference books are easily available. Booksellers estimate that anywhere between 30% to 70% of the market is supplied by pirated books. Estimated trade losses due to book piracy are \$28 million in 2000. Losses probably would have been higher, if not for the general economic difficulties in Turkey during 2000.

Estimated piracy levels and trade losses due to business software piracy in 2000 are \$68.3 million, with a 69% piracy level; both these statistics reflect a drop over the prior year. Software piracy continues to be a significant problem in both the distribution channel and with end users. Although the police raided one street market in December 2000 and seized a number of illegal CD-ROMs, illegal CD-ROMs are still being sold openly in street markets and in retail shops. The illegal loading of software onto the hard drives of PCs continues to be a major problem. The police conducted raids of approximately 30 resellers and 10 end users in 2000; however, the reseller fines issued averaged approximately \$3,500 per reseller, an amount which is not remotely deterrent. No end user cases reached judgment in 2000. A court in Izmir did order one reseller to serve three months in jail and to pay a substantial fine but the sentence was appealed and is now postponed under the general amnesty issued late last year.

For the recording and music industry, the estimated level of piracy for 2000 was 40%. Estimated trade losses to audio piracy remained at \$4.0 million last year. Affiliates and licenses of the major international record companies continue to be actively involved in local anti-piracy activities.

COPYRIGHT ENFORCEMENT IN TURKEY

Enforcement efforts by the Turkish authorities remain inconsistent. The most notable deficiency is that the criminal and civil judicial systems simply do not impose any effective deterrence against piracy. There is a litany of problems: The penalties issued are too low and not sufficient to deter piracy; judicial proceedings take too long; civil remedies and procedures are inadequate; and TRIPS-compatible civil *ex parte* searches are not available. While there has been cooperation between the industries and the various Turkish authorities on running raids and seizing infringing product, both in the cities and at the border, these actions have not translated into expeditious prosecutions and judgments which have a deterrent effect on piracy in Turkey. To compound matters, a general amnesty was adopted in December 2000 which had the effect of postponing sentences in cases involving crimes committed before April 22, 1999 – including copyright cases which had been decided or were in process of prosecution. The copyright industries continue to play active roles in investigating and conducting anti-piracy actions on the ground as well as working toward effective copyright law reform. Beyond existing legislative shortcomings, the handling of piracy cases in the Turkish courts must be improved.

Failure to Impose Deterrent Criminal Penalties for Copyright Infringement

IIPA's Special 301 reports consistently have identified the deficiencies in Turkey's enforcement system. Historically, the police have been willing to run raids. But raiding alone, without effective deterrent penalties imposed upon wrongdoers, will not result in deterrence. Simply put, Turkish authorities have failed to impose deterrent criminal penalties in piracy cases. Those cases which have been decided are characterized by low penalties and suspended sentences. Pirates view these merely as a "cost of doing business." Sentences are generally suspended by the court for first offenses. According to Law No. 647 for the implementation of criminal sentences, judges are required to automatically commute sentences of year (or less) into a fine. Fines can even be paid in installments (and given the depreciation problem, deterrence is again lacking). Also missing from the current copyright law are provisions which increase the penalties in cases of repeat offenses, provisions to withdraw business licenses, and provisions to order the closure of businesses. The pending copyright bill should cure these omissions.

On the audiovisual side, AMPEC, the local audiovisual anti-piracy organization of which MPA is a member, has conducted thousands of raids and close to a thousand legal actions over the years. AMPEC uses the criminal provisions of the copyright law; between 1988 and 1995, AMPEC primarily used the administrative sanctions available under the cinema law, since the penalties under the old copyright law were so abysmal. In late 1998, AMPEC began to focus on optical media piracy. During 2000 alone, AMPEC opened 325 investigations and conducted 109 raids, resulting in 93 new legal actions. Seizures included 124,110 pirate VCDs, 841 pirate DVDs and 578 pirate videocassettes. Despite this high level of activity, there is no deterrence within the Turkish legal system. To give a sense of scope of the industry's campaign over the last decade (1988-2000), 4,945 investigations were initiated; 1,198 raids were run; over 293,200 infringing copies of audiovisual works were seized; 1,003 legal actions initiated; and 604 decisions issued. In almost all these cases, prison terms were commuted to fines, and the fines were generally suspended.

The Business Software Alliance (BSA) has an active criminal enforcement program in Turkey, targeting primarily resellers and end-users. With respect to business software efforts, the software industry filed criminal complaints which resulted in raids of approximately thirty resellers and ten end users in 2000. Of the twenty-five criminal cases which came to judgment in 2000, eighteen ended in convictions. However, in seventeen of the cases, the court commuted the jail sentences to a fine and then suspended the fine. The average amount of fines was \$3,500, hardly a deterrent penalty for a successful pirate. However, the amount is somewhat irrelevant as the fines are not actually imposed. Consequently, the software industry must devote additional resources to appealing the suspension of the sentences and fines.

In one case this year, the court ordered a reseller to three months in jail and to pay a fine equivalent to \$77,000. This is the first case in Turkey in which a jail sentence has been ordered and the second with a substantial non-suspended fine. Predictably, the sentence was appealed (and the jail sentence has now been postponed under the general amnesty). Although the issuance of a deterrent-level fine by the trial court is a positive step, the court's decision appears to have been based on factors distinct from the actual infringement and was primarily in response to the defendant's excessive criminal record and contemptuous attitude to the court during proceedings. As in past years, if the court does convict, the software industry is often forced to expend considerable resources arguing appeals lodged by convicted defendants. Of the eighteen convictions in 2000, six are currently on appeal. In addition, seven defendants have been acquitted in spite of clear evidence of infringement. These cases are also being appealed. BSA's appeals have so far been upheld by the Court of Appeal. Even so, it is a waste of time and

resources to have to consistently appeal both unwarranted acquittals and the suspension of sentences and waivers of monetary penalties.

A recurring problem is the judiciary's lack of expertise and knowledge with respect to copyright cases and the inefficiency of the judicial system. For example, Turkish courts routinely request expert reports on issues of law, as well as fact, including basic legal questions, such as whether use of software without authorization is a violation of copyright law. BSA's experiences in Ankara highlight the problem. The court-appointed experts do not have the necessary expertise in copyright law and generally issue reports stating that they cannot determine if hard disk loading is a copyright infringement. On the basis of these reports, the court will grant an acquittal (as noted above, this has happened in seven cases this year).

Defendants can also use the court's over-reliance on expert reports to prolong proceedings. Defendants can stall cases for years by objecting to expert reports repeatedly without having to show any reasonable grounds for such objections. It often takes up at least two months for the court-appointed experts to issue a straight forward report; if the issues are complicated or if there is a high volume of work, it can take up to a year. In one case, which was filed in 1998, the defendant has objected to the expert report and requested that a new report be prepared three times. In addition, contrary to the rules of Turkish civil procedure and the general practice of courts, the court ordered BSA to pay the costs of obtaining all three reports even though BSA had raised no objections to any of the reports.

Several companies in the entertainment software industry pursue anti-piracy efforts in Turkey during 2000. There has been some success in working criminal cases with Customs officials. For example, one company ran over 70 raids in 1999 in retail areas in Istanbul and Ankara. Cooperation with customs has been very good. While the raids have helped those retail markets, they have not reached far enough to disrupt the distribution and supply chain, which often has organized crime elements. Another publisher participated in over 80 raids run by AMPEC which resulted in the seizure of 26,000 pirate videogames. Of the resulting ten cases, five included prisons sentence and fines, which were suspended; in the other five cases, these sanctions were not suspended. The obstacles to enforcement continue to be low penalties and slow prosecutions. The general amnesty passed in late 2000 ended many of the ongoing criminal prosecutions.

Lengthy Delays in Criminal Infringement Cases

Initiating criminal actions can often be cumbersome and expensive for injured parties under the current system. A typical criminal action in Turkey always starts with a complaint to the public prosecutor and a raid with the police under the copyright law. *Ex officio* actions are not possible for copyright offenses. In order to ensure that pirate products are confiscated, therefore, private parties (such as AMPEC or a member of the BSA)⁵ must file criminal complaints, and the Public Prosecutor has to approve a police raid followed by a criminal action.

Following a raid where suspect material is seized, the Public Prosecutor then presses criminal charges and the copyright owner's lawyers immediately submit a petition of intervention so as to become a party to the case. Without such intervention, cases, if lost, cannot be appealed.

⁵ The Attorneyship Law forbids private entities such as AMPEC and BSA from protecting third parties (rightsholders) without having a local lawyer as an intermediary for each and every case. Professional associations (such as collecting societies) do have standing to bring cases in their own right on behalf of their members.

Without the copyright owner's intervention on behalf of its member companies, it is also unlikely that cases would be won (without the presence of the copyright owner's attorneys, the accused can challenge rightholders' rights, and prosecutors are likely to find it difficult to prove their cases because of a lack of access to rightholders' documentation). As a result, lawyers must be hired for three key phases of any case to: (1) file an initial complaint with the public prosecutor and obtain a search warrant; (2) conduct a raid with the police; and (3) have the Public Prosecutor press charges and to assist him in the courtroom to obtain a conviction. Securing practical copyright protection can thus be a long and expensive process.

One IDSA company reports that it has had 70 criminal cases pending since 1998. Due to the recent amnesty bill (below), about 40 of these cases have been dropped. The rest remain pending in the Turkish courts.

Courts take one to two years to decide piracy cases and an additional 8 to 12 months to decide appeals. The few cases that have been decided are characterized by low conviction rates and low penalties, which fail to deter pirates. Penalties cannot be increased during trial, so the amounts of fines depreciate about 65% per year.

False Registrations of Banderoles

The number of false registrations of banderoles grew over the past year, and have adversely affected several copyright industries, especially book publishers and audiovisual and videogame companies. The banderole system has been around for years yet only recently is becoming a barrier to legitimate trade. It also impacts on anti-piracy operations, commercial market entry, and for the publishing industry, freedom of speech.

It has been increasingly difficult for legitimate rightholders to deregister these banderoles, which were obtained by unauthorized persons and/or companies. In other cases, it has also been difficult for legitimate rightholders to obtain banderoles in a timely manner in the first place. Two years ago, one foreign publisher refused to enter a copublishing deal with a local publisher because of significant difficulties in being able to procure government banderoles (official stickers) on a timely basis. Meanwhile, local Turkish publishers do not bother to procure the banderole, and the authorities do not followup on publishers' using the stickers. The proposed copyright amendments do contain provisions aimed at addressing this problem; the industry remains wary about whether the Turkish authorities will be able to correct these problems in an immediate and effective manner once the law is adopted.

The international publishing industry wrote to President Demirel in protest of the use of the banderole in book publishing, especially as the freedom to publish and distribute books is a right guaranteed by several international agreements, including the European Convention on Human Rights.

Ineffective Turkish Border Measures

Large quantities of pirate optical media product – videogames, VCDs and the like -- continue to enter Turkey. Customs offices have been warned by the Ministry of Culture and the General Customs Authority to stop mass importation of pirate VCDs. Nevertheless, pirates have found ways to bypass customs controls.

One of the keys to addressing this problem is to have effective border enforcement. The Turkish Customs Law has been reenacted very recently. Customs regulations have also been revised to harmonize with the mechanisms in the European Union system. Reportedly, these regulations require that the rightholder file a complaint or application to initiate action and that the customs authorities cannot act on their own initiative. TRIPS Article 58 requires “competent authorities to act upon their own initiative and to suspend the release of goods.” Given the rise in piratical optical media products entering Turkey, there is much room for improvement in border enforcement. It should be noted that some copyright industries do experience good cooperation with customs officials on raiding actions.

Lack of Effective Civil Remedies, Especially *Ex Parte* Searches

BSA has encountered difficulties in obtaining judicial authorization to order civil *ex parte* searches and it is not clear that Turkish law provides for civil searches that would fulfill its obligations under TRIPS. The Ministry of Justice has stated that civil *ex parte* searches are available under Turkish law without citing any specific provision. The only provisions that IIPA is aware of are Articles 368 and 369 of the Turkish Civil Procedure Law (TCPL) which provide a procedure to help a plaintiff collect evidence to build a case but are insufficient to meet TRIPS requirements because they depend on the consent of the alleged infringer. According to Articles 368 and 369, in the event that there is a risk that evidence may be damaged or destroyed, or that delays will result in difficulties in producing the evidence, the plaintiff may apply to the court for a request to search. If the court finds it necessary to protect the plaintiff’s rights, Article 372 provides that the court may dispense with the notification of the opposing party. The search of the infringer’s premises for evidence must be conducted by a judge in the presence of a bailiff, an expert witness appointed by the judge and the applicant.

However, Articles 368 and 369 allow the alleged infringer to refuse to allow the search of the premises and neither the applicant nor the court can enter the premises under any circumstances in the event that the target refuses entry. This search provision is not adequate and is not compliant with TRIPS. It does not allow a plaintiff the ability to do anything other than request to enter the premises of a company which is believed to be engaging in illegal behavior. The opposing party has every incentive to refuse entry; therefore, this procedure does not allow the software industry to collect the evidence necessary to bring civil actions against infringers.

In addition, under this procedure evidence cannot be seized unless a separate application for injunction is made and a precautionary injunction is granted. Therefore, the plaintiff must first apply for a search order and, if granted, entry to the premises would be gained. However, in order to seize the evidence at the premises, the plaintiff would then have to apply for an injunction. The problem is that by the time it takes to accomplish this two-step process, the evidence would likely have been destroyed as between search and seizure there would be sufficient time for the target to destroy or dispose of the evidence.

BSA is not aware of any instance where this search procedure has been successfully used. An application filed by a BSA member for both a search and an injunction was rejected because the court considered the request to be too unusual. The fact that the court rejected the BSA member company’s application for an order not commonly presented to courts, even though there

is nothing in the law to prevent its being granted, is another indication of the critical need for judicial training in software enforcement cases.

Awards of Expenses in Civil Cases

Articles 413-426 of the Civil Procedure law allow awards of court expenses, which include all reasonably incurred costs, appropriate attorney's fees, costs of collecting evidence, preparing and duplicating documents, travel, retaining exporters, and the like. Industry reports indicate that the Turkish courts award attorney's fees based on the fees fixed by the Turkish Bar, and not based on the amounts actually paid to attorneys – the form is always much lower than the latter. We request additional information from the Turkish government as to whether and how the Turkish courts, as a matter of practice, award such expenses in copyright infringement cases. The tariff based on which the attorney fees are reimbursed is determined and published by the Ministry of Justice. The inflation is not taken into account and this tariff is far from being realistic. The courts reimburse costs based on this tariff. Awards of expenses in civil cases must be clarified and consistently applied.

COPYRIGHT LAW REFORM IN TURKEY

The copyright industries have been pressing for copyright law amendments for over five years, and our frustration with the inability to adopt these amendments is palpable.

Amendments to the 1951 Copyright Law Need to be Adopted By the Parliament to Bring Turkish Law Up to International Standards

IIPA and the U.S. government consistently have urged the Turkish government to amend its copyright law to establish "world class" protection for copyright and neighboring rights. This would include making appropriate amendments to bring the law into compliance with Turkey's obligations under the Berne Convention and the WTO TRIPS Agreement. IIPA also has recommended that any legislation also should implement the standards set out in the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and Turkey should also take the necessary steps to ratify these treaties with WIPO. Turkish officials have indicated that they will consider ratifying these treaties after the copyright legislation is passed.

The pending copyright legislation should be adopted swiftly.

During 1999, efforts by the Turkish authorities to revise its copyright law up to international standards increased significantly. IIPA and its members were optimistic about local reports that the Turkish government would be able to revise the August 1999 version and achieve legislative passage by the end of 1999 so that Turkey might satisfy its January 1, 2000 TRIPS obligations. The Turkish Ministry of Culture did introduce a copyright bill to Parliament on October 21, 1999, and a Subcommittee in the Education and Culture Committee of the Parliament was tasked with discussing and making further technical amendments to the bill. Unfortunately, that WTO deadline came and went.

The good news was that the Ministry of Culture again took the lead in greatly improving the quality of this proposed legislation in late 1999-early 2000. IIPA and its members worked

informally with the Ministry of Culture drafter to explain the legal issues involved and recommend necessary revisions to the copyright law amendments. More amendments were made to the copyright bill, circa February 2000 and we heard again in the summer of 2000; all reports indicated that these were “positive” amendments. The copyright package was approved by the Education and Culture Committee on March 23, 2000, and unfortunately, the General Assembly went out of session for the summer before it could vote on the legislation. In the fall of 2000, we were informed that the copyright amendments were near the top of the agenda of the General Assembly. There was some hope that the bill would pass by late November or by the end of 2000. Sadly, that did not come to pass, and another year of the legislature’s inability to pass this legislation was marked. The bill is still pending its second reading.

The version of the bill which IIPA reviewed was circulated circa June 2000. In general, this version includes many positive points:⁶

- the range of criminal penalties have been increased. For infringement of economic rights, the jail terms are to be four to six years and a 50-150 billion lira fine (about U.S.\$74,000-\$220,000). This would help eliminate the issue of suspended sentences, which can be issued in cases where the law provides specifically for jail terms of two years or less. However, proposed penalties for certain other offenses, including storage of infringing materials for commercial purposes, were decreased; these should match the higher penalties for economic rights.
- the range of criminal penalties for unauthorized uses of banderoles has been increased to the same level, as above.
- repeat offenders will be subject to a doubling of penalties when another infringement is committed within a two-year period.
- the longstanding TRIPS-incompatible retroactivity issues appears to be fixed adequately. In this regard, IIPA also has requested confirmation that the proposed sell-off period for certain products will be narrowly targeted to pre-June 12, 1975 videos only, not to other copyrighted materials.
- the sections on exclusive rights (including reproduction, distribution, importation and broadcasting) have been amended in positive ways, including incorporating obligations of the WIPO Treaties.
- the objectionable exception for nonprofit public performances in education and instructional institution appears to have been narrowed.
- defendants who cannot produce evidence of legality for the copies they use will be presumed guilty.
- prosecutors will be granted authority to apply to the court for an order to close a business engaged in illegal reproduction, as well as to order the seizure of pirated copies. In urgent cases, prosecutors will themselves have the authority to issue such an order without applying to the court.
- procedures for injunctions to be ordered by Customs have been included.
- criminal sanctions for people who remove rights management information have been inserted.
- provisions have been added which state that the Customs Laws shall apply in cases where there is a possible importation or exportation of infringing copies.

⁶ We must point out a caveat that the Turkish government may have made several additional amendments to the legislation since June 2000. IIPA does not have that text and therefore cannot comment on their adequacies or deficiencies.

- an intellectual property court will be established.

IIPA applauds the advances made in improving the quality of the proposed legislation. We support its swift adoption. Nevertheless, we note for the record that we still have several points of ongoing concern:

- the bill does not provide express provisions regarding civil *ex parte* search measures.
- the bill does not include provisions on anti-circumvention of technical measures. Both criminal penalties and civil remedies for these acts are a necessary part of effective enforcement of copyright rights, especially in the digital age.
- provisions requiring the recording and registration of music and films have been proposed. While the Turkish government may intend to establish a licensing system with a goal of enhancing the protection of these works, such registration formalities may very likely violate the Berne Convention and TRIPS.
- additional last-minute amendments affecting the *banderole* may have been made which will require further evaluation.
- it appears that a new transition article will establish regulation regarding the compulsory deposit of copyrighted materials. To the extent that this is a formality prohibited by the Berne Convention, it would violate Turkey's TRIPS and Berne obligations.
- modifications have been made regarding how the Council of Ministers will use the funds generated by the blank tape levy, and states that the distribution of such collected amounts will be left to regulations which will be issued after the law passed. This issue needs to be monitored closely.
- IIPA had urged that clear provisions on contractual transfers, especially for those involving cinematographic works, be included in the bill.

... to correct deficiencies in the current copyright law

In June 1995, the government of Turkey amended its 1951 copyright law, after years of consideration.⁷ Despite the few improvements brought about by these 1995 amendments, the current law still does *not* comply with the TRIPS Agreement. IIPA has provided lengthy summaries of the deficiencies in the Turkish copyright law in prior Special 301 submissions.⁸

⁷ The June 1995 amendments improved the 1951 law by adding protection for software (mostly in line with the E.C. Software Directive), protecting producers of sound recordings, adding rights of distribution and rental for works and sound recordings, and providing protection against piratical importation. Those amendments also increased the fines for infringement to 300 million to 600 million Turkish Lira (at current rates, approximately U.S.\$445 to \$890).

⁸ Here is a brief outline of the deficiencies IIPA has identified in the current copyright law over the years: (a) the failure to provide full protection for pre-existing U.S. works, sound recordings and performances, as required by TRIPS; (b) short jail terms and the low level of fines, which are not a sufficient deterrent to copyright infringement and are far too low, both in terms of statutory levels and as applied in practice; (c) clarification is needed regarding the availability of civil *ex parte* searches, as required by TRIPS; (d) the law contains a Berne- and TRIPS-incompatible article permitting the creation and use of anthologies for educational purposes without permission; (e) a presumption which grants any owner of a copy of a cinematographic work the right to exhibit it remains in the law, and is Berne- and TRIPS-incompatible; (f) the system permitting a right of remuneration only for the public performance of works recorded on audio or video media remains and is Berne- and TRIPS-incompatible; (g) clarification is needed that compilations and databases are protected as "literary works"; (h) the exception for the nonprofit public performance of published works for public education and charitable purposes is vague, overbroad and likely violates Berne and TRIPS. In addition, IIPA urged that the government clarify that it may not issue a decree expropriating foreign works and sound recordings first published in Turkey and that moral rights should be made subject to waiver.

Implementation of the 1998 Software Circular Remains Lax

On February 6, 1998, the Turkish Prime Minister signed a circular requiring all government ministries to adopt measures designed to legalize their software. These measures include audits and separate budgeting for software. In IIPA's 1999 Special 301 filing, BSA reported that it was "too early to assess definitively the impact of this circular. Initial feedback from the software industry suggests that the government has made some progress toward compliance." However, another year has passed and compliance remains disappointing. Ensuring that adequate funds are provided for software purchases remains largely unaccomplished. While BSA understands that the events of 1999 may have slowed process in Turkey, the government should begin to take concrete steps to put systematic procedures in place to monitor current and future use of software and to allocate sufficient funds to acquire all necessary licenses. BSA and its members have conducted sessions to training enforcement officials on the end user issue. This Circular appears to have had a minimal impact.

The Cinema, Video and Music Works Law Remains Inadequate

Any Turkish effort to amend the 1986 Cinema, Video and Music Works Law would resume only after the passage of the pending copyright law amendments. Such amendments would parallel the provisions found in the pending copyright law amendments, IIPA was told by Turkish officials. Efforts to change the 1986 cinema law have been in play, off and on, for over six years. The 1986 law fails to provide adequate protection, though initially it was helpful in curbing piracy. Efforts to amend it stalled back in 1995, and then were dropped by the then-current government. Before the copyright law was amended in 1995, the motion picture industry used the cinema law almost exclusively to conduct its anti-piracy campaign. The major problems with the cinema law are its low fines and the lack of jail terms. Several versions of draft amendments to this cinema law have included proposals to increase fines and to permit the closure of businesses engaged in illegal activities. The last draft which IIPA reviewed (circa 1995) failed to include jail terms and contained discriminatory registration fees and tariffs for the recording and registration of films (which violate GATT). Also missing were provisions to increase the penalties in cases of repeat offenses, provisions to withdraw business licenses, and provisions to order the closure of businesses. Any effort to revise the 1986 cinema law must not repeat the problems in prior sets of draft amendments. Penalties should be the same in both this law and the copyright law. As described above, MPA and AMPEC currently rely on the copyright law, not the cinema law, to fight piracy in Turkey. The Turkish courts have confused the two.

Criminal Code Issues

A general amnesty law was adopted in 2000

Over the last two years, the copyright Industry has been gravely concerned about the effect any general amnesty would have on pending criminal cases for copyright infringement. In September 1999, the Turkish Parliament passed a separate general amnesty bill, which was subsequently vetoed by the President. The president vetoed that 1999 bill and a subsequent one presented in December 2000, but ended up signing a second amnesty bill presented days later. As a result, this amnesty law (Code No. 4616) entered into effect on December 22, 2000. It

reduces sentences for a variety of violent and nonviolent crimes and permits early release from overcrowded prisons. We were informed that this amnesty bill is retroactive, and applies to all offenses (not just copyright infringements) committed before April 23, 1999. For cases in which no final decision has yet been issued, the cases will be suspended for five years, and if the defendant does not commit another crime within five years (from December 22, 2000), the case will be dropped. We have been told that this amnesty does not waive any criminal fines imposed in decided cases.

The bottom line is that, for all intents and purposes, any cases involving acts committed before April 23, 1999, will be dropped. Given the longstanding problems the industries have had in getting any criminal cases through the Turkish courts, the passage of the copyright law amendments (which contain higher criminal penalties) becomes even more imperative. IIPA is in the process of gathering information about this amnesty's impact on pending copyright cases. BSA reports that the majority of its pending cases have been postponed due to the amnesty. In the audiovisual area, AMPEC reports that 174 cases (most of which involve video and VCD retail cases) have been adversely affected by the amnesty. One IDSA member company reports that 40 of its 70 pending cases have been affected (i.e., dropped) by this amnesty.

Criminal code reform accomplished in 1999

Amendments to Turkish Criminal Code and the Criminal Enforcement Act entered into force on August 1, 1999.⁹ These amendments increased fines eightfold for all laws that entered into force between January 1994 and December 1998. These 1999 amendments also automatically update all fines under these laws by the inflation rate in the preceding year, as defined by the government. The Culture Ministry is working with the Justice Ministry to ensure that the higher fines in the copyright law will be at least as high as those calculated using the criminal code multiplier.

Computer Crimes Law (CCL)

Software piracy is currently punishable by one to five years in jail under the CCL. In the case of conviction under either the copyright law or the computer crimes provisions, all material including illegal software is confiscated and destroyed following final conviction. In 1999, some public prosecutors denied ordering the seizure of personal computers (PCs) that contain illegal software. Although BSA has been working closely with the public prosecutors to explain why it is critical for PCs or hard drives to be seized, this has continued to be an issue in cases filed this year. This is a major problem because in order to get convictions, the PCs must be produced in court as evidence; the courts do not view expert reports detailing the illegal software found as sufficient and will not issue a decision unless the PCs, with the illegal software, are produced in court as evidence. Given the lengthy trial schedules, the PCs may not be put into evidence for a year or more. By then, the defendants will have deleted the infringing software from their PCs, and the court will acquit them on the basis of lack of evidence. This phenomenon points to the urgent need to educate prosecutors and the courts about the fact that digital evidence can be quickly and easily disposed. In fact, using the CCL can involve delays; it can take up to 10 days to obtain a search. During this period, targets have enough time to defeat the object of the intended search.

⁹ IIPA does not have the text of this bill.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

URUGUAY

EXECUTIVE SUMMARY

Uruguay has been struggling for over a decade to reform its 1937 copyright law in order to improve both the substantive standards of copyright protection, and Uruguay's enforcement mechanisms. While the May 2000 version represented an improvement over earlier texts, it still requires major revisions before its adoption. The congressional committee reviewing this bill made some amendments and approved it in December 2000, passing it to the full Congress for introduction, possibly as early as March 2001. In addition, a software-only bill was presented to and unanimously approved by the Chamber of Representatives in October 2000. This bill contains numerous dangerous and TRIPS-incompatible provisions; it is unclear whether the Senate will reject the proposed bill.

Without a new copyright law, it will remain virtually impossible to protect copyrighted materials or provide effective enforcement in Uruguay. Copyright piracy levels continue to remain high. Enforcement at the borders needs to be significantly improved, especially given the growth of optical media piracy in the Mercosur region. Civil enforcement of copyright is also ineffective. Meanwhile, the U.S. copyright industries lost an estimated \$39.7 million due to piracy in Uruguay in 2000.

At the May 1, 2000 Special 301 announcement, the U.S. Trade Representative noted: "We urge the Government of Uruguay to enact TRIPS-consistent copyright legislation and to amend the new patent law to bring it into full compliance with TRIPS Agreement obligations."¹ Sadly, yet another year has passed, and Uruguay still has not passed copyright legislation. As a member of the World Trade Organization, Uruguay fails to meet the TRIPS-level standards of both substantive copyright protection and enforcement.

Because of the long delays in passing much-needed copyright legislation, the continued high levels of piracy, and inadequate enforcement, IIPA recommends that Uruguay be elevated to the Special 301 Priority Watch List this year. We also request that USTR conduct an out-of-cycle review later this year to evaluate progress made on these copyright issues. IIPA and its member associations urge the U.S. government to use all available trade tools – including the possibility of formal action in the WTO -- to deal with the serious copyright deficiencies in Uruguay.

¹ Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	65%	2.0	65%	2.0	65%	2.0	75%	2.0	65%	3.0	43%
Sound Recordings / Musical Compositions	4.0	35%	4.0	35%	3.0	25%	2.0	25%	2.0	25%	0.1	19%
Business Software Application ²	15.4	67%	16.0	70%	13.1	72%	11.0	74%	13.9	80%	14.0	84%
Entertainment Software ³	16.3	82%	6.9	70%	7.6	74%	7.0	70%	7.2	73%	6.9	71%
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
TOTALS	39.7		30.9		27.7		24.0		27.1		26.0	

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Law of 1937 Fails to Satisfy TRIPS Standards.

Copyright protection in Uruguay is afforded under its 1937 copyright law, Law No. 9739, as amended in 1938.⁴ Separate anti-piracy legislation to protect sound recording producers was passed in the 1980s.⁵ It is important to note that Uruguay, as a member of the World Trade Organization, was obligated to provide TRIPS-level protection as of January 1, 2000.

For more complete discussion and details on these items, please refer to IIPA's August 21, 2000, GSP Petition against Uruguay.⁶ IIPA has highlighted the major deficiencies in Uruguay's copyright law in previous Special 301 submissions over many years. Below is yet another summary of the substantive copyright TRIPS deficiencies in the current 1937 copyright law:

² BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$13.1 million and 72%, respectively, were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

⁴ IIPA does not have any knowledge or text of any major subsequent amendments implemented into the 1937 law, prior to the various bills proposed herein.

⁵ See Law No. 15.289 of 1982; Law No. 541 of 1984.

⁶ The U.S. government did not accept IIPA's August 2000 petition to review Uruguay in this year's annual review of country eligibility practices under the Generalized System of Preferences (GSP) program. One of the criteria to obtain and keep GSP preferential duty-free benefits is "the extent to which such country is providing adequate and effective protection of intellectual property rights." See International Intellectual Property Alliance, Request for Review of the Intellectual Property Rights Practices of Uruguay in the 2000 Annual GSP Country Eligibility Practices Review, Aug. 21, 2000, available on IIPA's Website at <http://www.iipa.com> and in USTR's Reading Room in Washington, D.C. In 1999, \$56.8 million in Uruguay's imports to the United States benefited from the GSP program, accounting for nearly 29.4% of its total imports to the U.S. For the first 11 months of 2000, \$76.1 million of Uruguayan goods entered the U.S. under the duty-free GSP code, representing a 46.9% increase over the period last year. For further details on Uruguay's history on the Special 301 lists, see Appendices D and E of this submission.

- inadequate term of protection is afforded for works, phonograms and performances (TRIPS Arts. 12, 14.5).
- computer programs are not expressly protected in the copyright law, but by executive decree. Explicit integration in the copyright law as “literary works” is necessary (TRIPS Article 10). Despite this deficiency, BSA has been able to conduct anti-piracy operations, albeit with some procedural difficulties. The lack of express protection for software, however, does represent a risk for favorable court decisions in piracy cases.
- protection for compilations of data is unclear as to whether it covers data in machine- readable or other form (TRIPS Article 10).
- it is not entirely clear from the law whether the “right to disseminate” encompasses the specific retransmission rights found in Article 11*bis* of the Berne Convention (TRIPS Article 9.1). It is important that this Berne Convention/TRIPS right be afforded in the Uruguayan law.
- the 1937 law does not have an express rental right for computer programs and sound recordings rights (TRIPS Articles 11, 14.4). The law does contain broad rights of “alienation” and “economic exploitation” so that it is possible, therefore, to argue that these broader rights encompass a right of rental.⁷
- one article permits the “transmission of sounds or images by broadcasting stations or any other means operated by the State, when such stations have no commercial purpose and operate solely for cultural purposes.” Nowhere does this overbroad exception to protection mention anything about remuneration, which might have suggested a Berne-compatible outcome (TRIPS Article 13). It appears that this compulsory license may not have been invoked to date, but nevertheless, as written, this provision violates TRIPS.
- given the short terms of protection under the 1937 law (above), IIPA harbors concern over Uruguay’s application of full protection to pre-existing works, phonograms and performances whose term of protection have not expired in the country of origin (TRIPS Articles 9.1, 14.5, 14.6).

Copyright Reform in Uruguay Has Languished for Years. Swift Passage of the 2000 Version of the Comprehensive Copyright Bill, Including Amending Certain Provisions, is Needed.

For much of the last decade, Uruguay has been working on draft legislation. It is this seemingly never-ending legislative saga which prompts IIPA’s recommendation that Uruguay be elevated to the Priority Watch List. While the latest copyright bill (circa 2000) is a good improvement over the current law, the bill continues to contain several deficiencies which require attention before passage.

⁷ MPA reports that only in the Spring of 1999 did it finally obtain a judicial decision that the rental of pirate videos was indeed a copyright infringement; the appellate court reportedly expanded the term “distribution” to include sale or rental.

There have been numerous versions of copyright legislation over the years, starting in the early 1990s, then followed by a bill in 1995, again in 1996, 1997, 1999 and another in 2000. To varying degrees, these bills did address many of the basic TRIPS deficiencies. However, all the bills have required additional improvement and refinement on TRIPS issues. Passage of modern legislation is long overdue, from both a bilateral and multilateral perspective, and passage of a new law is needed urgently.

The 1995 Copyright Bill

In 1995, the Uruguay Copyright Council solicited comments from interested parties on a draft law which, in general, represented a distinct improvement over the 1937 copyright law, but contained significant deficiencies which did not comply with international standards. In late 1996, the Ministry of Education and Culture forwarded another draft to the Presidency for further review. It was hoped that the bill would be forwarded to Congress by the end of 1996, but that did not occur.

The 1997 Copyright Bill

After a revised draft was circulated in early 1997, the bill was presented to Congress in June 1997. Hearings before the Senate Education and Cultural Committee were held in August 1997. After much coordination, numerous parties, including the Copyright Council (comprised of local entities such as authors' rights groups), book publishers, the Business Software Alliance, and the Motion Picture Association (represented by the Uruguayan Video Union), the World Intellectual Property Organization (WIPO) and the Inter-American Development Bank (IDB) agreed to support the copyright bill. The 1997 bill represented a vast improvement over the current 1937 law and the drafts IIPA and the USG had reviewed in 1995 and in prior years. While that 1997 bill certainly was not perfect, the copyright industry representatives agreed that it would provide a fairly solid basis for copyright protection in Uruguay, and that it should be passed "as is."

IIPA reported in our 1998 Special 301 submission our fear that if the copyright bill were not passed by the end of 1998, it would risk becoming lost in the politics of the 1999 presidential campaign. In July 1998, Uruguayan President Dr. Julio María Sanguinetti met with Ambassador Charlene Barshefsky to discuss regional issues and intellectual property issues in his country. Reportedly the President responded positively to the Ambassador's entreaties for passage of the long-pending copyright bill, indicating that he would work with the Uruguayan legislature to pass a good law. Unfortunately, IIPA's concerns about timing came true, and copyright reform was not achieved that year.

The 1999 Copyright Bill

In 1999, the copyright bill was revised once again, except this time many of the positive improvements in the 1997 bill were removed. The 1999 bill included changes which *lowered* the levels of protection found in the 1997 version which industry had supported. For example: the term of protection was shortened; the section on border measures was deleted; the criminal penalties proposed for the unauthorized public communication of films or audiovisual works was made lower than those for infringements for other copyrighted materials; a TRIPS-compatible provision allowing courts to order confiscation and destruction of infringing copies and equipment and precautionary orders was removed. IIPA urged that it was important that the TRIPS-

compatible enforcement mechanisms be included in any final legislation. The 1999 bill also continued to contain several troubling issues which industry had identified in the 1997 bill. These included the need to expand exclusive rights for producers of phonograms in on-demand situations, narrowing language affecting exceptions to protection, removing the lengthy provisions regulating contracts and leaving such decisions to private contractual negotiations between the parties, as examples. Despite a flurry of last-minute activity to try to pass the bill, the bill was not passed before the Uruguayan Senate went on recess on September 15, 1999, and the bill was not considered during the following Extraordinary Session.

The May 2000 Copyright Bill

On January 1, 2000, Uruguay's obligations under the WTO TRIPS Agreement entered into effect. The copyright industries cannot support legislation which fails, at the very minimum, to satisfy TRIPS. In addition, one of the copyright industries' current challenges around the world is to elevate the levels of substantive copyright laws to account for changes in the digital environment. Modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed. Many of these changes are contemplated by the two WIPO treaties -- WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In fact, Uruguay signed both these treaties in 1996, but has yet to pass instruments of accession to deposit with WIPO. The Uruguayan government should be encouraged to ratify and deposit as soon as possible. As described below, Uruguay should also include the basic rights afforded in both treaties in its new legislation.

The May 2000 copyright bill, like its 1997 and 1999 predecessors, represented an improvement over the current 1937 copyright law. However, IIPA remains disappointed in the lack of progress Uruguay has made in addressing the difficulties and deficiencies in the proposed legislation. This comprehensive copyright bill was sent to the Congress on May 19, 2000,⁸ and was being considered by the Education and Culture Committee of the Chamber of Deputies until the end of December 2000. During its review, this Committee reportedly made some modifications to the May version of the bill, but these have not yet been published (see discussion at the end of this section). For example, the Committee striped the bill of its computer program-related provisions, because, the Committee alleged, software should be regulated under the separate software-only bill passed by the Chamber of Deputies in October 2000 (see discussion, below).

IIPA's discussion herein focuses on the May 2000 version of the bill. The good news is that many of the amendments in the May 2000-version copyright bill reflect raising the levels of protection up to TRIPS level. For example, improvements include: expanding the scope of protected subject matter to include computer programs and databases; adding a distribution right (which includes both rental and importation); revising the rights of broadcasting and public communication; adding TRIPS-level protection for performers and producers of sound recordings. With respect to civil remedies, the 2000 bill provides that a civil or criminal judge can authorize a judicial inspection without advance notice to the target; this is an essential tool for the industries. The bill does appear to recapture those works and other "productions" (presumably including

⁸ Derechos de Autor y Derechos Afines, Comisión de Educación y Cultura, Carpeta No. 255 de 2000; Perpartido No. 161, Junio de 2000. When the bill goes to the floor of the Chamber of Deputies, it will be assigned a new bill number.

phonograms) which fell into the public domain by giving them the longer term of protection set forth under the bill.

Unfortunately, many of deficiencies found in both the 1997 and 1999 bills sadly remain in the May 2000 version. IIPA consistently has urged that the pending bill⁹ be amended to address and correct these longstanding deficiencies and then be passed swiftly. Below is a brief description of our key concerns; for more detailed discussion, please consult IIPA's 2000 GSP petition against Uruguay. Now that a revised bill dated December 2000 has been prepared, IIPA reserves the right to provide additional comments and analysis.

- Criminal penalties -- some good news, no news and a step backward: The good news is that the May 2000 bill reinserts several important provisions found earlier in the 1997 bill, such as allowing the courts to order the confiscation and destruction of infringing copies as well as equipment and packaging used in the manufacture of said copies giving the judicial authority to issue precautionary measures like injunctive orders; both are TRIPS requirements. Second, there has been no change in the article on unauthorized public communication of audiovisual or cinematographic works, which continues to contain lower penalties than similar infringing acts for other works. Third, the May 2000 bill continues the long silence regarding fines as criminal sanctions. There are no levels of fines included in the copyright bill, and IIPA has no knowledge at this time whether other Uruguayan criminal codes may afford such fines. Ideally both jail terms *and* fines should be available. Last, deleted from the 2000 bill was a provision which would have provided protection for technological protection measures, an important obligation of the WIPO treaties.
- Border measures: The May 2000 bill reinserts another important enforcement tool from the 1997 bill which provides that the Customs Department must act *ex officio*, or at the request of an interested party, hold suspect shipments entering the country for ten days. This is a positive first step in starting to address Uruguay's obligations under Part III of the TRIPS Agreement. Still missing from this draft, at least, is that Customs does not have the explicit right to detain suspect shipments once they have notified the rightholder. It appears that the copyright holders might have to go to court to obtain a judicial order to detain the goods; this is not the optimal solution for border enforcement. IIPA has no knowledge whether the separate Uruguayan Customs law would permit such detention, nor do we have any information on whether the substantive provisions of Uruguay's customs legislation currently and fully satisfies TRIPS. Given the amount of pirated and counterfeited product which crosses the Uruguayan border with ease, we doubt that such measures, even if on the books, are properly enforced.
- Exclusive rights for record producers: Like the 1999 bill, the May 2000 bill fails to provide producers of phonograms with an exclusive right for the making available of their phonograms as contemplated in the WPPT. As mentioned above, it is critical for copyright owners such as record producers to have the right to the control the delivery of their creative materials in the digital age, regardless of the specific technological means employed.
- Term of protection: Both the 1999 and May 2000 bills shortened the proposed term of protection from life plus 70 years (or 70 years after publication/fixation) in the 1997 bill down to life plus 50 (the TRIPS minima). Interestingly, the 2000 bill affords the longer 70-year term of protection only to orchestras and other choral-type groups. IIPA recommends that the

⁹ This summary is based on the Spanish text of the copyright bill which was the version drafted by the Uruguayan Executive and submitted to the Congress in the Spring of 2000.

longer terms, which reflect the international trend, be inserted into the May 2000 bill for all protected subject matter. In addition, term should be 95 years from first publication in cases where the author is a legal entity and for producers of phonograms.

- Broadcast compulsory license: The May 2000 bill properly removes TRIPS-incompatible broadcasting compulsory license found in the 1937 law. There is, however, another broadcasting compulsory license proposed in the bill which provides that it is legal for a broadcaster, without authorization from the author (copyright owner) but with the previous payment of remuneration, may publicly retransmit or transmit publicly by cable a work originally broadcast by the broadcaster with the copyright owner's consent, as long as the retransmission or public transmission was simultaneous with the original broadcast and that the work transmitted by broadcasting or public transmission was unaltered. In this case, our industries prefer that copyright owners and broadcasters negotiate terms of payment and uses of their works via contract. However, the Berne Convention/TRIPS does permit countries to determine conditions under which the right of broadcasting may be exercised, and this can include compulsory licenses. It is imperative, however, that any compulsory licenses follow the terms of Berne Article 11*bis*. A key concern with this provision is that it must in no way, shape or form be interpreted or applied in such a manner that would permit broadcasters to transmit or retransmit (via either rebroadcasting or via cablecasting) copyright-protected audiovisual programming over the Internet. Such "streaming" should not be subject to any compulsory licensing scheme. IIPA and our members harbor a concern that Uruguayan broadcasters who also happen to own cable systems may expand the scope of this compulsory license and use their cable infrastructure to transmit programming to the Internet.
- Overbroad exceptions to protection: The May 2000 bill does not appear to make any changes to the various objectionable provisions IIPA identified in prior draft legislation. The catch-call provision for exceptions fails to track TRIPS Article 13. There is an overbroad exception permitting photocopying of works for teaching or examination purposes in nonprofit institutions without the authorization or payment of a royalty. This same provision was included in the separate software-only bill that was approved by the Chamber of Deputies in October 2000; this exception would eviscerate the educational software market. Another article would require the Executive Branch to present a bill regarding a "moving image archive" within a year after the new copyright law enters into effect. In the interim while the copyright law has not yet entered into force, the National Archive of Images of SODRE and Cinemateca Uruguay shall be governed by the 1937 copyright law. The copyright bill should be revised to clearly provide that the deposit of audiovisual works in any archive shall be voluntary. The ephemeral broadcasting exception allowing the archiving broadcast recordings of an "exceptional documentary value" is overbroad, and at the very least should be limited to a single copy.
- Private copying levy and national treatment: The copyright bill should make clear that the exception for private copying does not apply to copying in digital or high definition analog formats. Furthermore, it remains unclear whether the collection and distribution of the blank tape levies collected for reproduction of works in graphic form, by video, by sound recordings will be based on the principle of national treatment. While the bill does provide for the general application of national treatment, it will be important to monitor the process for the collection of such levies, which will be established by regulation within 180 days after the copyright law enters into effect.

- Moral rights: Both the 1999 and May 2000 bills expand the scope of moral rights of attribution and integrity for performers. Moral rights should be waivable (or said another way, an author should be able to exercise his or her moral rights by consenting to acts that might otherwise violate moral rights). Because these are personal rights, they should not subsist after the author's death, nor should they be transferred to other entities, including government agencies. Article 111.2 explicitly states that the activities of editing, compacting, dubbing and impairing the sound or audiovisual fixations shall avoid "unjustified mutilation" of these performances. Activities like dubbing or editing a motion picture (which by definition consist of "mutilating" performances) are normal and reasonable practices of the audiovisual industry. Therefore, they should be explicitly excluded from the scope of the performer's moral right of integrity. In the 1997 bill, these activities were properly and explicitly excluded from the scope of the performer's moral right of integrity, and the 2000 bill should be revised to track that language.

The *sui generis* software legislation should not be passed by the Senate.

In early September 2000, the Uruguayan government supported the development of a bill which was aimed at establishing copyright protection for computer programs. The bill was quickly submitted to the Education and Culture Committee of the Chamber of Deputies and approved there, before being sent to the Chamber of Deputies. It was adopted by the Deputies by unanimous vote on October 10, 2000, and was forwarded to the Senate.¹⁰ The bill is currently pending before the Education and Culture Committee of the Senate and is expected to be considered during the next few weeks. The local and foreign software industry have expressed their opposition to the software-only bill to the Senate on several occasions.

Unfortunately, this software-only bill contains very troubling provisions and should not be adopted by the Senate, as its enactment would represent a major setback in copyright protection for the software industries.

First, this bill would take a *sui generis* approach to protecting computer software, that is, establishing a separate legal regime from other copyrighted materials. If this bill passes the Senate, there is a high likelihood that the Supreme Court of Justice of the Republic of Uruguay might overturn the only conviction for software copyright infringement that was obtained in Uruguay.¹¹ In 1992, a criminal complaint was filed against a reseller of software. After a raid at his place of business hundreds of diskettes containing illegally reproduced software were seized. During his trial, the reseller admitted that he copied the software without authorization with intention to distribute it. In his defense he argued, among other things: 1) that software was not a copyrightable work; and 2) that the unauthorized reproductions were for educational purposes only. On November 20, 1997, the Juzgado de Primera Instancia en lo Penal No. 15 (Criminal Court), found that although not expressly recognized in the copyright law of 1937, software was a literary work and, therefore, its unauthorized reproduction and distribution was a crime. The Court convicted the reseller to eight months, imprisonment for the crime of "illegally reproducing a literary work."

¹⁰ Proyecto de Ley sobre Derechos de Autor sobre Programas de Ordenador (Comisión de Educación y Cultura, Carpeta No. 568 de 2000) ("Proyecto de Ley de Soporte Lógico").

¹¹ "G.M.H.D. s/ Edición, venta y/o reproducción ilícita de una obra literaria (Art. 46 Ley 9.739, Art. 23 ley 15.913), Juzgado de Primera Instancia en lo Penal de 15º Turno Sentencia N° 65 November 20, 1997, upheld by Tribunal de Apelaciones en lo Penal de 1er. Turno, Sentencia N° 84 May 14, 1999, Ficha N° 210/98.

The defendant appealed and the Tribunal de Apelaciones (Court of Appeals) upheld the decision on May 14, 1999. He appealed again and the case is currently under review of the Supreme Court of Justice of the Republic of Uruguay. Should the bill become law, there is a possibility that the Supreme Court will determine that software was not protected under the Copyright Law of 1937 and overturn the Court of Appeals' decision. There have been reports that this person is expected to give testimony before the Education and Culture Committee of the Senate during the hearings scheduled to consider passage of the bill.

Second, the software-only bill is poorly drafted in several respects. It lacks clear definitions and uses nonstandard terms to refer to complicated legal issues. The bill does not establish what the copyright holder's exclusive rights are and it fails to incorporate by reference the rights found in the copyright law. Third, its proposed remedies and sanctions are inadequate. If approved, the bill would reduce criminal penalties for copyright infringement and, in some cases, it would completely decriminalize certain infringing acts such as the unauthorized reproduction of software by end users. In fact, the bill expressly exempts end users from criminal liability for copyright infringement through the use of unauthorized copies of software, unless they then resell those pirated copies. The bill also fails to include a civil *ex parte* search remedy.

Fourth, it contains very broad exceptions to protection which are clearly TRIPS-incompatible. Finally, while there are additional copyright-related concerns, the bill goes further by including onerous consumer protection measures establishing compulsory warranty and service provisions, consumer protection measures which go beyond those contained in the Uruguay Consumer Protection Act, thus discriminating against the software industries by placing more onerous requirements than those imposed on any other commercial entity.

BSA is working with the local software association to stop this bill from being adopted by the Senate. Legislative attention should be placed on passing the long overdue, comprehensive copyright package. Both BSA and the local Uruguayan Software Chamber (CUS) have expressed their opposition to the software-only bill and have reiterated the need to obtain a new comprehensive copyright law. On January 7, 2001, Roni Lieberman, the President of CUS, stated that "...it is necessary to leave behind so many delays so that Uruguay will finally have a copyright law solid enough to protect copyrights in general, and software in particular."¹²

The December 2000 Copyright Bill

As discussed above, IIPA has learned that on December 29, 2000, the Education and Culture Committee approved the comprehensive copyright bill. IIPA understands that it has not yet been officially published. The bill is expected to be introduced to the floor of the Chamber of Deputies when the next legislative session resumes in March 2001.

IIPA will be reviewing the substance of this bill in detail after it is made public and therefore we reserve our right to provide additional comments. However, we must voice several concerns about this December 2000 version, based on preliminary reports. First, it appears that the Committee striped the bill of provisions related to the protection of computer programs and databases because it believes that these works should be protected via the separate software-only bill, which was passed by the Chamber of Deputies in October 2000. As discussed above, the copyright industries oppose this *sui generis* software bill and continue to assert that protection for

¹² El País, Electronic Version, Sunday January 7, 2001. Internet Year 5, No. 1644, Montevideo, Uruguay.

computer programs should be fully integrated into the comprehensive copyright reform legislation. Second, IIPA is concerned that provisions related to enforcement tools, in particular the availability of *ex parte* criminal and civil search remedies as well as measures related to border controls, may have been curtailed. Third, there are indications that the scope of the distribution right may have been limited to permit parallel importation. Finally, there likely may be additional amendments which affect the scope of protection afforded to copyright owners which merit further attention, clarification and/or amendment.

COPYRIGHT PIRACY IN URUGUAY

The majority of business software piracy in Uruguay revolves around illegal copying of computer programs. This type of piracy takes two forms: end-user piracy and channel piracy. End-user piracy occurs when an end user makes illegal copies of a particular software program for their own use. Channel piracy involves the illegal distribution and sale of illegal copies of software through the sale of counterfeit or otherwise illegal copies of software programs in optical disk or diskette form, or through the illegal loading of software programs onto the hard disk of personal computers that are then sold to the public without user manual, certificates of authenticity or other documentation that properly loaded software would include. The legal and educational campaign of the BSA in Uruguay contributed to a slight reduction in the piracy rate over the last year. Estimated levels of piracy in Uruguay for 2000 were \$15.4 million, with a 67% level of piracy.

The motion picture industry reports that video piracy continues to hamper the legitimate video market in Uruguay, registering a 65% video piracy rate in 2000. Back-to-back copying in individual video clubs continues to be the dominant piracy method. The MPA Uruguay Program investigations have not yet uncovered evidence of organized pirate video duplication laboratories. Prerelease video piracy appears to originate from the contraband Paraguayan production and distribution structure. Since 1998, television cable piracy has increased, particularly within the country's interior. Some cable services continue to offer a dedicated film channel employing edited videos with advertisements. Unauthorized public performance of videos continues to present a seasonal problem, primarily over closed circuit cable systems in the tourist hotels in Punta del Este. Limited cable television piracy also exists in Uruguay, primarily in the interior, where small cable operators offer their subscribers unauthorized video transmissions. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Uruguay are estimated to be \$2 million in 2000.

Despite the change of attitude of some police officers that were finally convinced to enforce copyright, for the recording and music industries the main piracy problem continued to be the unrestricted importation of pirate CDs and bootleg recordings. In addition to affecting the Uruguayan market, shipments of pirated product for ultimate destination in Brazil were found in Montevideo's Free Zone, known as Zona Florida. After the national anti-piracy group (known as CUD) conducted its initial investigations, it found that Uruguay is also being used as a transshipment center for pirate product bound to Brazil via Paraguay. Uruguay is also serving as a center to send infringing products into Brazil via Rio Grande Do Sul/Santa Catarina. Estimated trade losses and levels of piracy in 2000 due to recording and music piracy were \$4.0 million, with a 35 % level of piracy, reflecting no progress over the 1999 estimates.

IDSA reports that the estimated level of entertainment software piracy in Uruguay escalated from 70% in 1999 to 82% in 2000. Like its neighbors, Uruguay is being affected by the influx of pirate optical media product from Asia which is pounding the Mercosur region. Piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia products) inflicted an estimated \$16.3 million for 2000, more than doubling estimated losses from the prior year.

The book publishing industry reports no improvement in reducing levels of book piracy in Uruguay over the past year. Photocopying remains the main source of piracy, especially within institutions of higher learning, and hence trade loss estimates are \$2.0 million in 2000.

COPYRIGHT ENFORCEMENT

Criminal Enforcement in Uruguay is Ineffective and Fails to Deter Piracy.

Increased attention by the police and prosecutors is needed to provide an effective deterrent against piracy under current Uruguayan laws. After the comprehensive copyright bill passes, Uruguayan police, prosecutors and judges will be faced with enforcing these laws in a much more effective manner than at present.

The Criminal Procedures Code finally entered into effect.

Amendments to the Criminal Procedure Code make copyright infringement a "public" action by which the Uruguayan authorities can initiate actions. Although amendments in 1997 changed criminal copyright enforcement from a public to a private penal system, new amendments to the Criminal Procedures Code were passed on December 21, 1999 (Law 17.221), and published in the Official Gazette on January 13, 2000. The law amended the 1997 Criminal Procedures Code to provide the following: (a) Article 91 of the Criminal Procedures Code now establishes a "public" penal action for copyright infringements, and (b) Article 339.8 of the Criminal Procedures Code now permits the extradition of copyright infringers. These amendments are very positive. Having a "public" action is essential to involving the state in protecting copyrights. Allowing the extradition of copyright infringers is particularly important because piracy is a multinational enterprise, and not all pirates doing business in Uruguay are Uruguayan nationals. These 1999 amendments were accomplished before the February 1, 2000 deadline, the date on which the new Criminal Procedures Code entered into effect. The Code now provides that litigation will proceed in a hearings format instead of using a code-pleading system; that the prosecutor will play a more active role since his office will handle the complaint; that the Supreme Court of Justice will be required to appoint official experts to assist judges in inspecting suspected premises; and that raids will be conducted by either police or court officials.

While this law is finally in force on the books, there is a great need for improvement on the application of this criminal law to the state of piracy in Uruguay. Piracy continues to be widespread, and adversely affects the development of a market for legitimate copyrighted materials.

Criminal enforcement efforts require much improvement in order to begin to deter piracy effectively.

During 2000, BSA filed eight criminal complaints against individuals who offer pirated software in the newspapers at a discount. Three of these cases were summarily dismissed by the Court due to criminal policy reasons. The Court has never explained what the phrase "criminal policy reasons" meant. This lack of explanation violates TRIPS Article 41.3, which requires member nations to issue "[d]ecisions on the merits of a case to be [...] reasoned." Four of these cases have been pending for over nine months with no progress, and in only one case has the Court decided to indict the defendant. That case is currently pending.

In another case, one of BSA member companies filed a criminal complaint against a reseller for hard disk loading (HDL) in June 1999. Over a year and a half has passed and the Court has yet to issue an order to analyze the hard disk offered as evidence of the crime. This practice is a clear violation of TRIPS Article 41.1 which mandates Uruguay to provide for enforcement mechanisms that do not "...entail unreasonable time-limits or unwarranted delays."

The recording industry conservatively estimates that the level of piracy is 35% of the market. The piracy situation remains dark, given the growth of CD burners and CD-R replication in Uruguay. The police have not been instructed to take actions against copyright pirates doing business in the main street markets (known as *ferias callejeras*) of Montevideo, Salto, Payson and Tacuarembó, where music, video, business software and entertainment software are easily found. However, some police departments and units began cooperating individually to conduct the first anti-piracy cases; this does not mean an official attitudinal change made by the Uruguayan government. The police departments (*seccionales de policia*) continue to request search warrants in order to act (even in streets and other public places) despite the fact that the new Criminal Code allows them to take "public actions" at their own initiative. The recording industry initiated 84 actions in 2000. In comparison, no criminal actions were taken against record pirates in Uruguay during 1999. This represents an initial positive trend but is still far away from the official attitude that is needed to deter the impact of piracy. Prosecutors are still hesitant to apply the law because they have not received specific guidelines from their superiors regarding these cases. Out of the 84 cases conducted in 2000, 38 were against street vendors, 11 against small laboratories reproducing CD-Rs and 5 cases were conducted by Customs. Almost 24,000 pirate CD-Rs were seized as well as 13,000 cassettes. The bad news is that the above-mentioned figures represent a drop in the ocean of piracy that can easily increase in Uruguay. The recording industry is keeping a close watch on the 61 people that are subject to investigation, and the 10 that were indicted under Law 15.289. One person is being processed under contraband charges and the industry is monitoring the will of the Uruguayan Judiciary to move these cases forward. Still, any decisions are distant due to the slowness of the legal processes in Uruguay.

In 2000, MPA discontinued its anti-piracy program in Uruguay because of the inability to effectively address piracy. MPA intends to restructure the program with more limited expectations, primarily focusing on retail piracy in Montevideo. The entire market continues to be important to the industry, however.

Uruguay's Border Enforcement System Fails to Halt Large Amounts of Pirated Product From Entering the Country.

With its proximity to Paraguay and the growing problem of pirated and counterfeited goods crossing its borders, Uruguay is faced with a major challenge to improve its border measures. Customs is a key element in the effort to control the contraband of legal and illegal product. Enforcement at the Uruguayan borders needs to be significantly improved, especially given the growth of optical media piracy in the Mercosur region.

Civil Enforcement is Ineffective Because of Procedural Obstacles, Including Substantial Delays, Lack of Clarity Regarding Unannounced Civil *Ex Parte* Searches, and High Bond Requirements for Copyright Litigation.

Due in part to Uruguay's outdated copyright law, business software producers have encountered great difficulties in protecting their products. During the last several years, the BSA has sought to conduct an aggressive anti-piracy program in Uruguay. Unfortunately, BSA has run into significant obstacles to software enforcement and, if anything, the legal situation has deteriorated over the last two years. In addition to criminal cases, BSA also conducts civil actions.

The Uruguayan courts are imposing substantial delays in copyright enforcement actions. After a BSA investigation uncovers evidence of software piracy, BSA requests the courts to schedule an inspection of the suspected pirate. The courts routinely delay granting judicial inspections of suspected copyright infringers' premises for three or more months. Such delays have recently resulted in ineffective actions because the evidence of piracy may be moved or may have disappeared altogether between BSA's investigation of a suspected software pirate and the actual date of the raid. These delays put software producers at an unnecessary disadvantage when they try to enforce their rights in Uruguayan courts. BSA filed nine civil complaints in 2000, of which it obtained search orders in only three cases; the other six still await action.

Concerning *ex parte* searches in civil actions, the BSA has encountered a legal obstacle when trying to procure judicial searches and/or inspections. The Uruguayan Civil Procedure Code is silent as to whether an *ex parte* search may be carried out without the prior notification of the defendant. BSA has experienced that in 20% of the cases, the courts will reject such a preparatory proceeding, thus running afoul of TRIPS Article 50.2 (judicial authority shall have the authority to conduct *ex parte* searches *inaudita altera parte*.)

Onerous bond requirements -- ranging from \$50,000 to \$100,000 per case -- were imposed in the last half of 1998 and early 1999 in several separate legal actions brought by member companies of the BSA against Montevideo companies suspected of engaging in software piracy. Such onerous bond requirements are "unnecessarily complicated or costly," in contravention of Uruguay's obligations under TRIPS Articles 41 and 50.3. These bonds impose substantial obstacles to the effective enforcement of intellectual property rights by creating an expensive barrier for software producers who are trying to enforcement their rights in Uruguayan courts. Although in practice some courts have recently diminished their bond requirements, it is still within the judge's discretion as to whether the court will require bonds before a BSA raid. High bonds continue to pose a serious obstacle to the BSA's enforcement campaign in Uruguay.

In a case filed in May 1998, BSA raided an academic institution that was suspected of using illegal software. After the search order was executed and several unlicensed products of BSA members were found, BSA and its members filed a civil complaint with the Court. During trial, defendant's counsel requested plaintiffs to demonstrate that they were in fact the copyright holders of the unlicensed software found during the raid. BSA and its members objected, but the Court agreed with the defendant and ordered plaintiffs to produce evidence that they owned the copyright in the relevant software programs. Under Uruguayan law, an author's notice of authorship is sufficient evidence to be regarded as such and the burden is on the defendant to challenge such a presumption.¹³ In compliance with the court's order, the software publishers submitted the requested evidence. BSA is still waiting for a resolution of this case. The court's imposition of onerous and "unnecessarily complicated" evidentiary requirements illustrates the existing defects in the Uruguayan legal system.

¹³ Berne Convention Art. 15(1) and TRIPS Art. 9.1.

WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

BAHAMAS

EXECUTIVE SUMMARY

In January 2000, the Government of the Bahamas implemented its copyright law. The law included an overbroad compulsory license that violated numerous international copyright standards and established an unacceptable precedent. Cable operators were authorized to downlink and retransmit pay television signals from the U.S., including via the Internet. Bilateral negotiations between the governments took place during 2000. The Bahamas agreed to narrow the scope of its compulsory license to permit rebroadcast via cable only of copyright works that are broadcast free-over-the-air. The Bahamas has taken the first steps toward correcting these problems by introducing amending legislation, but the issue has not been finally resolved.

IIPA advocates that the Bahamas be placed on the Special 301 Watch List this year in order to monitor the promises made in the bilateral agreement. Close attention must be paid to two issues in particular: (1) monitoring the adoption of the copyright amendment legislation recently presented to parliament, and (2) ensuring that consultations between the Copyright Royalty Tribunal and U.S. rightholders result in more equitable remuneration for the compulsory licensing of free-over-the-air broadcasts of copyrighted works. Prompt and effective implementation of bilateral agreements is a primary concern to all the U.S. copyright-based industries, not solely the motion picture sector.

COPYRIGHT LEGAL ISSUES

The Problem: Overbroad Compulsory License and Inequitable Remuneration Rates in the January 2000 Regulations to the Copyright Act

On January 5, 2000, the Government of the Bahamas implemented its 1998 copyright act ("the Act") through publication of regulations that, *inter alia*, authorized a new compulsory license for retransmission of television programming by persons who are licensed cable operators. This new compulsory license expands the scope of a compulsory license far beyond the internationally accepted limits of such a license (e.g., authorizing retransmission of free-over-the-air broadcasts) to the unprecedented step of permitting retransmission of *any* copyrighted work transmitted over its territory, including the encrypted signals of U.S. basic cable and pay TV services. The regulations also would have permitted Internet retransmission of all signals via Internet. The introduction of such a broad compulsory license is inconsistent with the obligations of the Berne Convention for the Protection of Literary and Artistic Works, to which the Bahamas is a signatory. By adopting a

Berne-inconsistent compulsory license, the Bahamas denies the member companies of the Motion Picture Association (MPA) adequate and effective protection of their intellectual property rights.¹

This legislative move compounded the already existing piracy problems of signal theft and cable piracy in the Bahamas, and indeed, throughout the region. The unauthorized reception and retransmission of U.S. domestic satellite signals is widespread. Cable operators, homeowners, hotels, resorts and bars have erected satellite dishes to receive programming intended for reception only in the U.S., without obtaining the authorization from the copyright holders. Signal theft in this region has completely disrupted the orderly sequential distribution (i.e., release of motion pictures first to theaters, followed by home video, pay television and free television release) of MPA member company programming. Signal theft also has hampered the establishment of a legitimate home video industry. In addition, earnings from legitimate television broadcasts have been significantly reduced, as local broadcasters are unwilling to pay license fees for programming that already has been viewed illegally by local audiences.

The extremely dangerous international precedent set by the Bahamas' compulsory license threatens to disrupt commercial markets for programming and cause serious adverse impact on U.S.-filmed entertainment and programming packages, not only in the Bahamas, but around the world. Because of the harmful precedent and its potentially worldwide consequences, MPA believes that the January 2000 Bahamian compulsory license requirement qualifies as one of the most onerous, blatantly illegal, and egregious policies, completely flaunting respect for rights protected under copyright.

Even after the Parliament of the Bahamas adopts its recently proposed amendments to the compulsory license to limit it to retransmission of free over-the-air signals through cable systems (discussed below), the equitable remuneration rates for the compulsory license fixed in the Regulations are unreasonably low and are inconsistent with the Berne Convention.²

- Under the Act, cable operators are required to pay fixed rates as equitable remuneration to the copyright owners in accordance with the Berne Convention. The rates established in the regulations are far lower on a per-signal basis than rates paid for television broadcast signals under compulsory licenses permitted by international norms, and fail to meet the "equitable" standard under Berne.
- The Regulations made a bad situation worse by permitting cable operators to pay only 25% of the already low rates of equitable remuneration otherwise payable when the subscribers are hotels. The Berne Convention's compulsory licenses provisions for retransmission of broadcasts do not provide any exemptions for retransmission to hotel rooms. The normal careful balancing of the interests of the users and rightholders is, in this situation, inordinately out of balance. A hotel is a commercial enterprise. There is no legitimate

¹ Both the MPA and the Television Association of Programmers (TAP) expressed their concerns with this Bahamian legislation in their February 18, 2000 submission to the U.S. Trade Representative.

² Bahamian cable operators have long argued that English language feeds of television signals are not available commercially in the Bahamas and have used this argument as justification for a compulsory license. Although MPA rejects the idea that the lack of program alternatives justifies abrogation of international copyright obligations, the premise of the argument is also incorrect. English language programming services are currently available for the English-speaking Caribbean area.

need for a reduction in the equitable remuneration payable and no public interest that justifies the exception. Thus, there is no basis under international law or a legitimate need that would support such an abridgement of the copyright owners' rights.

- Under the regulations, cable operators are exempt from having to pay to the rightholders these already low rates of equitable remuneration when the premises are rooms in hospitals, nursing homes, schools and any other health or educational facility. There are no "for profit" restrictions on this very broad exemption. For example, a school could show a copyrighted work on the school premises and charge an entrance fee to that premise to view or listen to the work.

New technological advances in the means of reproduction and distribution require careful consideration of the scope of allowable exemptions under the Act. Even if the Bahamian compulsory license were limited to television broadcast signals, by eliminating entirely the requirement to pay equitable remuneration in some cases such as hospitals and educational facilities, and by requiring a meager payment of 25% of the fees when the served premises are hotels, the Act renders meaningless the Berne Convention's requirement of "equitable" remuneration and is therefore inconsistent with Article 11*bis*(2).

The Issue Joined: Government Negotiations Result in an October 2000 Bilateral Agreement

Last year, the Bahamian and U.S. governments engaged in bilateral negotiations regarding this compulsory license problem in the Copyright Act and its regulations. The governments reached an agreement to resolve these matters, and this was reflected in an exchange of letters dated October 26 and November 9, 2000. The Bahamas promised to (1) submit amendments of its copyright act to its Parliament by December 31, 2000 to narrow the scope of its compulsory licensing regime to permit only the compulsory licensing of copyrighted works broadcast free-over-the-air; (2) have the Bahamian Copyright Royalty Tribunal (CRT) consult with U.S. rightholders to provide equitable remuneration for the compulsory licensing of such free-over-the-air broadcasts and to amend the royalty rate structure of the Regulations. In December 2001, the Bahamian government satisfied this first prong by submitting copyright amendments to its parliament. The second prong, consulting with rightholders about remuneration, has not yet happened. In particular, the motion picture industry wants the CRT to eliminate the rate reduction for hotels and narrow the exception for schools to noncommercial uses.

For its part, the U.S. government promised to "encourage" U.S. rightholders to negotiate licenses on commercial terms. The USG has contacted MPAA pursuant to this obligation. (It is important to note that the MPAA member companies are not the sole U.S. rightholders who have interests in distribution and programming in Bahamas and the rest of the Caribbean region.) MPAA has taken a number of specific steps and is exploring other options to assist its member companies and U.S. programmers in evaluating their options regarding licensing additional product to Bahamian cable operators.

The Bahamas is a beneficiary country under the Caribbean Basin Economic Recovery Act (CBERA, or CBI), a U.S. trade program which includes criteria requiring beneficiary countries to

afford adequate and effective intellectual property rights protection to U.S. copyright owners.³ Recently, the Bahamas also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), found in Title II of the Trade and Development Act of 2000.⁴ To maintain these CBTPA benefits, the Bahamas must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater IPR criteria.

The Solution in Progress: Monitor Legislative Progress of the Copyright Act Amendments and Have the CRT Engage in Consultations to Change the Remuneration Rates of the Compulsory License

The December 2000 proposed amendments

On December 14, 2000, the Government of the Bahamas introduced before Parliament new draft amendments to the copyright act that would limit the compulsory license to over-the-air unencrypted signals. This package reflects positive progress toward most of the legal issues raised by MPA and the U.S. government over the past year. Parliament should pass these amendments as soon as possible, and not later than June 30, 2001, which represents a reasonable six-month period after the legislation was introduced.

The proposed amendments would limit the scope of the compulsory license (Section 83 of the Act). Amendments clarify the exclusive right to broadcast a copyrighted work or transmit the work by cable. Thus, the new definition of "transmission" would limit the scope of the compulsory license to over-the-air, unencrypted transmissions. The right, which currently exists as a "public performance" right, would be explicitly granted as a right to "broadcast or include the work in a cable programme service." Encrypted satellite and terrestrial signals would no longer be within the scope of the compulsory license. An amendment also explicitly removes the Internet from the scope of Section 83 compulsory licenses. Finally, the legislative package also includes additional amendments proposed that are not associated with the compulsory license, but address transfer of ownership issues.

The remuneration rate problem has not been addressed and the CRT must commence consultations with industry

The December 2000 copyright law amendments do not address the industry-identified the deficiencies in royalty rates – specifically, the amount of the royalty rates in the Copyright Regulations 2000 (refer to the discussion, above). To the best of our knowledge, there is no proposal to amend the regulations at this time. To repeat, MPA believes that the rate reduction for hotels should be eliminated and the exception permitted for schools should be narrowed to non-commercial uses.

³ In 1999, \$56.0 million of Bahamas' imports to the United States came in under the duty-free CBI code, accounting for 28.8% of its total imports to the U.S. For the first 11 months of 2000, \$66.4 million of Bahamas' goods entered the U.S. under this program, a 30.3% increase over same time period last year.

⁴ Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000) (also known as CBTPA).

In addition, the Government of the Bahamas committed to undertake consultations with U.S. rightholders to provide enhanced equitable remuneration for the compulsory licensing for such free over-the-air broadcasts and to amend the royalty rate structure. Under the terms of the regulations issued pursuant to the Copyright Act, Cable Bahamas is obligated to have deposited monthly, beginning in January 2000, the royalties payable under the Compulsory License and to report at least annually information stipulated in Paragraph 30 of the Regulations, including numbers of subscribers, gross receipts, and signals transmitted.

Industry efforts continue on commercial matters

The U.S. government has contacted MPAA as part of its commitment to encourage U.S. copyright owners and/or holders to enter into good-faith negotiations with Cable Bahamas for providing voluntary licensing on commercial terms. MPAA has taken several actions to support this commercial endeavor. MPAA has contacted its member companies and several U.S. programmers to brief them on the policy context underlying the requests that U.S. programmers to enter into commercial negotiations with Cable Bahamas. MPAA has starting compiling historical, aggregate data on the pay television market in Bahamas and other Eastern Caribbean countries with the aim of providing updated market data to MPA member companies and other interested programmers to aid them in their independent consideration of any commercial response each individual company feels appropriate with regard to entering into negotiations with Cable Bahamas or with U.S. programmers regarding licensing of rights to programming. MPAA is also researching legal issues relating to rights held by other classes of rightholders in copyright that complicate the ability of film producers to authorize TV distribution to territories outside the United States as a part of the producer's licensing of U.S. domestic rights to U.S. programmers.

In summary, MPA believes the goal is to ensure that local cable operators have an attractive and competitive array of programming for their customers. There may be additional legal programming options available that require further exploration by all parties.

WIPO Treaties

IIPA recommends that the Bahamas should make all efforts to ratify the two WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In addition, the Bahamas should amend its 1998 Copyright Act to respond to the challenges of the rapidly evolving marketplace for copyrighted materials by implementing the substantive obligations found in these treaties.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

BOLIVIA

EXECUTIVE SUMMARY

IIPA recommends that Bolivia remain on the Special 301 Watch List. Levels of copyright piracy in Bolivia remain high across most industry sectors. Significant improvements are needed to strengthen civil enforcement mechanisms, criminal enforcement and border measures. Copyright legal reform has been considered for years, and a comprehensive intellectual property rights bill was introduced to the Bolivian Congress in early February 2001. Bolivia is long overdue in meeting its bilateral and multilateral obligations regarding copyright protection and enforcement. In October 2000, the U.S. Senate approved the Bilateral Investment Treaty (BIT) with Bolivia, which was signed in April 1998 and ratified by Bolivia. At the time of the BIT negotiation, Bolivia was required to have TRIPS-level protection by the end of April 1999, both in terms of its substantive intellectual property law requirements and the requisite enforcement obligations. Bolivia currently participates in both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of these programs is that Bolivia provide "adequate and effective protection of intellectual property rights."¹

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	4.1	84%	4.1	85%	4.0	88%	3.1	88%	3.0	88%	8.8	92%
Sound Recordings / Musical Compositions	15.0	85%	15.0	85%	20.0	85%	18.0	85%	15.0	85%	2.5	87%
Motion Pictures	2.0	100%	2.0	100%	2.0	100%	2.0	100%	2.0	100%	2.0	100%
Entertainment Software ³	1.5	NA	NA	NA	3.9	93%	3.8	94%	3.9	93%	3.3	91%
Books	5.5	NA	5.0	NA	5.0	NA	5.0	NA	5.0	NA	5.0	NA
TOTALS	28.1		26.1		34.9		31.9		28.9		21.6	

¹ In 1999, \$7.96 million of Bolivia's imports to the United States benefited from the GSP program, accounting for 3.6% of its total imports to the U.S. Another \$61.5 million of Bolivia's imports to the United States benefited from the ATPA program in 1999, accounting for 27.4% of its total imports that year. For the first eleven months of 2000, \$4.9 million of goods from Bolivia entered the U.S. under the duty-free GSP code, and \$55.7 million under ATPA. For a full history of Bolivia's placement on the Special 301 lists, see Appendices D and E of IIPA's 2001 Special 301 submission.

²BSA estimates for 2000 are preliminary. In IIPA's 1999 Special 301, BSA's 1998 estimates of \$3.9 million and 84% were also indicated as preliminary; the final 1998 and 1999 BSA numbers are reflected above.

³ IDSA estimates for 2000 are preliminary.

COPYRIGHT PIRACY IN BOLIVIA

Business software piracy by both resellers and end users is widespread in Bolivia. Estimated losses due to piracy of U.S. business application software in Bolivia in 2000 were \$4.1 million with an 84% piracy level. This is one of the highest piracy rates for business software anywhere in Latin America. Piracy levels in the government remain extremely high despite efforts to legalize several agencies. BSA urges the Bolivian government to consider stronger efforts to support government legalization of software in its public ministries and agencies.

Estimated trade losses due to the piracy of sound recordings and music in Bolivia has remained at \$15 million in 2000. In comparison, the legitimate industry reached sales of only \$2.2 million last year. The estimated level of audio piracy in the Bolivian market is 85%. In fact, the legitimate recording and music industries have accounted for no more than 15% of the total market for the last six years in a row. To compound matters, the market is being threatened by digital piracy, and is shifting into a pirate CD-R (recordable CD) market. These high losses are due primarily to the lack of action from the Bolivian government, the high levels of corruption of the police; the lack of commitment of the SENAPI (the National Intellectual Property Service) and the lack of commitment of the Bolivian judiciary. Bolivia continues to serve as an alternate route for product controlled by Paraguayan pirates. For example, Santa Cruz de la Sierra in Bolivia is a link between Paraguay's Ciudad del Este and other markets in Chile, Peru, Ecuador, and the Far East. Street vendors of pirated music are common in the Bolivian cities. The Bolivian authorities do not assist in conducting investigations; actions only happen after the local industry presses the bureaucracy

The level of book piracy in Bolivia has been slowly increasing over the last two years. Estimated trade losses due to book piracy in 2000 are \$5.5 million. A major source of pirated books are those imported from Peru, though there also appears to be some local production. The low-price availability of legitimate books through the RTAC/BIS program appeared to slow piracy for a while, but it is now higher than ever. Piracy of U.S. books affects mainly translations of college texts published by subsidiaries of AAP members. Many Spanish-language trade books regardless of source are also pirated.

Bolivia reportedly continues to have pirated interactive entertainment CD-ROMs and cartridges that are shipped from Paraguay by Chinese manufacturers, many of whom have Taiwanese connections. The Interactive Digital Software Association (IDSA) reports that estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Bolivia are \$1.5 million in 2000. Estimated piracy levels are not available.

For the motion picture industry, television piracy continues to be the priority problem in 2000, with over 87 television stations making unauthorized broadcasts of recent blockbuster titles. The estimated broadcast television piracy rate is 95%. This extensive broadcast television piracy is typically pre-video release and disrupts the sequential distribution of MPA Member Company programming (the release to theaters, home video, pay television, and free television) and diverts limited television advertising revenues away from legitimate broadcasters. Video piracy also continues to be rampant, blanketing 100% of the market. Until the passage of the new Copyright Law in 1992, MPA member companies did not enter the Bolivian home video market due to the lack of copyright protection for motion pictures. The extensive television piracy problem, which

enables viewers to see titles before their legitimate video release, also prevents the establishment of a legitimate video market in Bolivia. Losses to the U.S. motion picture industry due to audiovisual piracy in Bolivia are estimated at \$2 million in 2000.

COPYRIGHT ENFORCEMENT IN BOLIVIA

The Inter-Institutional Committee for the Protection of Copyright was created on March 15, 1997. The creation of this Committee was promoted by the National Counsel for Economic Development, with the participation of local Bolivian copyright organizations, including the Cámara del Libro, CONACINE, the Cámara Nacional de Empresarios Cinematográficos, and other similar organizations. This Committee is working, along with the Copyright Office and the Ministry of Justice, to develop a comprehensive IPR and anti-piracy reform (discussed below). Since 1997, this committee has not accomplished much.

In September 1997, Bolivia created a new agency responsible for copyright, trademark and patent issues. The Law of Organization of the Executive Power No. 1788 dated September 16, 1997, created the National Intellectual Property Service (SENAPI). This public entity was formed with the objective of managing issues regarding Industrial Property and Intellectual Property in an integrated manner. SENAPI operates in accordance with the provisions established under the Supreme Decree No. 25159, dated September 4, 1998. This Supreme Decree sets forth the objectives, institutional framework, and powers attributed to SENAPI. SENAPI officials are training personnel and attempting to strengthen the agency. However, SENAPI is still seriously underfunded, lacks a cadre of trained personnel, and lacks any mechanism by which to enforce intellectual property rights.

Bolivia Fails to Provide TRIPS-Compatible Civil *Ex Parte* Search Measures

Concerning civil actions, the BSA has encountered a legal obstacle when trying to procure judicial searches and/or inspections in Bolivia. Article 326 of the Civil Procedure Code states that all preparatory proceedings (e.g. judicial inspections) must be carried out with the prior notification of the defendant. This prior notification violates TRIPS Article 50.2. In Bolivia, the failure to notify the defendant will make the proceeding *null ab initio*. This requirement has caused problems for BSA by depriving BSA actions of the necessary element of “surprise” in inspections involving software programs. In addition, once the target has been notified of a pending search order, it is entitled to object to the search. This effectively stops the search and seizure before it even occurs, given that a judge must rule on the objection. Various targets have deleted their illegally installed software just prior to the raid

In 2000, BSA filed twelve civil complaints against end users, but the courts granted search orders in only 6 of them. Also, at least four of these cases had to be dropped by BSA due to leaks from the Bolivian judiciary. A few of the more salient examples follow. On May 5, 2000, BSA filed a civil complaint requesting a search order against a waste management company. Before the target had been notified of the search order, legal counsel for that company contacted BSA’s local counsel to discuss the complaint. A few days later that company placed a purchase order to legalize the software it had been illegally using. BSA experienced similar problems with leaks from the courts in a case filed on December 22, 1999, against a well-known Bolivian bank.

Unwarranted Delays in Civil Enforcement

The Bolivian Civil Procedure Code fails to impose any time limits for courts to review and approve civil search requests. On average, it takes 45 days to obtain civil search and seizure order, by which time news of the raid may have leaked to the defendant or BSA's evidence may have grown stale. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that remedies for copyright infringement be "expeditious."

In May 2000, BSA filed a civil search request against an end user in the city of Cochabamba. As of the time of this report, the search order in this case has yet to be issued. Depending on the city in which the civil complaint is filed, it could take up to four to five weeks to obtain a search order. As if the delay itself were not detrimental enough, once the court issues the order, the court must notify the defendant, as per the prior notice requirement discussed above.

Civil suits in Bolivia can take up to five years of court proceedings just to determine if there was a copyright infringement. Bolivian civil courts use a bifurcated system, meaning that even if the court finds that the software was infringing, there has to be a damages trial. This new trial on damages may take up to eight months. In addition, there has never been a final civil judgment for copyright infringement in Bolivia. All these factors make it extremely difficult to settle cases successfully, as defendants would rather wait for five or six years and take their chances than settle a case in which the law is unclear at best. In fact, BSA has only settled two cases in Bolivia during 2000. To make matters even worse, because Bolivian law only allows the recovery of direct damages (see discussion below), the potential award of damages in a civil suit is too limited to provide a meaningful deterrent effect.

Inadequate Civil Copyright Damages

The Bolivian copyright law permits only the recovery of direct economic damages for civil copyright violations and prohibits punitive, consequential, or statutory damages. Without the threat of significant damages large enough to create a meaningful deterrent to illegal activity, the copyright law fails to meet the requirements of TRIPS Articles 41 and 45.

In contrast, other countries have legislated a system of statutory damages that provide for an effective deterrent mechanism to combat piracy. In Brazil, for instance, the unauthorized reproduction or publication of a protected work may be subject to statutory damages equivalent to up to 3,000 times the retail value of the protected work.⁴ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁵ BSA is encouraged that the Ministry of Justice and other agencies have been working to overhaul the intellectual property laws of Bolivia by adding a statutory damages provision of between three to five times the retail value of the protected work⁶.

⁴ Ley de Derechos de Autor, No. 9610, Article 103.

⁵ 17 U.S.C § 504 (c)

⁶ Anteproyecto de Código de Propiedad Intelectual, Art. 175 I.

Inadequate and Ineffective Criminal Enforcement

BSA filed two criminal complaints in 2000 against resellers for hard disk loading (“HDL”). Although these cases were filed in September 2000, the Judicial Technical Police (Policía Técnica Judicial) took over four months to prepare the reports of the cases and request the issuance of a search and seizure order. To this date, the BSA has only been able to act against one of the resellers. The Prosecutor’s Office has yet to schedule the raid for the remaining reseller. BSA is concerned that due to leaks in the Police and Judiciary, all evidence of hard disk loading may be erased before the day of the raid.

The recording industry reports that a few small raids were conducted in Bolivia in 2000. Only 3,500 pirate cassettes were seized. Reports indicate that some raids are ruined due to leaks within the police, prior to the raid itself. In other cases, street vendors have attacked the police as anti-piracy actions were taking place.

Border Measures in Bolivia Must Be Strengthened

A new national customs service was created to control contraband and other infringing materials at Bolivia’s borders and ports of entry. Bolivia continued to serve as an alternate route for product controlled by Paraguayan pirates. Santa Cruz de la Sierra in Bolivia is a link between Paraguay’s Ciudad del Este and Chile, Peru, Ecuador and the Far East. Given the growing problem with piratical and counterfeit materials in the Andean Region, it is imperative that Bolivian law satisfy the TRIPS enforcement text on border measures. Bolivian laws and/or regulations should contain provisions in which the competent authorities can act on their own initiative and suspend the release of suspect goods (TRIPS Article 58).

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1992

Bolivia passed a copyright law on April 29, 1992, which replaced its antiquated 1909 law.⁷ While the 1992 Law was a vast improvement in legal protection, it left the implementation of many of its provisions, including enforcement, to subsequent regulations. For example, under the 1992 Copyright Law, computer programs are protected but not as “literary works,” and are subject to regulations. A first set of draft software regulations were proposed in 1993, and there were several rounds of revisions as well as numerous delays. Finally, a set of regulations providing the basic foundation for copyright protection of software and include provisions that specifically permit criminal actions to be undertaken against copyright infringers was implemented by presidential

⁷ Bolivia’s copyright regime must also comport with decisions made by the Andean Community. In December 1993, the five Andean Pact countries, including Bolivia, approved Decision 351, a common regime on copyright and neighboring rights, including an obligation to provide for injunctive relief, seizure and confiscation of unlawful copies and devices, and damages. Some very preliminary discussion has taken place regarding the modification of Decision 351 to make it TRIPS- and WIPO Treaties-compatible, but no resolution has been taken at this point by the Andean Community Copyright Office Directors.

decree five years after the original law, on April 25, 1997. With respect to films, the Copyright Law's protection is limited to works registered through CONACINE (Cámara Nacional de Empresarios Cinematográficos), a government/industry organization responsible for title registration, or, for works shown on television, through the Ministry of Telecommunications. The CONACINE registry has proven to be highly susceptible to fraudulent registration of titles by parties other than the legitimate rightsholder.

Copyright Law Amendments of 2001

Efforts to overhaul the 1992 copyright law have been underway for years. In 1996, the National Secretary of Culture and the National Secretary of Industry and Commerce started to develop a proposal for a "special law on intellectual property protection" which would complement the existing copyright law. The objective of this project was to increase the level of IP protection, streamline judicial proceedings relating to the enforcement of intellectual property rights, and otherwise improve enforcement efforts to combat piracy and counterfeiting of IPR-protected works in order to encourage the economic development of these industries in Bolivia. Due to funding problems, a final draft of this project was not originally expected until August 1997. At that time, IIPA received mixed reports on whether the project was abandoned in 1998 or whether Ministry of Justice took over drafting, with a goal of releasing a draft in the March-April 1999 timeframe.

IIPA has learned that the Bolivian Ministry of Justice and Human Rights presented a comprehensive package of proposed legislation on intellectual property rights, including a chapter on copyright, to the President of the Bolivian Congress on February 1, 2001.⁸ The copyright chapter reportedly contains over 200 articles which propose to expand the scope of exclusive rights, prescribe statutory damages for copyright violations, establish civil *ex parte* search procedures, add more enforcement powers to the Copyright Office, and create a special police force exclusively for intellectual property enforcement. IIPA and its members look forward to reviewing the chapters on copyright, as well as any separate enforcement-related chapters, in order to ensure that the proposals satisfy Bolivia's bilateral and multilateral obligations.

WIPO Treaties

Bolivia is a signatory to the WIPO Treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Ratification of these treaties by Bolivia, followed by deposit of instruments of ratification with WIPO, would show the Bolivian government's support for raising the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and fostering the growth of electronic commerce. Bolivia should ensure that any amendments to its copyright law incorporate the substantive obligations of the two WIPO treaties in order to respond to the challenges of the rapidly evolving marketplace for copyrighted materials.

⁸ IIPA does not have a copy of this bill as introduced. We are attempting to confirm whether this February 2001 bill matches the November 2000 document issued by the Vice Minister of Justice of the Ministry of Justice and Human Rights, entitled "Proposed Code of Intellectual Property."

Criminal Procedure Code Reform

The Bolivian Government published amendments to its Penal Code on March 10, 1997. The amended Article 362 of the Penal Code eliminates the previous requirement that works of intellectual property must be registered in Bolivia in order to be legally protected, and expands the scope of activities deemed as crimes against intellectual property rights. This amended article now matches the 1992 Copyright Law, which also establishes that registration is not required for the work to be protected by law. Importantly, the amended Article 362 of the penal code now allows the police to take enforcement actions against pirates. Previously, the code had required that copyright infringements be prosecuted and tried under rules for “private” penal actions, without the intervention of the state prosecutors. There are apparently two types of sanctions – “fine days” and “seclusion” (imprisonment) – but no range of fines appear to be specified in the code for copyright infringement. Because the use of these sanctions is not clear, the Supreme Court reportedly issued an administrative resolution in an attempt to provide better guidance. Perhaps this omission is addressed and corrected in the proposed IPR legislation presented to Congress on February 1, 2001.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

CHILE

EXECUTIVE SUMMARY

Chile is an important market for the copyright industries. On a positive note, Chile is taking steps to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, two treaties which recognize higher levels of copyright protection needed in this digital age. While there are signs that Chile is moving to further streamline its various copyright and copyright-related consistent with its bilateral and multilateral obligations, significant enforcement problems still exist.

The levels of copyright piracy in Chile remain quite high for such a developed market. Last year, Chile passed a new criminal procedure law which was supposed to improve the old and inefficient criminal system. Although this law is a promising step toward improved enforcement, it is still too early to assess any progress on the traditionally slow prosecution of infringement cases and the usually low, non-deterrent criminal sentences imposed upon defendants. Civil enforcement is slow and ineffective. Chilean law fails to provide for civil *ex parte* search procedures, an important enforcement tool required under the TRIPS Agreement. IIPA recommends that Chile remain on the Watch List for 2001.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1999 - 2000

INDUSTRY	2000		1999	
	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.5	25%
Sound Recordings / Musical Compositions	5.0	30%	NA	NA
Business Software Applications ¹	47.0	50%	47.7	51%
Entertainment Software ²	41.0	80%	NA	78%
Books	1.0	NA	NA	NA
TOTALS	96.0		50.2	

¹ BSA estimates for 2000 are preliminary.

² IDSA estimates for 2000 are preliminary.

IIPA recently provided comments to the U.S. government regarding the scope of intellectual property rights provisions for the negotiations of a Free Trade Agreement (FTA) with Chile.³ In addition, Chile currently participates in the Generalized System of Preferences (GSP) program, a trade program that offers preferential trade benefits to eligible beneficiary countries. An important part of the GSP discretionary criteria is that Chile provide "adequate and effective protection of intellectual property rights."⁴

COPYRIGHT PIRACY IN CHILE

Business software piracy rates in Chile were estimated at 50% in 2000, with estimated trade losses due to piracy amounting to \$47.0 million, representing a slight decrease from 1999.

The recording industry experienced a dramatic decrease in unit sales of 40% in 2000, compared to 1999. Most of the impact is related to a sudden increase in piracy. Pirate CD-Rs (recordable CDs) can be found all around the major cities (mainly Santiago) and in ferias around the country. More and more domestic piracy is popping out everywhere and the levels of piracy went up in more than 100% versus 1999 levels. The *carabineros* (police) are trying to be helpful but it is not a high priority for them, and deficiencies in the law and the delays in the courts greatly exacerbate the situation. Chile's border measures are also ineffective. Iquique continues to be considered as a center for traffic materials destined to pirate replicators around the country and, in some cases, connected to operations in Peru and Paraguay.

For the audiovisual industry, the main piracy concern in Chile in 2000 continues to be the 40% video piracy rate. Although back-to-back duplication in video stores forms an important part of the overall pirate video system in Chile, the more organized counterfeit video reproduction and distribution structure is of primary concern. A relatively small number of criminals, with national distribution networks through flea markets, street vendors and even directly to video stores, run the piracy industry in Chile. These pirates also sell the materials that facilitate individual back-to-back copying in video stores, such as professionally printed cover sheets. The country's flea markets, such as Bio-Bio in Santiago, and the increasing number of street vendors, are of particular concern. These unregulated distribution points, which are nearly 100% pirate, are a direct competition to the potential legitimate video market, making it even harder for otherwise legitimate retailers to compete. The black markets are increasingly linked to organized crime and other pirate distribution systems.

Cross-border piracy is an additional concern in Chile. MPA Chile investigations reveal a growing trend toward obtaining pirate video product from Peru. Cooperation from the Chilean Customs Office has been hampered by the slow implementation of TRIPS, which Chile joined on January 1, 2000. Parallel imports of original, unauthorized Region 1 DVDs are a growing cause of

³ See Letter of the International Intellectual Property Alliance to the Trade Policy Staff Committee on the Proposed U.S.-Chile Free Trade Agreement, January 29, 2001. This letter is available on the IIPA's Website, <http://www.iipa.com>, and at USTR's Reading Room in Washington, D.C.

⁴ In 1999, \$338 million of Chilean imports to the United States benefited from the GSP program, accounting for 12% of its total imports to the U.S. For the first 11 months of 2000, \$391.9 million of Chilean goods entered the United States under the duty-free GSP code, representing a 26.2% increase over the same time period last year.

concern to the legitimate home video industry in Chile. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Chile are estimated to be \$2 million in 2000.

The IDSA estimates the piracy level of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Chile to have risen slightly to 80%. This high level of piracy in turn causes an estimated \$41 million in trade losses due to videogame piracy in this market in 2000.

The book publishing industry report that its main problem in Chile involves photocopies of university texts. Most of those are translations of U.S. titles, produced by U.S. subsidiaries in Mexico and Chile. There are private copy shops located near universities, and university-run photocopy facilities on campuses. An estimated 30% of the potential market is being lost through illegal copying. There is also a high VAT charged on books (18%) which makes books among the most expensive in Latin America. In contrast, other countries have zero rates or concessionary rates on books, 50% to 60% below VAT rates. Some pirated trade books have appeared in Chile, presumably produced by Mexican sources. There appear to be no commercially pirated textbooks. Estimated trade losses due to book piracy in Chile are \$1.0 million for 2000.

COPYRIGHT ENFORCEMENT IN CHILE

IIPA members have identified several deficiencies in the Chilean enforcement system which do not meet the threshold of full TRIPS compliance. For example, Chile does not provide for deterrent criminal penalties and civil damages that would help prevent further infringements. It is difficult to secure prosecutions, convictions or adequate deterrent sentences in the Chilean judicial system. Raids carried out by the police and the Public Ministry can be relatively effective, but it is very rare for a case to reach the verdict stage. In the few cases that do reach judgment, the sentences are regularly suspended, and the defendants are never incarcerated. Furthermore, Chile has failed to set up effective and TRIPS-compliant border control mechanisms through its customs system. For example, there appears to be no provision by which a rightholder can stop entry into Chile of suspect pirate product, even when there are clear indicia of infringement.

Moreover, as a general rule, the civil courts are relatively slow in issuing relief to the rightholder. This could be solved by making it simpler for rightholders to prove their cases, particularly their losses, through the adoption of statutory damages. Importantly, Chile fails to provide the critical TRIPS-mandated remedy of *inaudita altera parte* (ex parte) searches and seizures, a measure which is particularly important for the business software publishing community. Chilean law requires that advance notification be given to the suspected party, and this notice obliterates the effectiveness of this remedy.

Criminal Penalties and Procedures

The ineffective application of penalties has been an enduring problem in Chile. The Chilean courts do not apply the penalties for infringement currently available under the law. Although distribution of pirated software is theoretically punishable by incarceration up to 540 days, it is difficult to secure prosecutions, convictions or adequate sentencing. Raids carried out by the police and the Public Ministry can be relatively effective, but it is very rare for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being

adjudicated. In the few cases that do reach judgment, sentences are suspended for an undetermined period of time without ever being effectively applied; consequently, defendants are never incarcerated for copyright infringement.

To fix these and other deficiencies, last year Congress passed a new set of rules on criminal procedure (Código de Procedimiento Penal). These new rules provide for a separation of the functions of preliminary investigation and decision-making. Under the previous criminal procedure, both functions were performed by the criminal judge. According to the new law, the preliminary investigation is now conducted by the prosecutor, and the decision is taken by the criminal judge. This new system is supposed to alleviate the work load of the judges and to lead to increased procedural efficiency. Because the new rules have only recently taken effect, it is still too early to assess whether they will provide better protection for intellectual property rights.

BSA brought thirteen criminal cases in 2000 and there is still no decision or verdict awarded.

The recording industry initiated anti-piracy actions in Chile for the first time during 2000. 211 raids were conducted, and 70 indictments issued. Eleven defendants were convicted in 2000 (all involving cases brought in 1999); no defendants in 2000 received convictions.

Lack of Effective Civil *Ex Parte* Search Remedy

Chile fails to grant *inaudita altera parte* (*ex parte*) proceedings in civil cases. In every civil case in which an expert is needed, the law mandates notification of the other party. Requiring notification allows a defendant time to remove/erase all traces of piracy or to take other steps to protect him/herself from the inspection. Thus, even when granted, inspections often fail. In order to avoid notification of a defendant, the right holder has to hire both a private investigator to inspect the premises, and a notary public to record the results of the inspection. This adds expense to the process and makes it less effective because private parties bear the entire burden and expense of investigation.

Civil and Administrative Procedures and Remedies

Chile's civil courts are relatively slow in issuing relief to copyright rightholders. Civil copyright infringement cases can take two or more years before being adjudicated. For example, the BSA conducted 16 actions against end-user defendants in 2000, of which eight cases were settled through private negotiation. However, the BSA could not reach an agreement with the other eight defendants and consequently resorted to civil actions against them. This system does not provide expeditious remedies to prevent infringements, as required by TRIPS.

In addition, Chilean copyright law does not provide for statutory damages in its law. Statutory damages, which prescribe that a court may use a fixed sum or multiple to determine damages in lieu of determining actual damages, are a feature of copyright legislation in a growing number of countries. For example, statutory damages incorporated in Brazilian copyright legislation – and recently increased – have resulted in penalties at deterrent levels.

Chile lacks an administrative agency or authority charged with enforcing the copyright law. Some copyright rightholders, such as business software publishers, sometimes resort to

administrative actions to supplement criminal and civil anti-piracy campaigns. Several countries in this hemisphere, such as Peru, Mexico and now the Dominican Republic, have given administrative agencies specific authority to conduct some anti-piracy inspections and levy administrative sanctions.

Ineffective Border Measures

As mentioned above, Chile's lack of effective border measures has permitted individuals in Chile to act in concert with pirates located on other territories—notably Peru and Paraguay. Additionally, there is an urgent need to promote more and more effective border measures. Iquique continues to be considered a hub of blank cassettes and compact discs, en route to pirate replicators around the country, extending to Peru and Paraguay. Iquique is also the center of traffic of business software applications with several destinations around the country and also Argentina, Brazil, Paraguay and Peru.

Chile fails to establish effective border measures through its customs regulations. For example, there is no provision by which a right holder can prevent the entrance of suspect merchandise into Chile, even when there are indicia of intellectual property rights violations.

COPYRIGHT LEGAL ISSUES IN CHILE

WIPO Treaties

Chile is a signatory to both of the WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The Chamber of Deputies approved bills to ratify both treaties in June 2000. The Senate will now be considering these bills when its session resumes in March 2001. The Chilean government has announced that these bills will be passed during 2001. Moreover, since November 2000, the IIPA members have sustained talks with the Chilean government to encourage Chile to adapt its local legislation to be TRIPS-compliant and to ratify the WIPO treaties.

Copyright Law of 1970, as Amended

IIPA believes that it is critical that — with respect to copyright — the FTAA IPR chapter include, on a technologically neutral basis, the obligations of the two WIPO Treaties, as well as modern and effective enforcement provisions that respond to today's digital and Internet piracy realities and that reflect the TRIPS obligations to which the countries of this hemisphere are already subject.

IIPA members have identified several deficiencies and/or ambiguities in the Chilean Law on Copyright (Law No. 17.336 of 1970, as amended). For example, protection for compilations of unprotected facts is unclear; both NAFTA and TRIPS require protection of compilations of data or other material. A non-exhaustible rental right for computer programs does not appear expressly. While the copyright law does provide producers of sound recordings with a rental right, it is not clear whether this right is non-exhaustible, as required by NAFTA and TRIPS. The Chilean law

does not provide authors or producers of sound recordings with an express right to authorize or prohibit the importation of copies of their works or recordings made without their authorization, as required by NAFTA; there appears to be a criminal penalty for this action, but because the underlying right is not clear, more certainty in the exclusive rights section of the copyright law must be provided.

While the Chilean law creates a right in the producer of a sound recording to publicly perform, broadcast and communicate its work, the law ties this right to the exercise of the right to the author of the underlying musical composition; the rights of the record producer should be independent or parallel to the author's right. Chilean law also contains specific percentages regarding the remuneration for publishing contracts and performances of works; these should be left to contractual negotiations between the parties and NAFTA provides an obligation permitting the free and unhindered transfer of rights by contract. NAFTA also requires that criminal penalties and civil remedies be available for the manufacture, import, sale, lease or other making available of equipment for encrypted satellite signals, and these should be added to Chilean law. The copyright law also contains overbroad exceptions regarding the use of photographs which are incompatible with the Berne Convention and TRIPS. These examples of substantive deficiencies in the Chilean copyright law should be considered illustrative, not exhaustive.

IIPA notes that while some amendments to the copyright law were proposed in the early 1990s, comprehensive reforms of the copyright law which were presented to the Chilean Congress in the mid-1990s were not adopted.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

COMMONWEALTH OF INDEPENDENT STATES (C.I.S.)

SUMMARY OF ISSUES IN THE COUNTRIES OF THE C.I.S.

This report encompasses separate but similar reports on the following countries of the Commonwealth of Independent States (C.I.S.):

Armenia
Azerbaijan
Belarus
Georgia
Kazakhstan
Kyrgyz Republic
Republic of Moldova
Tajikistan
Turkmenistan
Uzbekistan

IIPA recommends that each of these ten countries of the C.I.S. should be individually placed on the Watch List in 2001.

IIPA has grouped these ten (of twelve) countries of the C.I.S. under a single heading only for the convenience of reporting on their problems. This is due to the numerous similarities of the problems confronting the copyright industries in each of these countries.

In the remaining two countries of the C.I.S., namely **Russia** and **Ukraine**, much more serious piracy problems confront the copyright industries and thus warrant separate attention. So IIPA has filed separate reports on Russia and Ukraine, recommending the placement of Russia on the Priority Watch List, and that Ukraine be designated a Priority Foreign Country in 2001.

After a few issues are treated collectively in the introduction to this report, each of the ten countries of the C.I.S. listed above are then treated separately in alphabetical order.

To summarize, the major deficiencies for all of these countries include: (1) the failure to fully adopt the legal reforms required in bilateral trade agreements signed and ratified by each country; (2) the failure to comply with the World Trade Organization (WTO) TRIPS Agreement, especially the enforcement obligations; (3) the failure to adopt optical media production and distribution controls; and (4) with the rise of internet piracy, the need to accede to and implement the 1996 digital treaties of WIPO (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty).

An even more fundamental legal shortcoming in many of these countries in the C.I.S. is the absence of protection for sound recordings because many of these countries are still not members of the Geneva Phonograms Convention (or the World Trade Organization TRIPS Agreement) and thus have no point of attachment for American or other foreign sound recordings. This is so even though they were obligated by the bilateral trade agreements to do this over seven, and in some cases, eight, years ago. It is of utmost importance that the U.S. government press each of these countries to cure their current major violations of the agreements reached with the United States. Introducing the necessary legal infrastructure to prevent the growth of piracy is much simpler than attempting to dismantle piratical operations once they are established. In the current environment in the region, replication facilities are easily moved from one territory to another — today it is Ukraine; it could well be Belarus or Georgia tomorrow. Providing the necessary legal framework will go a long way toward dissuading this type of movement.

In almost all cases, even where legal reforms have been adopted in these countries, there is virtually no on-the-ground enforcement – neither effective civil, administrative, criminal, or border enforcement measures are in place. This has resulted in the countries in this region becoming a haven for the production and distribution of pirated material, including optical media material consisting of music CDs, CD-ROMs containing business and entertainment software, and DVDs containing audiovisual material. Much of this material is produced by regional organized criminal enterprises, and is not only hampering the development of legal markets in the countries of the C.I.S., but is spreading and thus doing significant harm to other legitimate markets in neighboring countries in Eastern and Central Europe. The combination of the failures in the legal regime, plus a total enforcement breakdown, especially poor border enforcement, acts as a bar to the entry of any legitimate copyright industries into the local markets; in addition, these are WTO TRIPS deficiencies.

Four steps are needed to curb this problem: (1) all works (including sound recordings) must enjoy protection consistent with the WTO TRIPS requirements – i.e., including materials released with the past 50 years; (2) optical media production regulations must be implemented to shut down illegal plants and control the production and distribution of this material; (3) police and prosecutors must commence raids, seizures, deterrent criminal actions; and (4) effective border enforcement must be implemented to prevent the widespread flow of material throughout the region or into territories beyond the region.

COMPLIANCE WITH BILATERAL TRADE AGREEMENTS

In 1990, the United States and the Soviet Union signed a far reaching bilateral trade agreement including extensive intellectual property rights obligations. These obligations included the enactment and enforcement of a (pre-TRIPS Agreement) modern copyright regime. As a result of the tumultuous events of August 1991, the 1990 U.S.-U.S.S.R. Trade Agreement, which required the U.S.S.R. to adopt a Berne-compatible copyright law by December 31, 1992, never entered into force because the U.S.S.R. did not implement it before it dissolved. The U.S. government determined that each country of the C.I.S. could (re)sign the 1990 U.S.-U.S.S.R. Trade Agreement with only minor technical amendments, including new deadlines to meet the Agreement's obligations, and a statement from each country of the C.I.S. acknowledging its succession to the Soviet Union's Universal Copyright Convention obligation, dating from May 27, 1973.

All twelve of the former republics of the Soviet Union did sign these agreements (see dates below). Once each agreement was signed, it was agreed it would enter into force upon an exchange of diplomatic notes between the U.S. and each new country. At such time that country would be eligible for "Most Favored Nation" (MFN; now known as "Normal Trade Relations") status. All of the countries have now put the agreements into force. Once in force, each country agreed to make its "best efforts" to enact all of the IPR components of the trade agreement, in the case of every country but the Russian Federation, by December 31, 1993. The Russian Federation agreed to complete its obligations by December 31, 1992.

The bilateral trade agreements were signed and entered into force in each country on the following dates:

Armenia (Signed April 2, 1992; entry into force on April 7, 1992);
Azerbaijan (Signed April 12, 1993; entry into force on April 21, 1995);
Belarus (Exchange of letters January 6 and February 16, 1993; entry into force on February 16, 1993);
Georgia (Signed March 1, 1993; entry into force on August 13, 1993);
Kazakhstan (Signed May 19, 1992; entry into force on February 18, 1993);
Kyrgyz Republic (Signed May 8, 1992; entry into force on August 21, 1992);
Republic of Moldova (Signed June 19, 1992; entry into force on July 2, 1992);
Russian Federation (Signed June 1, 1990; entry into force on June 17, 1992);
Tajikistan (Signed July 1, 1993; entry into force on November 24, 1993);
Turkmenistan (Signed March 23, 1993; entry into force on October 25, 1993);
Ukraine (Signed May 6, 1992; entry into force on June 23, 1992);
Uzbekistan (Signed November 5, 1993; entry into force on January 13, 1994).

The obligations of the bilateral trade agreements (Article VIII of each agreement and in the accompanying side Letter on IPR) include:

(1) Joining the Berne Convention (Paris Act); (2) Providing protection for sound recordings, including a right of reproduction, distribution (and importation), and a commercial rental right; (3) Providing a point of attachment for foreign (American) sound recordings and making best efforts to join the Geneva Phonograms Convention; (4) Providing full retroactivity (per Article 18 of Berne); (5) Protecting computer programs and databases (as "literary works" consistent with Berne, and now TRIPS); (6) Providing adequate and effective protection and enforcement (which is understood to include deterrent civil and criminal penalties, as well as border measures); and (7) Establishing a working group with each country to monitor the continuing progress of copyright and other IP protection and enforcement.

Berne Convention: Ten of twelve of the countries in the C.I.S. are members of the Berne Convention. They are: the Russian Federation (1995), Ukraine (1995), Georgia (1995), the Republic of Moldova (1995), Belarus (1997), Kazakhstan (1999), Azerbaijan (1999), the Kyrgyz Republic (1999), Tajikistan (2000), and Armenia (2000). This means that two countries, Turkmenistan and Uzbekistan, are in breach of this trade agreement obligation.

Sound Recording Protection (Geneva Phonograms Convention and WTO TRIPS Agreement): Only six of twelve countries in the C.I.S. provide any protection for American or other foreign sound recordings by virtue of their membership in the Geneva Phonograms Convention, or by their membership in the World Trade Organization (WTO TRIPS Agreement).

The six countries that do protect foreign sound recordings are: the Russian Federation (1995), the Kyrgyz Republic (1998), Georgia (1999), Ukraine (2000), Moldova (2000), and Kazakhstan (2001).

Only four of twelve countries are members of the Geneva Phonograms Convention: the Russian Federation (1995), Ukraine (2000), Moldova (2000), and Kazakhstan (effective January 2001). The Kyrgyz Republic and Georgia use their WTO membership as a point of attachment for foreign sound recordings since they are not Geneva Phonograms members. So, six of twelve countries provide no protection for foreign sound recordings over six, or in some cases, seven years after they obligated themselves to do so. They are: Armenia, Azerbaijan, Belarus, Tajikistan, Turkmenistan, and Uzbekistan.

Eight of twelve countries in the C.I.S. are in breach of the bilateral trade agreement obligation to join Geneva Phonograms. They are: Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan.

Note that as a point of attachment for a non-Geneva Phonograms non-WTO member, such as Belarus, the WIPO Performances and Phonograms Treaty (WPPT) is not yet in force. It will not be in force until thirty countries ratify it, probably some time in 2001. So, it cannot yet provide a point of attachment for American or other foreign sound recordings and thus Belarus does not yet provide such protection.

Pre-existing Works and Sound Recordings: The Russian Federation and Ukraine explicitly *do not* provide protection for pre-existing works or sound recordings in breach of the clear obligation in the bilateral agreement.¹ This lack of protection for pre-existing works and sound recordings is also a violation of Berne (Article 18 and the national treatment obligations) and the WTO TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works).

Belarussian experts claim that their law probably does provide protection for pre-existing works, though they acknowledge it is less clear with respect to sound recordings. For the other nine countries of the C.I.S. it is unclear what, if any, protection they do or do not provide for pre-existing works and sound recordings. The countries of the C.I.S. that are not providing protection for pre-existing works and sound recordings must do so or they are in breach of the bilateral agreement; those countries where such protection is unclear should clarify that protection. This problem of protection for pre-existing material, especially for sound recordings, is a regional problem because such protection has only very recently been provided in

¹The issue of protection for pre-existing works, at least back to 1973, was additionally required in every country in a special bilateral provision (not found in the Soviet agreement). That provision obligated each country to act as a successor state to the Soviet Union's obligations under the Universal Copyright Convention (U.C.C.). Thus a "gap" in protection for American works in each of the (non-Berne) countries of the C.I.S. was avoided, from May 27, 1973 to the present. This is because the Soviet Union became a party to the 1952 text of the Universal Copyright Convention on May 27, 1973. UNESCO (secretariat of the U.C.C.) reportedly treats all of the former republics of the U.S.S.R. as successors to the Soviet Union and confirms every republic's adherence to the U.C.C. from that date. Only five countries — the Russian Federation, Belarus, Kazakhstan, Tajikistan and Ukraine — formally confirmed their membership in that convention, however. At the time of the signing of the bilateral agreements, the USG requested that each country send such a confirmation letter to UNESCO to avoid any confusion about this status.

neighboring countries such as Poland and the Czech Republic, thereby creating a region haven for the production and widespread distribution of back-catalog material.

Computer Programs and Databases: Some form of explicit copyright protection for computer programs and databases is provided in every country except Turkmenistan. However, almost no country in the C.I.S. provides criminal *ex parte* search provisions necessary for effective enforcement against end-user piracy (and as required by the WTO TRIPS Agreement); the availability of civil *ex parte* search provisions is unclear in virtually all of these countries.

Criminal Code: Only a few of the countries have amended their criminal code to adopt any criminal provisions applicable for IPR violations; almost none of the countries have adopted deterrent penalties to stop commercial piracy, especially necessary against the organized criminal enterprises operating in this region.

Customs Code: Neither have most of these countries adopted the necessary Customs Code revisions to provide *ex officio* authority to properly seize material at the border.

Enforcement: None of these countries are providing "adequate and effective" enforcement on the ground as required by the bilateral agreements or the WTO TRIPS Agreement, that is, police, prosecutors, judges and customs officials must be engaged in effective enforcement activity to stop commercial piracy in the region.

Working Groups: Last, working groups consisting of representatives of the governments of United States and each of these countries should meet periodically to exchange information on the progress of IPR reforms. This is especially important because many of the countries of the C.I.S. do not have politically strong agencies for the adoption and implementation of IPR laws; perhaps such working group meetings could help spur the governments of the C.I.S. into better IPR protection and enforcement activity.

SUMMARY OF LEGAL REFORMS AND ENFORCEMENT ACTIVITY

Of course, the most important multilateral legal reforms that came into force after the bilateral trade agreements were adopted in the early 1990s, were the World Trade Organization TRIPS Agreement in 1995, and the 1996 digital WPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

World Trade Organization (WTO TRIPS Agreement): Only two of twelve countries in the C.I.S. are members of the World Trade Organization, and are thus bound by the TRIPS Agreement's substantive and enforcement obligations. They are the Kyrgyz Republic (December 20, 1998) and Georgia (June 14, 2000).

Eight other countries in the C.I.S. are in the process of acceding to the WTO. Working parties have been established for Armenia, Azerbaijan, Belarus, Kazakhstan, the Republic of Moldova, the Russian Federation, Ukraine, and Uzbekistan.

The U.S. Congress has made it clear, in the legislation implementing the Uruguay Round, that the Administration should work to encourage "acceleration" of WTO TRIPS compliance by existing and acceding WTO members. Consistent U.S. policy requires any nation newly acceding

to WTO to be in full compliance with TRIPS at the time of accession. In IIPA's view, the TRIPS obligations merely spell out in greater detail the C.I.S. countries' *existing* bilateral obligations under the bilateral trade agreements with the U.S. to provide "adequate and effective protection and enforcement" of intellectual property rights.

WCT and WPPT: Three countries are members of the new WIPO Copyright Treaty (WCT). They are Moldova (March 1998), Belarus (July 1998), and the Kyrgyz Republic (September 1998). Two countries are members of the WIPO Performances and Phonograms Treaty (WPPT). They are Moldova (March 1998) and Belarus (July 1998). Unfortunately, the Kyrgyz Republic bifurcated its membership in these important digital treaties and only joined the WIPO Copyright Treaty in 1998; it is expected that they will soon accede to the neighboring rights (WPPT) treaty as well. The United States deposited its instrument of accession to the WCT and WPPT in September 1999.

In December 2000, the Interparliamentary Assembly of the members states of the C.I.S. agreed in a resolution adopted in St. Petersburg that for those countries that have not yet done so "to recommend to the parliaments and governments" . . . to accede to the WCT and WPPT, and to modernize copyright and neighboring rights laws taking into account the two digital treaties. The Assembly even adopted recommendations on the specific definitions and scope of new rights that need to be adopted by the states of the C.I.S. to properly implement the digital treaties. The resolution and recommendations were agreed to by all 12 members states of the C.I.S., working with officials from the W.I.P.O.

Other Multilateral Agreements: Armenia and the Russian Federation have joined the Brussels Satellite Convention. The Republic of Moldova is a member of the Rome Convention (December 1955).

In September 1993, the C.I.S. Treaty on Cooperation in Copyright and Neighboring Rights was signed. This obligated member states to confirm their membership in the Universal Copyright Convention (U.C.C., 1952 text); to mutually protect their works on this basis; and to develop national legislation at the level of the Berne, Geneva Phonograms, and Rome Conventions. This treaty does not provide for the creation of any intergovernmental executive body.

Civil Code Reform in the C.I.S.: A dangerous development in breach of the bilateral agreement continues to unfold in several countries of the C.I.S., including the Russian Federation: the comprehensive reform of the civil codes of these nations that is underway.² In most cases, the efforts to revise the civil code will or has resulted in the addition in that code of new

²Prior to the breakup of the Soviet Union, the text of the U.S.S.R.'s 1961 "Fundamentals of Civil Legislation" was the governing copyright law throughout the Union. Based on the "Fundamentals," each of the republics adopted in its civil code a separate chapter for copyright protection. The main features of these civil codes were: a 25-year term of protection, no protection for producers of sound recordings or performers, and broad free use provisions. The Supreme Soviet of the U.S.S.R. adopted amendments to the Fundamentals in May 1991, but they did not become effective because of the dissolution of the U.S.S.R. The 1991 amendments entered into force in the Russian Federation on August 3, 1992 by special decree. Several of the republics still treat the old civil codes as in force; it is not known whether any of these republics explicitly treat the 1991 amendments drafted by the former U.S.S.R. as effective within their territories

copyright provisions inconsistent with Berne, TRIPS, and the bilateral agreements, and inconsistent with the more fully developed national copyright laws. These efforts to revise the Civil Codes should be opposed. For example, in the case of Russia, drafts of the Civil Code reform (in 1999, and again in 2000) included IPR provisions completely incompatible with the bilateral trade agreement, the Berne Convention, and TRIPS. In 1996 a so-called Model Civil Code for the countries of the C.I.S. was reportedly adopted by the C.I.S. Interparliamentary Assembly in St. Petersburg. Detailed provisions on copyright and neighboring rights were included that were contradictory to existing international standards of protection for copyrights.

Each country of the C.I.S. should enact separate copyright, customs, and criminal provisions and procedures, rather than build on the foundation of the Soviet-era civil codes.

Copyright Law Reform: To the best of our knowledge, 11 countries have passed major revisions to their copyright laws:

Armenia (May 13, 1996; effective June 6, 1996; amended December 8, 1999; effective February 12, 2000)

Azerbaijan (June 5, 1996; effective October 23, 1996)

Belarus (May 16, 1996; effective June 18, 1996; amended August 11, 1998; effective August 19, 1998)

Georgia (Civil Code in force on November 25, 1997; copyright law adopted June 22, 1999; effective August 16, 1999)

Kazakhstan (June 10, 1996; effective June 12, 1996)

Kyrgyz Republic (January 14, 1998; effective January 22, 1998)

Republic of Moldova (November 23, 1994; effective May 2, 1995; amended May 28, 1998)

Russian Federation (July 9, 1993, effective August 3, 1993; amended July 19, 1995)

Tajikistan (November 13, 1998; effective December 17, 1998)

Ukraine (December 23, 1993, effective February 23, 1994)

Uzbekistan (August 30, 1996; effective September 17, 1996)

Turkmenistan has for a number of years reportedly been in the process of drafting new copyright legislation; until it is adopted, the Civil Code (Chapter IV, 1961) from the former Soviet era is still the operational law there.

Generalized System of Preferences (GSP): As a result of their MFN/NTR status, all of the countries are eligible to be beneficiaries under the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible countries (duty-free tariffs on certain imports). Part of the discretionary criteria of the GSP program is that the country provide "adequate and effective protection of intellectual property rights..." which includes copyright protection and enforcement. In 1999 (the latest full year of statistics), the countries of the C.I.S. received the following preferential trade benefits under GSP:

<u>Amt. GSP duty-free (\$)</u>		<u>Percent of U.S. imports that benefit from GSP</u>
Armenia	\$2,743,000	18.1
Azerbaijan	\$0	0
Belarus	\$10,587,000	11.5
Georgia	\$0	0
Kazakhstan	\$188,124,000	83.3

Kyrgyz	\$30,000	5.7
Moldova	\$364,000	<1.0
Russia	\$417,070,000	7.3
Tajikistan	\$0	0
Turkmenistan	\$0	0
Ukraine	\$27,279,000	5.2
Uzbekistan	\$3,689,000	13.7

On June 16, 1999, IIPA submitted a request to the United States government in accordance with U.S. law that the eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan as a GSP beneficiary developing country be reviewed, and that its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by each of these countries to remedy the deficiencies which adversely affect U.S. copyright owners.

On February 14, 2000 the United States government accepted the IIPA petitions for: Armenia, Kazakhstan, the Republic of Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the United States government held public hearings on the GSP petitions regarding these five countries; the IIPA testified, as did representatives of most of the governments of the five countries.

As a result of cooperation with the Government of Moldova on legal reforms following the filing of the IIPA petition, on October 23, 2000, the IIPA requested that its petition be withdrawn; and, on January 10, 2001, the United States government accepted that action and the GSP review of the Republic of Moldova was formally ended.

The United States government has still not decided whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine, and Uzbekistan.

Also in 2000, the United States government withdrew GSP benefits from Belarus, but for reasons unrelated to intellectual property matters.

ARMENIA

LEGAL REFORM AND TREATY ADHERENCE

In April 1992, Armenia and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on April 7, 1992. Armenia did adopt a copyright law on May 13, 1996; it went into force on June 6, 1996. However, the law had many substantive deficiencies. A new Law on Copyright and Neighboring Rights was adopted by the National Assembly of Armenia on December 8, 1999 to replace the 1996 law. The new copyright law was signed by the President on January 12, 2000; it went into force on February 12, 2000.

Also in 2000, Armenia finally joined the Berne Convention, effective October 19, 2000. However, Armenia is not a member of any of the other relevant conventions, nor has it met its enforcement obligations as required by the bilateral agreement. These failures are long past the deadlines set in the agreement to take such action. For example, Armenia is not a member of the Geneva Phonograms Convention, leaving American sound recordings completely unprotected more than seven years after the bilateral trade agreement required such protection. The Government of Armenia indicated at the end of 2000 in discussions with United States government officials, that Armenia might soon join the Geneva Phonograms Convention.

Armenia does not clearly provide protection for pre-existing works or sound recordings as required by the clear obligation in its bilateral trade agreement, as well as by Berne (Article 18), national treatment obligations, and the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). Unfortunately, the Copyright Law of 2000 is silent on this matter in the relevant provisions for both works and sound recordings. Armenia must clearly provide protection for pre-existing works and sound recordings to meet these obligations.

The Armenian Copyright Law of 2000 does provide enumerated protection for computer programs and databases as required under the bilateral trade agreement. There are no criminal *ex parte* search procedures to enforce end-user piracy. The Civil Procedure Code was revised in 1998, effective January 1, 1999, but the provisions pertaining to the availability of civil *ex parte* search procedures are unclear.

Chapter 5 of the Copyright Law of 2000 (articles 42-44) provides civil remedies for copyright infringements including monetary damages, as well as for the seizure and confiscation of infringing goods and machinery used to make illegal copies.

Article 160 of the Armenian Criminal Code provides for fines of 200 times the minimum monthly wage for copyright and neighboring rights violations, and ("obligatory social") corrective labor of up to two years. However, there have not been any convictions under this law. Amendments to the Criminal Code, first drafted in 1997, were apparently ready for parliamentary consideration in late 2000, but they were never enacted.

It is also unclear whether the existing Criminal Code or the Criminal Procedures Code provides police with the proper *ex officio* authority to commence criminal copyright cases. Armenian copyright officials told U.S. government officials that they believed such authority does exist, but there has been no indication of any meaningful enforcement action to date. If the Criminal Code does not do so, these laws should be amended accordingly when the revisions to the code are considered.

Effective January 1, 2001, Armenia amended its Customs Code and included authority to protect "intellectual property rights" and "intellectual property objects." It contains a somewhat complex registration and notification system, though it also apparently does provide *ex officio* authority for customs officials to seize material at the border. Such authority should be clearly provided to and utilized by Customs officials to stop the flow of material across the border; this is a requirement of the WTO TRIPS Agreement.

Armenia was not a signatory to either of the two new WIPO treaties. The Armenian government should be encouraged to accede to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

COPYRIGHT ENFORCEMENT

Armenia is not currently providing "adequate and effective" enforcement with any meaningful police or prosecutorial activity, as required by the bilateral trade agreement, even if some (albeit weak) criminal, civil, and administrative remedies do exist. Also, border enforcement is very weak in Armenia, allowing illegal copies that are produced in any country in the region (like Russia and Ukraine) to freely cross borders for sale in Armenia and other countries. Hopefully, the new Customs Code effective in 2001 will energize the customs authorities to take appropriate actions. The failure to provide an adequate legal and enforcement regime in Armenia is causing significant harm to the copyright industries.

In addition, the environment is ripe for illegal optical media production facilities as well as other organized criminal production facilities. According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no known optical media plants yet, but there are at least two cassette manufacturing plants; most of the music piracy is in the form of audio cassettes. The level of music piracy is estimated at about 90%; trade losses for 2000 are estimated at \$5.0 million. It is estimated that in 2000, almost 400,000 CDs and 2.5 million cassettes were sold in Armenia.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000 (these are preliminary figures for 2000; they will be finalized later in 2001). The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

AZERBAIJAN

LEGAL REFORM AND TREATY ADHERENCE

In April 1993, Azerbaijan and the United States exchanged letters to implement a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on April 21, 1995. Azerbaijan adopted the Copyright and Neighboring Rights Law on June 5, 1996; it went into force on October 23, 1996. IIPA has not been able to obtain a copy of this law.

Azerbaijan did adhere to the Berne Convention, effective June 4, 1999. Azerbaijan is not providing any protection for foreign sound recordings, nor is Azerbaijan a member of the Geneva Phonograms Convention — two obligations of the trade agreement. So U.S. sound recordings are completely unprotected, six years after the bilateral trade agreement required such protection.

Azerbaijan *does not* clearly provide protection for pre-existing works or sound recordings as required by the clear obligation in its bilateral trade agreement, Berne and the WTO/TRIPS Agreement. Azerbaijan must clearly provide protection for pre-existing works and sound recordings.

Azerbaijani law reportedly does provide copyright protection for computer programs and databases. It is unclear whether Azerbaijani law provides civil or criminal *ex parte* search provisions for effective enforcement against end-user pirates.

Article 158 of the new Azerbaijani Criminal Code (in force on September 1, 2000) does provide liability for copyright and patent infringements, but no details of the scope of the penalties are available. There have not been any convictions under this law. The Azerbaijani Customs Code was amended on June 10, 1997 and does contain provisions (Article 19) relevant to the importation or export of intellectual property. However, it is not clear if the provisions adopted in the Customs Code provide *ex officio* authority for customs officials to seize material at the border as required by the WTO TRIPS Agreement. At present, the Criminal Code provides sanctions only for criminal liability for copyright and patent rights violations; neighboring rights violations are not covered at all. The criminal provisions that do exist are minimal and do not include jail terms. Neither the Criminal Code nor the Criminal Procedures Code provides police with the proper *ex officio* authority to commence criminal copyright cases. These laws should be amended accordingly.

Azerbaijan was not a signatory to either of the two new WIPO treaties. The Azerbaijani government should be encouraged to accede to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

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There is currently no “adequate and effective” enforcement in Azerbaijan; there is no meaningful police, customs or prosecutorial activity, as required by the bilateral trade agreement and the WTO TRIPS Agreement. There are administrative sanctions (Articles 186-1)

providing for fines of 20 times the minimum monthly wages for copyright infringements. However, these fines are only imposed if the infringement causes damages that equal more than ten times the minimum monthly wages. None of the copyright industries report that these administrative sanctions, nor any of the criminal penalties, have ever been levied in a copyright case. Also, border enforcement is very weak in Azerbaijan. This is allowing illegal copies, especially of musical material produced in another country in the region, to cross borders freely for sale in Azerbaijan and other countries. The failure to provide an adequate legal and enforcement regime in Azerbaijan is causing significant harm to the copyright industries.

In addition, as in other countries in the region, the environment is ripe for illegal optical media production facilities as well as other organized criminal production facilities. According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no optical media plants in Azerbaijan. Most music piracy is in the form of audio cassettes. The level of music piracy is estimated at about 90%; trade losses for 2000 are estimated at \$12 million, an increase from 1999 when it was \$10 million. It is estimated by the industry that 6 million cassettes and 700,000 CDs were sold in Azerbaijan in 2000.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000 (these are preliminary figures for 2000; they will be finalized later in 2001). The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

BELARUS

LEGAL REFORM AND TREATY ADHERENCE

In January and February 1993, Belarus and the United States exchanged letters to implement a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on February 16, 1993. In May 1996, Belarus enacted a new law on copyright and neighboring rights. That law entered into force on June 18, 1996.

Belarus adhered to the Berne Convention (Paris Act) on December 12, 1997, in accordance with its bilateral obligation. In December 2000, Belarus signed a cooperation agreement with the World Intellectual Property Organization (WIPO) to improve its IPR regime.

On August 11, 1998, amendments to the Law on Copyright and Neighboring Rights were adopted; those amendments went into force on August 19, 1998. The new amendments added: (1) a rental right consistent with TRIPS for computer programs and audiovisual works (Art. 16.1) and for sound recordings (Art. 32.2); (2) a right of communication to the public with definitions of “communication to the public” and “broadcasting” (Arts. 16.1 and Art. 4, respectively) – but absent a clear right of making available; (3) provisions pertaining to “rights management information” (Art. 4); (4) a limited right of archival backup copying for computer programs plus a narrow exception for decompilation (Art. 21); (5) a point of attachment for sound recordings – by creation, and first or simultaneous publication in Belarus (Art. 30); and (6) making available rights for sound recordings (Art. 32.2) (but maintaining a compulsory license for the public performance, broadcasting, communication to the public [including interactive use] of sound recordings [Art. 33]).

These amendments were adopted not only for eventual WTO TRIPS compliance, but also to comply with the new WIPO “digital” treaties. Belarus then deposited its instrument of ratification on July 15, 1998 for both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), becoming one of the first countries to do so.

However, even with all of these important legal reforms in place, Belarus is still not providing any protection or rights to American or any other foreign sound recordings; nor is Belarus a member of the Geneva Phonograms Convention — two obligations of the trade agreement. So U.S. sound recordings are completely unprotected, more than seven years after the bilateral trade agreement required such protection. Note, that Belarus is a non-Geneva Phonograms, non-WTO member. Since the WIPO Performances and Phonograms Treaty (WPPT) is not yet in force, Belarus cannot rely on this treaty to provide a point of attachment for American or other foreign sound recordings. The WPPT will not be in force until thirty countries ratify it, probably some time in 2001.

The August 1998 Copyright Law added in the remedies section provisions relating to anticircumvention devices or services and the removal or alteration of rights management information (Art. 39.5). The remedies for anticircumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices.

New Criminal Code provisions were adopted in 1999 and went into force on January 1, 2000. The new provisions reportedly (IIPA was never provided with a copy) provide for up to five years imprisonment for copyright and neighboring rights violations. The Criminal Procedures Code still needs revision to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases. There are administrative remedies against violations of copyright and neighboring rights, including acts of illegal retail sale and distribution. Although Customs Code amendments were made in 1998 to include intellectual property materials, the proper *ex officio* authority was not granted to customs officials.

Under the Copyright Law (Article 40), the civil penalties for copyright or neighboring rights violations included injunctive relief, damages (including lost profits), seizure and impoundment of infringing copies, and statutory penalties of between 10 and 50,000 times the minimum wage. Belarussian officials also point to the Civil Code revisions, adopted effective July 1, 1999, as providing additional remedies for IPR violations.

Belarus does not clearly provide protection for pre-existing works, nor at present does it provide such protection for pre-existing sound recordings, as required by the clear obligation in its bilateral trade agreement, as well as by Berne (Article 18) national treatment obligations, and the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). Belarussian officials insist this protection does currently exist, at least for works. This is because Article 42 of the 1996 Law, and Article 3 of the 1998 law make international treaties (such as the Berne Convention) self-executing in Belarus, meaning that absent any legislative action to the contrary, Article 18 of Berne should currently provide protection for pre-existing foreign works. Belarussian officials also believe that such protection for pre-existing sound recordings also exists but absent membership in the relevant treaties, there is no point of attachment. Belarus should clarify that this protection is provided for works and sound recordings to meet its international obligations.

Belarussian copyright law does provide explicit protection for computer programs and databases as required under the bilateral trade agreement. However, there is no known criminal *ex parte* search procedure necessary to provide effective enforcement against end-user pirates. The availability of civil *ex parte* search procedures is unclear.

Neither are its anticircumvention or copyright management information provisions fully compatible with the new digital treaties. In particular, implementation of the anticircumvention requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. In addition, rightholders need to be able to protect so-called "copyright management information" that is attached to or accompanies a work or sound recording, including protection against the alteration, removal or falsification of this information. The Belarussian provisions provide some, but not all, of these rights.

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Levels of piracy are extremely high and enforcement remains virtually nonexistent in Belarus. This piracy and the lack of effective enforcement in Belarus is preventing entry by the U.S. creative industries into the country. In addition, Belarus is in the midst of its accession process to

join the World Trade Organization. To accede, Belarus must bring its law into full compliance with its TRIPS obligations by improving its laws and providing effective enforcement (including criminal penalties), since the current laws and enforcement regime fall short of these obligations.

Belarus must also act to stem the unacceptable rates of piracy by (1) enforcing its new criminal penalties provisions; (2) building an enforcement regime with effective police, prosecutorial and judicial enforcement; (3) taking action aimed at the growth of musical cassette production, and the growing threat of optical media production and distribution in Belarus – this includes implementation of optical media regulations to close illegal plants down; (4) licensing its television broadcasting stations; and (5) adopting procedures for government agencies to effectively deter commercial piracy.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), Belarus has large-scale illegal musical cassette production facilities for domestic and foreign consumption. There is confirmation of the involvement of organized criminal enterprises in the music piracy business in Belarus. These criminal organizations are not only producing musical cassettes in Belarus, but are producing optical disk media in neighboring countries, and distributing CDs and CD-ROMs containing musical recordings as well as business and entertainment software in Belarus and in these other countries. Because of the ineffective border enforcement measures, materials are flowing freely through Belarus to Ukraine, Poland, Russia, the Czech Republic, and a number of other countries.

The environment and infrastructure are ripe for illegal optical media production facilities, although there are no confirmed reports of these plants at this time. In July 2000, CD plant representatives from Ukraine visited Belarus to consider moving some of their production facilities there. These optical disk plants are capable of producing thousands of CDs, DVDs, CD-ROMs, and even VCDs. The Belarussian authorities should act now to prevent illegal production facilities from taking root in Belarus by adopting legislation controlling optical media production and distribution (including plant licensing regulations, raw material monitoring and Source Identification (SID) coding). Illegal optical media production is now a major regional problem. Adopting measures now will prevent the rapid growth of this problem in Belarus, in anticipation that, unfortunately, optical media production in Belarus is likely to be a reality in the very near future.

The growth of illegal musical cassette plants for the production and distribution of musical works in Belarus and the rise of optical media production elsewhere in the region are very serious developments. Belarussian authorities need to implement systems to regulate and monitor the activities of the illegal cassette tape plants, to prevent their illegal reproduction and distribution with regular copyright compliance controls. Also, they need to adopt optical media controls before Belarus becomes a production site; if optical media plants do begin operations they should also be strongly encouraged to implement IFPI SID codes.

Customs officials must be better trained and equipped to prevent any illegal product made in Belarus from being exported, and to prevent the importation of material (tapes and CDs) made elsewhere in the region from entering into Belarus. In 2000, only five cases were reported where the shipment of CDs (about 1000 total) was stopped by customs; obviously, much more needs to be done to stop the heavy trafficking of illegal material into and out of Belarus.

In 2000, the IFPI continued to coordinate its anti-piracy actions against retailers and illegal manufacturers, seizing over 29,000 tapes, over 20,000 CDs, and over 40 recording devices. The recording industry considers this, a very modest figure, taking into account the huge Belarussian markets, and notes that much more enforcement activity is needed successfully to deter the pirates.

The music industry has endemic piracy problems: The recording industry estimates total trade losses for all international repertoire in Belarus were \$28.0 million in 2000 (up from \$25 million in 1999); the piracy rate was estimated at 90%. In 2000, more than 3.6 million CDs and 10.8 million cassettes were sold in Belarus.

In Belarus, pirated CDs sell for one-third the legitimate price, preventing the music industry from creating a market; and as mentioned, pirate tapes are a major problem. This is coupled with the lack of protection for pre-existing works (domestic or foreign), and the lack of any protection for foreign sound recordings (because Belarus does not provide a clear point of attachment). Belarus must adhere to the Geneva Phonograms Convention, and adopt strong enforcement mechanisms to allow a legitimate music market to develop.

The Interactive Digital Software Association (IDSA) reports wide-scale piracy in Belarus of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products). Most of the material is produced elsewhere in the region; it is controlled by organized Russian piratical operations who use Belarus as a major distribution point for this material which is shipped to other parts of Eastern Europe and throughout the C.I.S. The IDSA reports that there may now be one plant in Belarus producing both entertainment software and music material, that is, an optical media plant, though this has not been confirmed. In any case, it is clear Belarus is the source of a large amount of material whether produced in or simply shipped through Belarus to neighboring countries.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000 (these are preliminary figures for 2000 and will be finalized later in 2001). The level of piracy was estimated to be 90%.

The Motion Picture Association (MPA) reports that video and other forms of piracy remain rampant in 2000. Almost all videocassettes in Belarus' open markets are pirate Russian-language copies imported from Russia (costing approximately U.S.\$1.10 at Moscow wholesale stores) by small traders and sold locally for U.S.\$1.30. The lack of border checkpoints between Belarus and the Russian Federation facilitates such cross-border piracy. Counterfeit packaging and tapes can also be bought separately in Russia and assembled locally. So without any enforcement activity by police, and with virtually no border enforcement, pirate video dealers sell their wares at rock-bottom prices in the huge open markets and pirate cassettes are sold at retail stores at slightly higher prices.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries. The book industry reports that the primary production and distribution source of most of the pirated material in Belarus and throughout the C.I.S. is Ukraine.

Copyright piracy not only threatens foreign investment, but the development of local copyright industries in Belarus, as it does in the other countries in the C.I.S. This threat must be

met by a coordinated legal and enforcement response. All enforcement agencies (police, prosecutors, customs, plus ministries such as Justice, Interior, and Internal Revenue) should treat commercial copyright infringement as a serious crime and, as noted above, have the proper *ex officio* authority to act against it. Clear government strategies and lines of authority should be developed. Training of judges, prosecutors, magistrates, and police should be part of regular ongoing enforcement efforts.

GEORGIA

LEGAL REFORM AND TREATY ADHERENCE

In March 1993, Georgia and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on August 13, 1993. Until adoption of a separate (specialized) copyright law in 1999, the operating law was the Civil Code of Georgia (Chapter IV), which entered into force on November 25, 1997. On June 22, 1999, Georgia adopted the Law on Copyright and Neighboring Rights; it came into force on August 16, 1999.

Georgia adhered to the Berne Convention, effective May 16, 1995. However, Georgia is not a member of the Geneva Phonograms Convention, an obligation of the trade agreement. On June 14, 2000, Georgia became a member of the World Trade Organization (WTO) and obligated itself on that date fully to comply with the TRIPS Agreement, including substantive provisions as well as the important enforcement obligations. This meant that as of June 14, 2000, there was finally a point of attachment for American and other foreign sound recordings.

The Georgian Copyright Law does not provide protection for pre-existing works or sound recordings as required by the clear obligation in its bilateral trade agreement. However, as required by the WTO TRIPS Agreement (Article 14.6 for sound recordings, and Article 9 for works), Georgia is obligated to provide protection for pre-existing works and sound recordings that are less than 50 years old.

Georgia does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement. However, there is no known criminal *ex parte* search procedure, something that is necessary to provide effective enforcement against end-user pirates. The availability of civil *ex parte* search procedures is unclear.

Also in June 1999, Georgia adopted a new Criminal Code, which came into force on July 1, 2000. Article 189 applies to copyright and neighboring rights violations. The penalties range from fines of between 300 to 500 times the minimum wage, or obligatory social labor for up to two years, for illegal reproduction, importation or export. They increase up to 1,000 times the minimum wage and the same temporary limitation on freedom, for the unauthorized "use" or "release" (including first publication, i.e., moral rights violations) of copyright and neighboring rights material. For repeat offenders, the temporary limitation of freedom increases up to three years; there is a jail sentence of up to one year. There is nothing in the Criminal Code or the Criminal Procedures Code to provide police with the proper *ex officio* authority to commence criminal copyright cases.

A new Customs Code was adopted on June 23, 1999. IIPA was never provided with a copy of those amendments, but they reportedly did not provide Customs officials with *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement, and as is necessary to conduct effective border enforcement. The June 1999 amendments explicitly provide for border measures relevant to intellectual property violations. Customs

officials are authorized to seize suspected IP materials and hold them until a court renders a decision; however, there must be an application submitted by the rightholder for such action.

A few years ago, Georgia was considering a major revision of its Civil Code. The proposal was to incorporate new and extensive copyright provisions into that Code, inconsistent with its international treaty obligations including Berne and the WTO TRIPS Agreement. That effort, opposed by the European Union, the U.S. government, the WIPO, and the IIPA, seems now to have been abandoned.

Georgia was not a signatory to either of the two new WIPO treaties. The Georgian government should be encouraged to accede to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In 1999 and again in 2000, efforts were underway in the Georgian government to begin to prepare treaty implementation legislation (for both the WCT and WPPT) for eventual accession as well. The IIPA supports these efforts.

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Georgian law and its enforcement regime is currently not providing “adequate and effective” enforcement as required by the WTO TRIPS Agreement obligations found in Articles 41 through 61, and as required by the bilateral trade agreement. There is no meaningful police, prosecutorial, judicial or customs activity to stop retail distribution, much less organized criminal enterprises producing and distributing material in Georgia and trafficking that material in neighboring countries.

The administrative sanction provisions provide penalties only for the sale of illegal products; there are no special provisions for the violation of copyright and neighboring rights. In addition, they are not being used to close retail (including kiosk) establishments, by removing business licenses from pirate shops. And, even more telling, they don’t even apply to infringements of copyright and neighboring rights, such as the reproduction and distribution of sound recordings, which is the most prevalent form of piracy in Georgia. In fact, none of the copyright industries report that these administrative sanctions, or any of the criminal penalties, have ever been levied in a copyright case.

As in other countries in the region, border enforcement is very weak in Georgia. This is allowing illegal copies, especially of musical material produced in neighboring countries freely to cross borders for sale in Georgia and other countries. This is causing significant harm to the copyright industries.

In addition, as in other countries in the region, the environment is ripe for illegal optical media production facilities as well as other organized criminal production facilities. According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no known optical media plants or cassette plants in Georgia. The reports that in the near future some of the illegal Ukraine CD plants may move their operations to Georgia are very troubling. Most of the music piracy in Georgia is currently in the form of audio cassettes. The recording industry estimates trade losses in Georgia in 2000 were \$5 million; the piracy rate was estimated at 90%. In 2000, about 480,000 CDs and 3.6 million cassettes were sold in Georgia.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000

(these are preliminary figures for 2000 that will be finalized later in 2001). The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

KAZAKHSTAN

LEGAL REFORM AND TREATY ADHERENCE

In May 1992, Kazakhstan and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on February 18, 1993. On June 10, 1996, Kazakhstan passed the Law on Copyright and Neighboring Rights. That law entered into force on June 12, 1996. Among its many features, the law for the first time protected computer programs and sound recordings; it provided copyright owners with exclusive rights of reproduction; distribution including importation, rental and public lending; public display and public performance; communication to the public; broadcasting; and a right of translation as well as adaptation. The law enacted a Berne-compatible term of life-plus-50 years.

Kazakhstan joined the Berne Convention, effective April 12, 1999. Effective on January 13, 2001, Kazakhstan finally became a member of the Geneva Phonograms Convention, providing a point of attachment for foreign sound recordings, albeit more than seven years after the bilateral trade agreement required such protection.

The Kazakh Copyright Law does not clearly provide protection for pre-existing works or sound recordings as required by the clear obligation in its bilateral trade agreement, as well as by Berne (Article 18), national treatment obligations, and the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). Kazakhstan's Copyright Law (Article 4) states where there is a conflict between the Kazakh Law and an international treaty obligation (i.e., Berne Article 18) the latter shall govern and be self-executing in Kazakhstan. However, when Kazakhstan adhered to Berne in April 1999, it did not make clear in a directive or decree that it was complying with its obligations under Article 18 and is providing full so-called "retroactive" protection for works. Kazakhstan must clearly provide protection for pre-existing works and sound recordings to meet its international obligations.

The Kazakh Copyright Law does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement. However, there is no known criminal *ex parte* search procedure, something necessary to provide effective enforcement against end-user pirates. The availability of civil *ex parte* search procedures is unclear.

On July 16, 1997, Kazakhstan did adopt a new Criminal Code; it went into force on January 1, 1998. Pursuant to the bilateral agreement obligations, the new Criminal Code includes important sanctions for copyright and neighboring rights violations. Article 184 of the Criminal Code includes substantial fines of between 100 and 500 times the statutory minimum monthly wage; detention (arrest) of up to six months; and imprisonment up to five years for repeat offenders. However, the provisions are limited to actions committed for the purposes of "deriving profits" and which cause "considerable harm." The imposition of thresholds, especially the "considerable harm" standard, has been a particular problem for effective enforcement in other countries, notably Russia. The "considerable harm" standard is a vague one that shifts the burden of proof away from the pirates onto copyright owners. In other countries, this threshold has resulted in otherwise clear piracy cases being dismissed because the burden could not be

met to move forward -- either the prosecutors refuse to press charges, or judges dismiss cases. The threshold is not only a burden for identifying infringing acts under the criminal law, it also provides critical guidance for the police when they are conducting the initial raids, and must determine whether the cases should be brought under the criminal code or the administrative code. The threshold for criminal violations should be clear and it should be a relatively low standard applied against those in commercial activities.

In addition, there is nothing in the Criminal Code or the Criminal Procedures Code to provide police with the proper *ex officio* authority to commence criminal copyright cases.

The Law on Customs was amended on June 16, 1999. It contains five articles on IP border control (Articles 218-1 to 5). However, the Customs Law must be further revised to give Customs officials the proper *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement. Reportedly, new Customs Code regulations were under consideration in Fall 2000, but they have not yet been adopted; it is not clear if they would grant Customs officials this authority.

Copyright authors and owners (individuals or legal entities) have the right to commence civil actions under Article 125 of the Civil Code as amended effective December 27, 1997. The Copyright Law provides only civil remedies that include compensation for losses, including lost profits, and statutory damages ranging between 20 and 50,000 times the minimum salary, as determined by the court (Article 49).

Last, Kazakhstan was a signatory to both of new WIPO treaties. The Kazakh government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and to adopt the appropriate legislation to implement these treaties.

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As in past years, there are reports that piracy of all copyrighted products -- music, sound recordings, business applications software, interactive entertainment software (on all platforms, CDs and cartridges), motion pictures, videos, television programming, books and journals -- is widespread throughout Kazakhstan. Levels of piracy are extremely high and enforcement is virtually nonexistent. The only change in 2000 was a structural one, whereby the Copyright Agency was moved into and under the direction of the Ministry of Justice. It is hoped that this will result in better enforcement operations, especially against criminal piracy operations.

Although new criminal penalties have been adopted, none of the copyright industries report any cases that have been commenced under the new laws. IIPA urges the United States government to monitor how these new penalties scaled to multiples of the monthly salary or income of individuals convicted, and especially the threshold ("considerable harm"), are applied and whether penalties are imposed in a way that they actually deter piracy. The availability and application of criminal penalties at levels sufficient to deter piracy are necessary to effective copyright protection as required under the bilateral agreement, as well as the WTO TRIPS Agreement. In addition, there is no effective customs law and therefore no border protection for the importing or exporting of illegal material -- (a problem region-wide in Russia, Ukraine, Belarus, the Czech Republic and Poland).

According to the music industry, because of the lack of any effective border enforcement, illegal sound recordings (especially CDs) are being imported, particularly from Russia and China. The music industry (IFPI) does report good cooperation with the Kazakh copyright officials with ongoing legal reforms to improve the levels of protection and enforcement for sound recordings and copyrighted works. However, the lack of a clear point of attachment for foreign sound recordings is of course a major obstacle to effective protection.

The recording industry reports total trade losses in Kazakhstan were \$25 million in 2000 (up from \$20 million in 1999). The piracy rate was estimated at 90%. It is estimated that in 2000, more than 3 million CDs and 12 million cassettes were sold in Kazakhstan. The recording industry reports that more than 190 raids were run in 2000, but only about 5,000 CDs, 28,000 cassettes and 8 recording devices were seized; so obviously, most of the "raids" were taken against very small operations, and only minimal administrative sanctions were levied against infringers.

At present, there are no illegal optical disc production facilities reported in Kazakhstan. However, the lack of effective enforcement and the infrastructure there makes this country ripe for movement of plants into Kazakhstan from the neighboring countries, such as Ukraine. For example, there are fears that several former military facilities in Kazakhstan could easily be converted to optical disc plants; there are no confirmed reports that this has already occurred. In any case, illegal optical media production is now a major regional problem including facilities in Ukraine, Poland, Russia, and the Czech Republic, that manufacture and distribute throughout the region. Optical disc plants, like the ones operating in Ukraine and other neighboring countries, are capable of producing thousands of musical recordings, entertainment and business software, and audiovisual works on CDs, DVDs, CD-ROMs, and even VCDs.

The Kazakh authorities should act now to prevent illegal production facilities from taking root in Kazakhstan by adopting legislation controlling optical media production and distribution (including plant licensing regulations, raw material monitoring, and the use of IFPI Source Identification [SID] codes). Adopting measures now will prevent the spread of this problem to Kazakhstan.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000. (These preliminary figures for 2000 and will be finalized later in 2001.) The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

Copyright piracy threatens not only foreign investment but the development of local copyright industries in Kazakhstan. This threat must be met by a coordinated legal and enforcement response. All enforcement agencies -- the police, prosecutors, customs, in addition to ministries such as Justice, Interior, and Internal Revenue -- should treat commercial copyright infringement as a serious crime, and should have the proper authority (*ex officio*) to act against commercial piracy. Clear government strategies and lines of authority should be developed. Training of judges, prosecutors, magistrates, Customs officials, as well as police, should be part of regular ongoing enforcement efforts.

KYRGYZ REPUBLIC

LEGAL REFORM AND TREATY ADHERENCE

In May 1992, the Kyrgyz Republic and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on August 21, 1992. In January 1998, the Kyrgyz Republic adopted the Law on Copyright and Related Rights; the law went into force on January 22, 1998. The Civil Code was amended in 1998 by introducing a new Part IV (of the former Soviet Code) with very detailed provisions on intellectual property, including 40 articles on copyright and neighboring rights. These provisions now contradict the Copyright Law; this problem should be clarified so that the Copyright Law supercedes the Civil Code amendments and is consistent with international norms and obligations.

The January 1998 Copyright Law included, for the first time, protection for computer programs and sound recordings. It provided authors with a full set of rights, including reproduction (that includes the "storage of a work in a computer memory"); distribution; importation; public presentation and public performance; communication of the work to the public by broadcasting or rebroadcasting (or by cable); translation; and adaptation. The law adopted a life-plus-50-year term of protection. The rights afforded to producers of sound recordings include reproduction, adaptation, distribution (including rental) and importation. However, the law provides a right of remuneration only for producers of sound recordings for the public performance, broadcasting or transmitting by cable of their phonograms.

The Kyrgyz Republic joined the Berne Convention, effective July 8, 1999. Also, the Kyrgyz Republic deposited its instrument of ratification of the new WIPO Copyright Treaty (WCT) on September 10, 1998, although the latter is not yet in force. It did not deposit an instrument of ratification for the WIPO Performances and Phonograms Treaty (WPPT). Neither is the Kyrgyz Republic a member of the Geneva Phonograms Convention as required by the bilateral agreement. According to the copyright officials in the Kyrgyz Republic, draft laws are under consideration for accession to the WPPT, the Rome Convention and the Geneva Phonograms Convention sometime in 2001.

On December 20, 1998, the Kyrgyz Republic became the 133rd member of the World Trade Agreement (WTO) and the first country in the C.I.S. to become a WTO member.

The Kyrgyz Copyright Law in Art. 51 does clearly provide protection for pre-existing works or sound recordings that are less than 50 years old (from first publication, or creation for unpublished works). However, the applicability of this provision to foreign works should be clarified to avoid judicial misinterpretation. As a member of the WTO, effective on December 20, 1998, the Kyrgyz Republic is obligated to provide not only a point of attachment for the sound recordings of other member nations, including the United States, but to afford a minimum of fifty years of protection for pre-existing works and sound recordings under Article 14.6 (sound recordings) and Article 9 (works) of the TRIPS Agreement. This is also an obligation of the bilateral agreement and the Berne Convention (for works).

The Kyrgyz Copyright Law does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement. However, there is no known civil or criminal *ex parte* search procedure, something necessary to provide effective enforcement against end-user pirates. The availability of civil *ex parte* search procedures is unclear.

According to Kyrgyz officials, in 1999 a package of intellectual property law amendments was adopted along with implementing regulations in order to comply with the WTO TRIPS Agreement. Currently, criminal sanctions in the Kyrgyz Republic provide for imprisonment of up to five years for intellectual property violations (Art. 150 of the Criminal Code). Administrative sanctions provide for liability (fines) for minor violations of copyright and neighboring rights, with the possibility of confiscating infringing copies (Art. 340). The Customs Code contains a special Chapter IV on customs measures applicable to IP goods; this has been in force since 1998. However, these provisions do not provide Customs officials with *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement.

There is nothing in the Criminal Code or the Criminal Procedures Code to provide police with the proper *ex officio* authority to commence criminal copyright cases.

The Copyright Law does contain civil law remedies (arts. 48 through 50). These include damages of between 20 and 50,000 times the minimum salary; these are to be determined by the discretion of the court in lieu of actual damages.

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The Kyrgyz enforcement regime is currently not providing "adequate and effective" enforcement as required by the WTO TRIPS Agreement obligations found in articles 41 through 61, and as required by the bilateral trade agreement. Material is easily being imported across the border from China, as well as musical material from Ukraine. There is no meaningful police, prosecutorial, judicial or customs activity to stop the ongoing distribution of this material, much less organized criminal enterprises producing and distributing material in the Kyrgyz Republic who are also trafficking this material in neighboring countries. In December 2000, the government announced it would authorize the State Customs Agency to begin seizing illegal copyright material, especially singling out audio and video pirate product. It is hoped that this announcement will soon be followed by actual and effective border enforcement.

The Kyrgyz Republic must put the civil, administrative and especially the criminal and customs provisions into action. The administrative sanctions, perhaps the easiest to implement, should be directed at the retail level including kiosks and small stores by taking away business licenses and closing such pirate shops. There are no reports from any of the copyright industries that the administrative, much less any of the criminal, penalties have ever been levied in a copyright case.

As noted above, border enforcement, as in other countries in the region, is very weak in the Kyrgyz Republic, and the known importation of musical CD material from China and Ukraine must be stopped. It is causing significant harm to the copyright industries, especially the recorded music industry.

In addition, as in other countries in the region, the environment is ripe for illegal optical media production facilities as well as other organized criminal production facilities. According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no known optical media plants nor cassette plants in the Kyrgyz Republic. Like Kazakhstan, the danger is that the former military bases are an enticing target to open illegal manufacturing operations. Currently, most of the music piracy is in the form of audio cassettes. The recording industry estimates trade losses in the Kyrgyz Republic were \$10 million in 2000, with the level of piracy estimated to be about 90% out of approximately 500,000 CDs and 4.2 million cassettes sold in the country in 2000.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000 (these are preliminary figures for 2000 and will be finalized later in 2001). The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

Included in the package of 1999 amendments and regulations was a provision to open a single office with responsibility for intellectual property law enforcement. It is reported that this office would act as a focal point for interagency activity, bringing together the efforts of the police, Customs officials and the judiciary. IIPA still has no additional reports of the progress or activity of this office.

REPUBLIC OF MOLDOVA

LEGAL REFORM AND TREATY ADHERENCE

In June 1992, the Republic of Moldova and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on July 2, 1992. The Republic of Moldova adopted a comprehensive copyright law on November 23, 1994; it went into force on May 2, 1995. Some minor amendments were added on May 28, 1998.

The Republic of Moldova is a member of the Berne Convention, effective November 2, 1995. Also, on March 6, 1998, Moldova deposited its instrument of accession to both new WIPO treaties the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Neither is yet in force.

On July 17, 2000, Moldova finally provided a point of attachment for foreign sound recordings when it became a member of the Geneva Phonograms Convention. The Republic of Moldova is also a member of the Rome Convention (December 5, 1995). It is also likely that early in 2001, the Republic of Moldova will become a member of the World Trade Organization and thus be obligated to all of the substantive and enforcement provisions of the TRIPS Agreement upon the date of such accession.

The Republic of Moldova has not yet adopted additional copyright or neighboring rights provisions to implement the WCT or WPPT. The Copyright Act of the Republic of Moldova adopted in late 1994 was intended to comply with the Berne Convention obligations. It provides a Berne-compatible term of life-plus-50 years. It provides authors with exclusive rights of reproduction; distribution, including rental for computer programs and sound recordings; importation; public presentation and public performance; communication of the work to the public (but without an explicit right of making available); translation; and adaptation. The producers of phonograms are afforded the exclusive rights of reproduction, distribution (including rental), adaptation, and importation. However, the law provides a right of remuneration only for producers of sound recordings for the public performance, communication of a phonogram over the air, or by cable.

Until last year, it was unclear whether the Moldovan Copyright Law provided protection for pre-existing works or sound recordings as required by the clear obligation in its bilateral trade agreement, as well as by Berne (Article 18) and the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). However, in an exchange of letters between the United States government and the government of the Republic of Moldova in 2000, the Moldovans (Letter of October 16, 2000) acknowledged that their Copyright Law does provide protection for works and sound recordings that are less than 50 years old. They cited Article 3 of the Moldovan Parliamentary Decision no. 294/XII of November 23, 1994. The IIPA is pleased that this issue has been resolved and hopes that future actions by the enforcement authorities (and the courts) will provide for actual enforcement of these older works and sound recordings.

The Moldova Copyright Law does provide copyright protection for computer programs and databases. It does not, however, provide for criminal *ex parte* search provisions, something necessary for effective enforcement against end-user pirates. The Civil Procedure Code (articles 31, 135, 136, 140-142) were all cited by the government of Moldova (Letter of October 16, 2000) as clearly providing for the availability of civil *ex parte* searches. It is hoped that such searches will now commence in reality.

The Republic of Moldova introduced criminal sanctions into its Copyright Law (Art. 38, para. 12). It contains a provision for criminal liability for copyright and neighboring rights infringements, providing up to three years of imprisonment and/or fines of between 100 and 1,000 times the minimum monthly wage. However, Moldova should also amend its Criminal Code, following passage of the 1994 copyright law, in order to include special criminal provisions for IPR violations. We are concerned that some of the provisions in the current Criminal Code only apply to works and not to sound recordings, and that overall the provisions need to be strengthened to provide deterrent penalties. The Criminal Procedures Code does provide police with the proper *ex officio* authority to commence criminal copyright cases.

The Government of Moldova (Letter of October 16, 2000) noted that in 2001 improvements to the Criminal Code and Criminal Procedure Code are expected in compliance with the WTO TRIPS Agreement.

The Republic of Moldova has not amended its Customs Code to provide *ex officio* authority for customs officials to seize material at the border as required by the WTO TRIPS Agreement. This is necessary to conduct effective enforcement at the border. Moldovan authorities acknowledged these problems (Letter of October 16, 2000) and agreed to fix them with amendments currently under consideration in the Parliament.

There are civil law provisions in the Law on Copyright and Neighboring Rights that in theory could provide strong remedies if implemented. The provisions permit the payment, in the discretion of the court, of between 10 and 20,000 times the minimum wage. There are also administrative remedies against legal entities to enjoin illegal activity for up to 30 days, or to assess fines of between 30 and 100 times the minimum wage.

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The copyright enforcement regime in the Republic of Moldova is not “adequate and effective” as required by the bilateral agreement. There are no adequate civil, criminal, administrative or customs provisions either in place or being utilized against commercial piracy. Although civil and administrative sanctions exist, they are not being used. There have not been any known raids or seizures against retail (including kiosk) businesses. None of the copyright industries report that the administrative sanctions, much less any of the criminal penalties, have ever been levied in a copyright case. Border enforcement is very weak in the Republic of Moldova, allowing illegal copies, especially of musical material produced in Ukraine, freely to cross borders for sale in the Republic of Moldova and other countries. This is causing significant harm to the copyright industries.

In addition, as in other countries in the region, the environment is ripe for illegal optical media production facilities as well as other organized criminal production facilities. According to the recording industry (International Federation of the Phonographic Industry, IFPI), there is

reportedly at least one illegal optical media plant in the Republic of Moldova, but this has not been confirmed. The threat of CD piracy is, however, very great; Moldova is an attractive location for the production of illegal material that could then be distributed to other countries in the region. The IFPI reports that CDs and musical cassettes are being imported into Moldova from Russia and Ukraine. The recording industry estimates trade losses in the Republic of Moldova was \$6 million in 2000, with the level of piracy estimated to be about 90% out of 750,000 CDs and 4.2 million cassettes sold in Moldova in 2000.

Both the recording industry and the software industry report that the Republic of Moldova has become a haven for CD piracy. As noted, some of this material may be produced in Moldova, but even if produced elsewhere, the poor border enforcement, combined with little on-the-ground police activity, has created an environment where material can be warehoused and shipped to countries throughout the region using Moldova as a base of operations.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000 (these are preliminary figures for 2000 and will be finalized later in 2001). The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

TAJIKISTAN

LEGAL REFORM AND TREATY ADHERENCE

In July 1993, Tajikistan and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on November 24, 1993. On November 13, 1998, the Republic of Tajikistan adopted the Law on Copyright and Neighboring Rights providing a comprehensive revision of the copyright law in Tajikistan; the law went into force on December 17, 1998.

According to the Minister of Culture B.A. Makhmadov in an official statement that accompanied the passage of the Tajik Copyright Law of 1998, the law was intended to modernize the legal regime in Tajikistan by: (1) protecting sound recordings (and other neighboring rights) for the first time; (2) removing the Soviet-era “maximum rates of author’s remuneration”; (3) permitting authors and users freely to contract (eliminating the “standard authors’ contract”); (4) adding a term of life-plus-50 years (from life-plus-25); (5) expanding author’s economic rights and moral rights, including the possibility of assignment of economic rights to third parties; (6) limiting the scope of “free use” and adding more exact terms of such use; (7) adding numerous definitions to clarify the scope of the Act. That said, there are still numerous provisions regulating the terms and conditions of authors’ contracts.

The exclusive economic rights provided to authors include reproduction; distribution, including rental for computer programs and sound recordings; importation; public presentation and public performance; communication of the work to the public (but without an explicit right of making available) including broadcasting, cablecasting or by other wire or comparable means; translation; and adaptation. The producers of phonograms are afforded the exclusive rights of reproduction, adaptation, distribution (including rental), and importation. However, the law provides a right of remuneration only for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable.

Tajikistan finally deposited its instrument of accession to the Berne Convention on December 9, 1999 and became a member of Berne effective March 9, 2000. However, Tajikistan is not providing any protection or rights to U.S. or any other sound recordings, nor is Tajikistan a member of the Geneva Phonograms Convention — two obligations of the trade agreement. So U.S. sound recordings are completely unprotected, more than seven years after the bilateral trade agreement required such protection.

Tajikistan *does not* clearly provide protection for pre-existing works or sound recordings as required by the clear obligation in its bilateral trade agreement and the Berne Convention. Tajikistan must clearly state its protection for pre-existing works and sound recordings that are less than 50 years old in order to comply with its bilateral trade agreement obligations and international norms.

The Tajik Copyright Law does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement. However, there are no known civil or criminal *ex parte* search procedures necessary to provide effective enforcement against end-user pirates.

Tajikistan has not amended its Criminal Code, following passage of its November 1998 copyright law, to adopt criminal provisions for IPR violations, in breach of the bilateral agreement's obligation to provide "adequate and effective" protection and enforcement. The Criminal Code must provide deterrent penalties. In addition, there is nothing in the Criminal Code or the Criminal Procedures Code to provide police with the proper *ex officio* authority to commence criminal copyright cases. Further, the Customs Code must be amended to provide Customs officials with *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement. The Customs Code, last revised in November 1995, does make one liable for the transfer of illegal goods, including intellectual property material, through the border.

Tajikistan was not a signatory to either of the two new WIPO treaties. The Tajik government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

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The Tajik copyright is currently not providing "adequate and effective" enforcement as required by the bilateral trade agreement. In addition to the many deficiencies in the enforcement legal regime (civil, administrative, criminal and customs provisions), there is no meaningful on-the-ground police, prosecutorial, judicial or customs activity to stop retail distribution much less the organized criminal enterprises who produce and distribute material in Tajikistan and throughout the neighboring countries.

The Criminal Code (Art. 156) does sanction copyright and neighboring rights infringements with penalties of between two and five years. However, none of the copyright industries report that these criminal penalties, much less any of the administrative sanctions, have ever been levied in a copyright case. The Administrative Code was amended on December 10, 1999 (Art. 158-2; IIPA does not have a copy of this new law). Reportedly, this provision levies fines and seizure of illegal copyright and neighboring rights material.

Border enforcement, as in other countries in the region, is very weak in Tajikistan. This is allowing illegal copies, especially of musical material produced in neighboring countries such as Russia, to freely cross borders for sale in Tajikistan and other countries. This is causing significant harm to the copyright industries.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no known optical media plants in Tajikistan. Most of the music piracy is in the form of audio cassettes, some produced in Tajikistan. The recording industry estimates trade losses in Tajikistan were \$3 million in 2000 (up from \$500,000 in 1999); music piracy levels were estimated to be at about 90%.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000. (These preliminary figures for 2000 will be finalized later in 2001.) The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

TURKMENISTAN

LEGAL REFORM AND TREATY ADHERENCE

In March 1993, Turkmenistan and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on October 25, 1993. Since that time however, Turkmenistan has done little to modernize its copyright regime or to join any of the relevant treaties as it obligated itself to do in the bilateral agreement.

In the first instance, Turkmenistan never adopted a comprehensive Copyright and Neighboring Rights Law. In October 1993, Turkmenistan formally incorporated the Soviet-era Civil Code (Chapter IV) into its legal structure. On March 1, 1999, the Civil Code was revised, with extensive amendments pertaining to copyright. So, the operational copyright laws are those that were last amended by the Civil Code (1961) as amended in 1999. The Civil Code does contain provisions for the protection of computer programs, databases, and sound recordings, but the rights and provisions necessary to comply with international norms are still lacking. A draft Law on Copyright and Neighboring Rights was under consideration in 2000, but it has not yet been adopted by the Parliament.

Turkmenistan is not a member of the Berne Convention. Turkmenistan is not providing any protection for American or any other sound recordings, nor is it a member of the Geneva Phonograms Convention, leaving U.S. sound recordings completely unprotected. These are all obligations of the bilateral agreement that Turkmenistan obligated itself to fulfill more than seven years ago.

When Turkmenistan does adopt a modern copyright law, it must clearly provide protection for pre-existing works and sound recordings that are at least 50 years old, in order to avoid another breach of its bilateral trade agreement and international norms. It also must adopt explicit copyright protection for computer programs and databases as required under the bilateral trade agreement. Further, it must include provisions for civil and criminal *ex parte* search procedures necessary to provide effective enforcement against end-user pirates.

Turkmenistan must also adopt intellectual property remedies into its Criminal Code, as required by the bilateral agreement's obligation to provide "adequate and effective" protection and enforcement. The Criminal Code must provide deterrent penalties. In addition, provisions must be added into the Criminal Code or the Criminal Procedures Code to provide police with the proper *ex officio* authority to commence criminal copyright cases. Further, the Customs Code must be amended to provide Customs officials with *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement.

Turkmenistan was not a signatory to either of the two new WIPO treaties. The Turkmen government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

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The addition into the Turkmen copyright law of basic civil, administrative, criminal and customs remedies is essential to bring the copyright enforcement legal regime up to the international norms. Currently, Turkmenistan, in the absence of these essential provisions and the lack of any police, prosecutorial, judicial or border activity, is clearly not providing “adequate and effective” enforcement as required by the bilateral trade agreement. The Turkmen government must adopt the necessary legal reforms. Then, at a minimum, the authorities must commence police raids and seizures, and must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

The Criminal Code currently does not provide any sanction for copyright or neighboring rights infringements. The Administrative Code does not provide any sanctions for violations of copyright or neighboring rights infringements.

Border enforcement, as in other countries in the region, is very weak in Turkmenistan. This is allowing illegal copies freely to cross borders for sale in Turkmenistan and other countries.

The recording industry (International Federation of the Phonographic Industry, IFPI) reports that most of the music piracy is in the form of audio cassettes; further they report that illegal musical cassettes produced in neighboring countries, including Uzbekistan in particular, are entering Turkmenistan as a result of poor border enforcement. The IFPI reports there are no known optical media plants in Turkmenistan. The recording industry estimates trade losses in Turkmenistan were \$5 million in 2000 (up from \$3 million in 1999); music piracy levels were estimated to be at about 90% out of a total of 3 million cassettes and 360,000 CDs sold in Turkmenistan in 2000.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000. (These preliminary figures for 2000 will be finalized later in 2001.) The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

UZBEKISTAN

LEGAL REFORM AND TREATY ADHERENCE

In November 1993, Uzbekistan and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (above). This agreement entered into force on January 13, 1994. On August 30, 1996, the Uzbek Parliament adopted the Law on Copyright and Neighboring Rights providing a comprehensive revision of the copyright law in Uzbekistan; the law went into force on September 17, 1996. Since that time, there have not been any important revisions to the Copyright Act, or to the relevant enforcement laws. After meetings with United States government officials in October 2000, Uzbek officials suggested that revisions would be undertaken before the end of the year to fix some of the legal deficiencies. Some minor amendments to the Copyright Law were reportedly adopted in December 2000, but none of the important deficiencies noted herein were corrected.

Neither has Uzbekistan acceded to any of the relevant copyright or neighboring rights treaties as it obligated itself to do in the bilateral agreement over seven years ago. In fact, in discussions with the IIPA and the United States Government in 2000, the Uzbek government officials stated that they did not expect to join the Berne Convention or the Geneva Phonograms Convention before the end of 2003!

The Uzbek Law on Copyright and Neighboring Rights of 1996 established protection for the first time of computer programs, databases and sound recordings. The exclusive economic rights provided to authors (Art. 22) include "the right to exploit the work in all forms and by all means" such as by reproduction and dissemination; public presentation; rental; public performance; broadcasting including cable distribution or satellite transmission; recording of a work by technical means and communication of a technical recording (including by radio or television); and translation or transformation. There are numerous provisions that remain that regulate the terms and conditions of authors' contracts. The producers of phonograms are afforded the exclusive rights of public presentation, adaptation or other transformation, distribution (including commercial rental); and importation. The law does not even clearly specify a right of reproduction for producers of sound recordings. In addition, the law provides a right of remuneration only for producers of sound recordings for the public communication of the recording, the broadcasting, or the communication to the public by cable.

Uzbekistan is not a member of the Berne Convention. Neither is Uzbekistan providing any rights to U.S. or other foreign sound recordings, nor is Uzbekistan a member of the Geneva Phonograms Convention; U.S. sound recordings are completely unprotected. Joining Berne and Geneva Phonograms and providing protection for U.S. sound recordings are all obligations of the bilateral trade agreement that Uzbekistan promised to fulfill over seven years ago. Uzbek officials suggested in meetings that a point of attachment may be available for works and sound recordings under the Foreign Investment Law, but instead, they need to clearly provide copyright and neighboring rights protection under the relevant treaties and laws.

In addition, Uzbekistan does not clearly provide protection for pre-existing works. When Uzbekistan extends protection for foreign sound recordings, it must clearly protect pre-existing works and sound recordings that are at least 50 years old to comply with the bilateral treaty obligations and international norms.

The Uzbek Copyright Law does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement. However, there are no known civil or criminal *ex parte* search procedures that are necessary to effective enforcement against end-user pirates.

Uzbekistan did not amend its Criminal Code following passage of the 1996 Copyright Act to adopt deterrent penalties for intellectual property violations, in breach of the bilateral agreement's obligation to provide "adequate and effective" protection and enforcement. The Criminal Code (Art. 149) does provide for liability for infringement of copyright and patent violations, but does not include neighboring rights violations. In any case, the existing penalties are too weak and must be amended to strengthen and broaden the provisions for all copyright and neighboring rights violations. Reportedly, Article 149 is under review for revision. IIPA has not seen any drafts currently under consideration.

IIPA recommends that the draft criminal reform also include revisions to the Criminal Code and Criminal Procedures Code to provide police with the proper *ex officio* authority to commence criminal copyright cases. Further, the Customs Code must be amended to provide Customs officials with *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement.

IIPA is aware of Resolution 215 of the Cabinet of Ministers, April 19, 1994, that established a licensing system for the production, reproduction and sale of records, cassettes and CDs. However, IIPA has no reports of how these provisions were implemented, if at all, and their effectiveness against pirate production enterprises that are so common in this region.

Uzbekistan was not a signatory to either of the two new WIPO treaties. The Uzbek government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

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The Uzbek copyright regime must be amended to include basic civil, administrative, criminal and customs remedies to bring the enforcement regime up to international norms. Currently, Uzbekistan is not providing "adequate and effective" protection and enforcement as it is obligated to do under the bilateral agreement. There are significant legal reform deficiencies and there is no effective police, prosecutorial, judicial or border activity underway. The Uzbek government must adopt the necessary legal reforms, including accession to the relevant treaties to protect foreign works and sound recordings. Then the authorities must commence police raids and seizures at a minimum, and must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

The Criminal Code currently does not provide deterrent penalties and must be amended. The Administrative Code does not provide any sanctions for violations of copyright or neighboring rights infringements and must be amended to provide for fines and the forfeiture of business licenses for retail establishments that are operating pirate operations.

Border enforcement, as in other countries in the region, is very weak in Uzbekistan. This is allowing illegal copies freely to cross borders for sale in Uzbekistan and other countries. This in turn is causing significant harm to the copyright industries, in particular the music industry.

The recording industry (International Federation of the Phonographic Industry, IFPI) reports that most of the music piracy is in the form of audiocassettes; further they report that illegal musical cassettes produced in neighboring countries (particularly Russia), are entering Uzbekistan as a result of poor border enforcement. The IFPI reports there are no known optical media plants in Uzbekistan, although the opportunity is there for the startup of pirate CD and cassette operations due to the climate and infrastructure. The recording industry estimates trade losses in Uzbekistan were over \$30 million in 2000 (up from \$20 million in 1999); this is considerably more than for almost any other country in the C.I.S. Music piracy levels were estimated to be at about 90% of the estimated 6 million CDs and 36 million cassettes sold in Uzbekistan in 2000.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$32.7 million in 2000. (These preliminary figures for 2000 will be finalized later in 2001.) The level of piracy was estimated to be 90%.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

The difference between promise and practice in Colombia is extreme. For example, despite the creation of a well-publicized anti-piracy effort, with resources and new laws, the actual enforcement action has resulted in only insignificant seizures that receive no follow-through and have no practical deterrent effect. As a result, piracy continues to grow unabated. The application of the law is so bad, for at least the audiovisual industry, that the fourth largest potential market in Latin America may be completely lost within three years if the current situation continues.

For the second year in a row, Colombia has completely failed to take concrete action on the three key enforcement issues identified by USTR in the April 1999 Special 301 announcement: the need to improve copyright enforcement; the need to resolve Colombia's failure to license legitimate pay television operators and pursue pirate operators; and the necessity of full TRIPS compliance by January 1, 2000.¹ Most of these required goals were not met. In enforcement, any positive effects of the raiding activity undertaken by Colombian authorities for some industries stops after the seizure of pirated goods because the Colombian judicial system simply fails to actively prosecute cases, much less issue deterrent penalties. The long-standing effort to legitimize the nearly completely pirate television market has failed because the government's activity, primarily that of the CNTV, is full of internal conflicts of interest, deliberate delays and demonstrable untruths. Finally, Colombia still must work to improve its judicial system to ensure that its criminal, administrative, civil and border procedures meet the enforcement obligations of the TRIPS Agreement, as a statutory matter and, more importantly, as applied in practice.

Piracy levels in Colombia continue to be very high for such an important market. For example, the video piracy rate skyrocketed to 90% in 2000, which, coupled with a completely ineffective enforcement environment, forced the U.S. motion picture industry to terminate its video anti-piracy campaign in 2001 and recognize the complete loss of the market to pirates. Piracy levels for the recording and music industry are at 60%; for the entertainment software industry, 85%. In all, estimated losses due to piracy of U.S.- copyrighted materials in Colombia climbed to \$193 million in 2000.

IIPA recommends that Colombia remain on the Special 301 Watch List in 2000.

Last year, Colombia deposited its instruments of ratification to the two WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, in November 2000. This was a major accomplishment and Colombia, and its Copyright Office, merit acknowledgment for this achievement.

¹Press Release 99-41, Office of the U.S. Trade Representative, April 30, 1999.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	90%	40.0	55%	38.0	60%	33.0	60%	27.0	75%	33.0	60%
Sound Recordings / Musical Compositions	60.0	60%	60.0	60%	65.0	60%	54.0	60%	18.0	66%	4.3	15%
Business Software Applications ²	48.0	55%	50.5	58%	68.1	60%	52.4	62%	74.3	67%	82.4	78%
Entertainment Software ³	39.0	85%	7.0	75%	7.7	78%	7.2	73%	6.8	62%	6.8	62%
Books	6.0	NA	6.0	NA	6.0	NA	5.0	NA	5.0	NA	NA	NA
TOTALS	193.0		163.5		184.8		151.6		131.1		126.5	

Colombia currently participates in both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of these programs is that Colombia must provide "adequate and effective protection of intellectual property rights."⁴

COPYRIGHT PIRACY IN COLOMBIA

Although Colombia is one of the most important potential markets in Latin America for the motion picture industry, piracy is so integrated into the economy and enforcement efforts are so ineffective, that the battle for a viable and legal audiovisual market appears close to being lost. The incidence of video piracy is so high that some audiovisual producers have simply given up on the market, despite the country's potential. The Motion Picture Association (MPA) has worked with the very few legal video outlets over the past several years to fight video piracy, but in 2001 the anti-piracy program will withdraw from that effort because of discouraging

² BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$50.2 million and 56%, respectively, were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

⁴ In 1999, \$46.8 million of Colombia's imports to the United States came in under the duty-free GSP code, accounting for .8% of its total imports to the U.S. Another \$797.3 million of Colombia's imports to the United States benefited from the ATPA program in 1999, accounting for over 13.5% of its total imports to the U.S. that year. For the first 11 months of 2000, \$62.4 million of Colombian goods entered the United States under the GSP program, representing a 39.9% increase over the same time period last year. \$767.4 million of Colombian goods entered the U.S. under the ATPA program, accounting for a 4.8% increase over last year. For a full history of Colombia's placement on the Special 301 lists, see Appendices D and E of IIPA's 2001 Special 301 submission.

progress. At least 90% of the video market is pirate – almost doubling from the prior year -- and it may become 100% pirate in the near future.

The MPA will continue to fight signal theft piracy, although there is very little that the Colombian government has done in the past few years to make the effort more viable than the failed video anti-piracy effort. Prior to the long-delayed licensing process, MPA estimated that 80% of the television market was pirate. Many of those formerly pirate stations now have licenses. However, this does not mean that these “legal” operators pay for the programming that they transmit. In an agreement with CNTV, MPA agreed not to bring enforcement actions against the newly licensed operators for a period of time to allow them to legitimize their operations. CNTV agreed to take legal action, in coordination with criminal prosecution, of the nonlicensed operators, concurrently attacking piracy and allowing the newly licensed operators the ability to develop larger subscriber bases and more financial ability to obtain legal contracts for MPA member company product. However, CNTV completely failed to fulfill its promises. As a result, MPA estimates that at least 90% of the potential television market is pirate or systematically involved in unauthorized transmissions of MPA member company product. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Colombia are estimated to be \$40 million in 2000.

In 2000, the estimated level of audio piracy remained constant at 60%, with estimated losses at \$60 million. Piracy of music CDs in Colombia continues to increase. Hundreds of stalls in the street markets of San Andrecitos openly sell and distribute pirate and counterfeit product. Thousands of street vendors sell pirate CDs on the traffic corners in Bogota, and even more vendors sell pirate audiocassettes. Because these vendors move around so much, it is difficult to locate them and get the police to conduct raids in a swift and efficient manner. Infringing recordings enter Colombia via “ant smuggling” through airports around the country. CD-R piracy (recordable CD) is flourishing in Colombia, as a cottage industry of pirate CD-R products has exploded, pirating primarily Colombian repertoire. The Colombian pirates source much of their business for industrial pirate product out of Florida (Miami), Panama, Belize, Ecuador and Peru. They use a shipping technique in which Miami is both the point of origin and final destination of their pirated goods; they send both counterfeit and legal materials using the same invoices. The Far East, Israel and the U.S. remain important counterfeit production centers.

The piracy rate for business software still reflects an unacceptably high incidence of illegal software use in Colombia, particularly within small to medium-sized organizations. Piracy levels in cities outside Bogota are believed to be much higher than the average national rate. Significantly, in 2000 BSA for the first time encountered sophisticated, high-volume software counterfeit production facilities outside Bogota. A raid by Colombian law enforcement authorities confirmed that the facilities had manufactured several thousands of counterfeit software licenses and packaging. Some of the licenses were being sold through a major Latin American Internet auction site. BSA also believes that the counterfeiters may have combined the fake materials with counterfeit CD-ROMs imported from Paraguay. Estimated trade losses due to business software piracy are an estimated \$48 million in 2000, with an estimated 55% piracy level. The educational and legal campaign of the Business Software Alliance (BSA), combined with only modest growth in the legitimate market, resulted in a slight reduction in the piracy rate and estimated losses in Colombia in 2000, compared to the prior year.

The publishing industry reports no real improvement in the book piracy situation in Colombia over the past year, despite continued activities of the Colombian Book Chamber, which includes U.S. publishers. Concerns about excess production of commercial books into other Andean countries, primarily Venezuela, remain viable. Illegal photocopying of books and

other printed materials is the predominant book piracy problem in Colombia. There are reports that the drug cartels use piracy to launder money. Estimated trade losses due to book piracy remain at \$6.0 million in 2000.

Trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) skyrocketed over the prior year. The estimated level of piracy of entertainment software jumped from 75% in 1999 to 85% in 2000. The Interactive Digital Software Association (IDSA) reports that its preliminary trade loss estimate due to entertainment software piracy in Colombia rose exponentially to \$39 million in 2000. There are concerns that Colombia is becoming another destination for pirated product out of Southeast Asia. This higher estimate may also be due to an overly conservative underestimate of videogame piracy in Colombia in prior years.

ENFORCEMENT IN COLOMBIA

There is a number of Colombian institutions and interagency groups which take part in anti-piracy activities. Ironically, some enforcement activity has actually improved in the last two years in Colombia, although there are few results in terms of deterrent sentences and judgment issues, or actual reductions in the levels of piracy, to show for these efforts. Below is an overview of the interagency players:

- In May 1998, the copyright industries signed an interinstitutional agreement with Colombian agencies to strengthen the government commitment to fighting piracy. This agreement, approved by then-President Samper, establishes a collaborative effort between the copyright industries and government agencies.
- On February 25, 1999, President Pastrana confirmed the National Anti-Piracy Campaign, which decrees the involvement of a large number of governmental and independent agencies in the fight against piracy.⁵ This agreement reaffirmed the first anti-piracy agreement (known as CERLALC), signed in December 1995. The governmental entities involved in the 1995 agreement included the Secret Service (DAS), the General Prosecutor's Office (*Fiscalía*), the Investigation Corps of the Prosecutor General (CTI), and the Customs Administration. The 1999 agreement increased the number of involved agencies to include the Ministry of Foreign Affairs, the Ministry of Foreign Trade and the DIAN (Customs).

The purpose of this public/private sector organization is to coordinate anti-piracy activities. Industry reports on the effectiveness of this agreement are mixed. MPA reports that this organization's results have been very disappointing, especially in light of the amount of time spent in strategy meetings, planning meetings, organizational meetings and general monthly meetings. It has been MPA's experience that action and

⁵ The Colombian National Anti-Piracy Campaign is supported by the following agencies which coordinate anti-piracy efforts: The President's Office, the Ministry of Foreign Commerce, the Ministry of Communications, the Ministry of Culture, the National Attorney General's Office, the National Police Force, the National Author Rights Association, the National Television Commission, DIAN - the Tax and Customs Authority, the Colombian Record Producers Association, the Colombian Book Chamber, the Colombian Video Chamber - (COLVIDEO), Colombian Industrial Software Association and the Sayco Collection Society.

“cooperation” failed to extend beyond the meeting room, except for a few coordinated raids, after which there was no follow-through and no deterrent effect. With respect to business software actions, BSA reports that the campaign has resulted in increased enforcement efforts by Colombian law enforcement agencies.

- The Minister of Industry and Commerce was given control of the government’s policy on IPR, effective January 2000. The Attorney General ordered the creation of a special unit of prosecutors and investigators (CTI) to work, at the national level, to fight copyright piracy and crimes involving telecommunications systems (Resolution No. 0-08888 of May 31, 1999). As a result, there are five special prosecutors, 15 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces. In Bogota alone, there are approximately 25 special prosecutors and 25 special judicial police officers.

Recently, one prosecutor was appointed to prosecute signal theft actions. MPA has coordinated with the unit for signal theft action with good raiding results, but advises that the government’s effort basically stops after the raid and does not develop deterrent impact. MPA also notes the surprisingly weak overall results from such a dedication of resources. This organization’s results have been very disappointing, especially in light of the amount of time spent in strategy meetings, planning meetings, organizational meetings and general monthly meetings. It has been MPA’s experience that action and cooperation failed to extend beyond the meeting room, except for a few coordinated raids, after which there was no follow-through and no deterrent effect.

- The National Television Commission (CNTV) indicated for years that it would take the lead in combating signal theft. Unfortunately, this well-funded agency has been completely ineffective in addressing the problem of television piracy. As described below, MPA has lost confidence in this agency and its commitment to resolve the problem of television piracy.

Police And Prosecutors Are Active In Conducting Criminal Actions But Have Not Been Able To Reduce High Piracy Levels.

For the motion picture industry, an effective anti-piracy effort in the home video industry requires three elements: MPA anti-piracy resources, government commitment to deter piracy with the assistance of MPA’s investigative and legal resources, and the industry’s commercial follow-through to encourage legitimate business practices. MPA has taken important anti-piracy action in Colombia’s home video market, seizing over 40,000 pirate videos in 1999 and over 18,000 videos in 2000. However, the violators face absolutely no sanction, other than the loss of their pirate videos, which they quickly replace. Without government follow-through towards sanctions, the replacement of seized stock is so easy that there is virtually no impact on the business. As a result, MPA’s video anti-piracy efforts have not been able to deter continued growth of video piracy and the member companies have been forced to recognize that Latin America’s fourth largest market is virtually past any chance of recuperation.

MPA’s signal theft campaign will continue in 2001, despite some tough choices to make regarding avenues by which to pursue effective enforcement. MPA does recognize the government’s efforts to follow up MPA investigations with raids and recognizes that the raids are well done. Following raids of signal theft pirates conducted in conjunction with the police, MPA

had initially sought private settlements with signal theft pirates that provided compensation for past piracy and commitments to legalize future content. MPA has done so, in part in the hopes that this would be a useful transition measure leading toward legalization of the market and because the prosecution procedures and sentencing possibilities had not been a deterrent for pirates. In June 2000, the MPA stopped seeking such settlements, advising the criminal authorities that it preferred to seek deterrent sentences. However, the lengthy prosecutions continue to favor the pirate, and the MPA is faced with the difficult choice of again seeking settlements to quickly end the specific incident of piracy or enduring piracy while cases work their way through the criminal process. MPA took seventeen criminal actions against alleged television pirates in 2000. However, MPA's 2000 television anti-piracy strategy depended largely on a complementary effort promised by CNTV. CNTV failed to fulfill its promises and thus MPA's overall effort did not have nearly the result expected.

Because of the high levels of audio piracy in Colombia, the international and national recording industries decided to form a united group (APDIF), with presence in Bogota, Cali and Medellin. This unit is fully staffed and trained to identify sources of piracy. Unless the Colombian government acts in certain markets (Bogota and Medellin would represent good starting points), the piracy rates will only increase and legitimate companies will suffer even more losses. There has been good cooperation between the industry and the Colombian enforcement authorities.

During 2000, the Customs Office (DIAN) conducted several large raids, seizing impressive quantities of infringing product. Unfortunately, this had no impact in the Colombian market. Customs has been key in the plan to control the import of pirate goods, but the pirates are changing their strategies by bringing in smaller shipments to avoid Customs control. The police had been very active in conducting raids, both efficiently and constantly, but this is no longer the case. The recording industry continues to conduct an anti-piracy campaign which results in seizures and other actions. While cooperation between industry and the authorities is good, more active involvement by Customs and the Finance Ministry (*Ministerio de Hacienda*), under the clear direction and specific instruction of the President, is needed to conduct investigations and order constant street raids. While fighting street vendors has been a big challenge, the Colombian government should go the next step, and identify and investigate larger producers and distributors of pirate product. To this end, the involvement of the Colombian tax authorities would be instrumental.

In the area of business software piracy, BSA reports strong cooperation from DAS and the *Fiscalia*. These agencies have proven critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogota. In 2000, 25 legal actions were conducted against end user pirates, and more than 40 actions against reseller pirates. BSA relied on Colombian law enforcement agencies to conduct most of these actions, in part because of the continuing difficulties in obtaining civil search authority in a timely manner. Significantly, the *Fiscalia* and DAS conducted several criminal raids in Cali, Cartagena and Barranquilla, where the rate of piracy tends to be much higher than the national average. Criminal enforcement efforts briefly halted in early 2000 due to threats against BSA from a FARC-related group. DAS worked with BSA to investigate the threats and renewed enforcement activities after the threats ended.

There has been some enforcement action in Colombia on book piracy matters. In April 1999, Colombian police took action against a bookshop and seized 1,500 books (280 different titles, 250 of which are reportedly published by U.S. publishers like Harcourt, WB Saunders, McGraw-Hill, Mosby and Prentice Hall). The Colombian Book Chamber was coordinating this case.

Colombian Judiciary Fails To Impose Deterrent Criminal Sentences.

Despite the active level of criminal raids, these actions simply do not result in deterrent penalties or criminal sentences. The Colombian judicial system remains a serious obstacle to effective enforcement. Amendments to the criminal code have been approved, and will enter into effect on January 1, 2001. This is one measure of improving enforcement in the judicial system.⁶

Administrative Enforcement Against Signal Theft Piracy Needs To Be Significantly Restructured In 2001.

Given the arrest of three of its five commissioners in mid-2000, repeated failure to redeem its pledges of effective enforcement, and the delays in a now-questionable licensing process, CNTV has been completely ineffective in addressing the problem of piracy in television. CNTV's only effort in 2000 was a public relations campaign which served to distract attention from CNTV's decision to delay enforcement of licensing requirements and its failure to act against piracy. Without cooperation from the responsible authorities, there is little reason for industry to expend its resources in a one-sided fight against piracy.

Colombia Needs To Strengthen Its Border Enforcement Measures.

Colombia is faced with a major challenge to improve its border measures. Customs is a key element in the effort to control the contraband of legal and illegal product. Last year DIAN did engage in several major actions, resulting in significant seizures. Enforcement at the Colombian borders still needs to be improved in-practice, especially given the growth of optical media piracy in the region.

Civil Enforcement Efforts Suffer From Unwarranted Delays, Including Delays in Issuing *Ex Parte* Search Orders.

As part of its national enforcement campaign, BSA also uses civil remedies to pursue those persons and businesses engaged in end-user piracy. However, civil enforcement against software pirates continues to be hampered by excessive judicial delays in granting *ex parte* seizure requests. Despite efforts to educate judges on the critical importance of *ex parte* orders to effective anti-piracy enforcement, BSA routinely must wait two to three months to obtain such an order, often longer in cities outside Bogota. Problems with the Colombian courts tend to be greatest in cities outside Bogota, where judges show less understanding of intellectual property rights, despite educational efforts. Because of the judicial delays in obtaining civil *ex parte* search authority, BSA was forced to rely heavily on criminal enforcement in 2000, conducting only a handful of civil end-user actions.

⁶ IIPA does not have the text of this new code, and will consult with its members to evaluate progress made under this new code during 2001.

LICENSING FOR PAY TELEVISION/CABLE OPERATORS

The Colombian government finally accomplished concrete results in the longstanding problem regarding the licensing of pay TV. After years of delays, the government issued 114 new cable television operator licenses in November 1999. At that time, MPA urged caution and continued monitoring of the issue, because the history of obtaining cable television operator licenses in Colombia is one of delays and broken promises that have resulted in serious economic damage to the industry.⁷

In IIPA's 2000 Special 301 submission, the need for continued monitoring of the licensing process as well as the enforcement process in 2000 was identified to be of paramount importance. In particular, MPA encouraged the active participation of the CNTV in inspecting the new licensee to assure compliance with copyright law obligations and acceptable business practices. CNTV has failed completely to fulfill its promises to enforce license requirements and to enforce copyright law by inspections and cooperation with MPA. Its delays have only continued to damage MPA member company legitimate market interests and to allow piracy to continue to integrate itself in cable operators' business practices.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1982

The 1982 copyright law, as amended in 1993 and 1997, and including a 1989 decree on computer programs, is reasonably comprehensive. Amendments to the Colombian law made in 1993 increased the level of criminal penalties for piracy, and expanded police authority to seizing infringing product. In May 1998, the Court ruled in favor of the copyright industries, holding that the economic rights of copyright owners are in fact alienable. The interplay between the Colombian law and the Andean Communities Decision 351 on copyright and neighboring rights affords a level of copyright protection close to TRIPS standards.

During the summer of 1999, the Colombian Copyright Office (ONDA) was dissolved by the President via executive decree (No. 1164 of June 29, 1999). After a four-month period of

⁷ The licensing problem took four years to resolve. In 1995, the Colombian Television Broadcast Law 182/95 created a commission to oversee the regulation of the growing pay television market in Colombia. The CNTV pledged to establish a regulatory environment which would be conducive to the growth of a legitimate pay television market, including tough anti-piracy measures and a simple application process to obtain an operating license. From 1995 to late 1999, no operating licenses were issued, and hundreds of illegal, pirate cable operators continue to flourish throughout Colombia. The government prohibited MPA member companies from selling to unlicensed operators, while it did not license new operators. As a result, only 300,000 of the estimated 3.5 million subscribers received authorized programming; the rest received pirated signals. Some 55 new cable operator licenses were expected to be issued in mid-October 1998, but the process was suspended in November. In December 1998, a large delegation of U.S. pay television executives visited Colombia to seek a solution to this problem and press for the acceleration of the licensing process. During the visit, CNTV and Minister of Communications pledged that the licenses would be issued in July 1999. All bids were received by CNTV, and the bidding process closed on August 27, only two weeks behind the original date. The winners of the bids were notified in early October, and 114 licenses were issued in November 1999.

dissolution, ONDA was to be integrated into the Industrial Property Office within the Ministry of Industry and Commerce. This dissolution was later overturned by the Supreme Court (which overturned all Presidential emergency decrees). The President sought approval for a bill that would accomplish this transfer of the Copyright Office, which was to happen before July 2000. IIPA was reassured by the Minister of Industry and Commerce that the national and regional leadership of the former Colombian Copyright Office would continue.

WIPO Treaties

With the strong support of the Colombian Copyright Office, legislation to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) passed the Congress in November and December 1999. After some delay in completing the *pro forma* constitutional review, official deposit with WIPO in Geneva took place on November 29, 2000. IIPA applauds the Colombian government for taking this important step, which will contribute to raising the minimum standards of copyright protection worldwide, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Criminal Code and Criminal Procedure Code Revised

Legislation to reform the criminal and criminal procedure codes of Colombia was approved at the end of 1999, and will enter into effect on January 1, 2001.⁸ Given past history, it seems prudent to reserve judgment on the effectiveness of these changes until the industries see how the authorities will use the new tools provided under law.

Fiscal Enforcement Legislation

In July 2000, Colombia enacted fiscal enforcement legislation (Law 603) that requires Colombian corporations to certify compliance with copyright laws in annual reports filed with regulatory agencies (the *Superintendencias*). Any corporation that falsely certifies copyright compliance is subject to inspection by the *Superintendencia* and could face criminal prosecution. In addition, the legislation treats software piracy as a form of tax evasion and empowers the national tax agency (DIAN) to inspect software licenses during routine tax inspections. BSA is currently working with the *Superintendencias* and DIAN to issue implementing guidelines and promote awareness of the new law.

Government Legalization of Software

President Pastrana issued a directive in February 1999 to all government and educational institutions to use only legitimate software. Although the directive represents an important policy statement, there is no evidence that its requirements are being actively implemented by government agencies and institutions.

⁸ IIPA does not have the text of this legislation.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

CZECH REPUBLIC

EXECUTIVE SUMMARY

In 2000, long-promised legal reforms, including the correction of certain TRIPS deficiencies, were undertaken in the Czech Republic with the enactment of a new Copyright Law in April 2000. That law went into force on December 1, 2000. In particular, the new law fixed two of the most serious legal shortcomings. It corrected the absence of protection for pre-existing sound recordings; and it added a correction in the civil procedure code to permit *ex parte* searches, the latter being critical for effective enforcement in the software industry.

Still, even with these legal improvements, on-the-ground enforcement in the Czech Republic remains a matter of serious concern. Some industries did report improvements in 2000, including better police cooperation and the disposition of new cases through the judicial system. But all of the copyright industries complain of a failure to treat the significant backlog of cases, and of the long-standing problem preventing effective enforcement, namely, that prosecutors and judges do not use existing remedies to impose deterrent criminal sanctions against pirates. Also, ineffective border enforcement means that the Czech Republic continues to be a source of or a transshipment point for pirate material.

Perhaps the most serious enforcement problem is one that was not addressed in 2000 and, as a result, is getting worse. This is the problem of optical media piracy (CDs, CD-ROMs and DVDs), including its production and distribution in the Czech Republic, and elsewhere in the region. Because this problem has gone unchecked for years, it has resulted in large quantities of optical media material being sold in the Czech Republic and in neighboring countries. In 2000, the industries reported a sizeable rise in the overall plant capacity for and the level of actual optical media piracy material fueled by legal and on-the-ground enforcement deficiencies. Although copyright law deficiencies were corrected in 2000 (i.e., protection for pre-existing material), there are still no optical media production controls, effective border enforcement procedures, to address this problem. As a result of these significant problems and concerns, the IIPA recommends that the Czech Republic remain on the Watch List in 2001.

To correct its problems, the Czech Republic must: adopt optical media regulations; fully implement the new copyright law and civil code provisions; and undertake significant and long-overdue deterrent enforcement activity by police, prosecutors, and in the courts. As one example, the failure to provide protection for preexisting sound recordings until December 2000 (even though obligated to do so since 1996 under the TRIPS Agreement) resulted in a huge production of back-catalog repertoire that was exported for years into other countries in the region. Now that the Czech Republic correctly protects this material (reaching back at least 50 years), it must enforce its law and stop any further production or distribution of this back-catalog material, something it pledged to do in an exchange of letters with the United States government in 2000. Also, the clarification of the Czech civil code provisions that allow for civil *ex parte* searches must be implemented to guarantee the preservation of evidence in software

piracy cases. Last, it must end a cycle of frustration in a country that contains civil and criminal penalties that are among the toughest in Central and Eastern Europe by using its laws effectively to deter piracy. The police investigators, and especially the prosecutors, must stop the delays in bringing cases forward and address the backlog of cases, and judges must stop imposing low level penalties that do not deter commercial pirates of sound recordings, computer software (including business and entertainment software), and motion pictures. These enforcement failures have allowed piracy to remain widespread even in the face of strong laws, and even, this year, in the face of some enforcement improvement.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	8.0	18%	10.0	30%	8.0	35%	10.0	35%	10.0	35%	8.2	35%
Sound Recordings / Musical Compositions	35.0	20%	60.0	8%	62.0	6%	62.5	6%	47.5	6%	1.7	6%
Business Software Applications ¹	19.2	39%	30.2	42%	39.5	49%	39.7	52%	56.7	61%	40.5	62%
Entertainment Software ²	45.0	81%	12.0	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	4.5	NA	4.5	NA	4.0	NA	4.5	NA	4.5	NA	5.0	NA
TOTALS	111.7		116.7		113.5		116.7		118.7		55.4	

COPYRIGHT LAW AND RELATED ISSUES

Optical Media Regulations and Additional Digital Copyright Law Amendments are Needed.

The new copyright law amendments that went into force on December 1, 2000 corrected the most severe legal shortcoming, namely, a guarantee of protection for pre-existing sound recordings (and works). Further the Civil Code was amended to demonstrate with greater clarity that *ex parte* searches consistent with TRIPS are possible under Czech law. In fact, the Czech government insists its law is now fully compatible with TRIPS and the European Union Directives (for example, adding a definition of "computer programs"). The 2000 amendments increased civil and criminal penalties for copyright and neighboring rights infringements (Amendments to the Penal Code, Articles 109 and 152). Also, provisions were adopted in 2000 to comply, in part, with the new WIPO treaties, that is, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). Before the 2000 amendments were adopted, the Czech Republic had last amended its copyright law in 1996, adding important

¹ BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not available. These numbers were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

protections with regard to computer software, in compliance with the European Union Software Directive.

Even with the commendable changes made in 2000, IIPA believes that the Czech Republic must address three additional areas of legal reform for a modern and effective copyright regime. These legislative concerns are the lack of: (1) optical media regulations; (2) encrypted satellite signal protection; and (3) provisions fully complying with the WIPO digital treaties to stop Internet piracy.

Also, the newly adopted provisions on the collective administration of the rental right (that is, rental levies applied to video shops) found in Article 96 should be implemented in such a way as not to interfere with rights that may have been cleared at the (production) source. In these cases the administration of the new provisions is not necessary, and will in fact negatively impact the market. Moreover, any such collection should recognize the principle that there is no legal basis for the collection of remuneration for nationals of another country for rights not accorded to those nationals. Collection in such circumstances is inappropriate and without legal authority.

Certain aspects of the April 2000 amendments concerning the circumvention of technological protection measures should be modified at the earliest possible opportunity. Technological protection measures are the tools that rightholders use to manage and control access to and copying of their works in the digital environment. Proper and full implementation should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention.

In particular, the provision added in April 2000 relating to the requirement to prove “economic gain” as an element of demonstrating a violation of the anticircumvention provisions (Article 43) must be deleted. That’s because experience has demonstrated, unfortunately, that there are countless parties who would devise and publish ways to circumvent technological measures employed to protect copyrighted materials without seeking any economic gain, and the existence, or absence, of economic gain is irrelevant to the interests of copyright holders whose works may be exposed. Unless this provision is revised, Internet piracy activities resulting in millions of dollars of losses that are not for such economic gain may go unpunished, and the Czech Republic will not be in compliance with Article 11 of the WCT and Article 18 of the WPPT. There is another suggested change to Article 43. The technology applied and the means of their defeat change constantly. Therefore, the list of prohibited activities should include an opening clause such as “or otherwise traffics” or “or otherwise makes available” to be inserted between the terms “disseminates” and “utilizes” in Article 43.

Further, in Article 43, “technical devices” should be interpreted broadly, consistent with the WIPO treaties (Article 11 of WCT and Article 18 of the WPPT). That is, all technical devices should be protected against circumvention so long as they “restrict acts, in respect of their works, which are not authorized by the authors [or rightholders] concerned or permitted by law.” For example, the technological protection provisions should not be interpreted as being tied to an “infringement of copyright” thus requiring proof of such infringement; to do this could significantly diminish the effectiveness of these provisions.

In addition, rightholders need to be able to protect so-called “copyright management information” that is attached to or accompanies a work or sound recording, including

protection against the alteration, removal or falsification of this information. The 2000 amendments did add rights management information provisions (Article 44). However, the definition of rights management information does not cover information about the author or any other right holder as prescribed in Article 12.2 of the WCT and Article 19.2 of the WPPT.

In 2000, Internet piracy emerged as an issue in the Czech Republic. A local terrestrial television signal containing Motion Picture Association (MPA) member company television programs and motion pictures was temporarily streamed over the Internet to computer screens all over the world via an Internet Website which purported to be the station's official Website. While the transmissions were of a sporadic and indiscriminate nature, they nevertheless constituted blatant copyright and trademark infringements and a breach of territorial limitations of licenses granted by the MPA's member companies to the station. An amicable settlement was ultimately reached between the TV station, the MPA, and the Czech Anti-Piracy Union (CPU), and the station now limits its transmissions to its own indigenous programming.

In addition, in 2000, the recording industry was able to close down 12 pirate Internet sites offering MP-3 format material; as a result, four persons are facing criminal prosecution. However, there are no reports of convictions for Internet piracy. The Business Software Alliance (BSA) reports that five, or approximately half, of the Czech Internet service providers (ISPs) it contacted in 2000 proved cooperative in removing infringing content from its site.

In addition to the Copyright Law amendments, penal code amendments were adopted in 2000, to increase the maximum penalties for copyright infringements for up to five years' imprisonment and a fine of five million Crowns (U.S.\$ 125,000). There remain some statutory impediments to effective enforcement that must be deleted from the Code of Criminal Procedure. There were reports that penal code amendments to reduce the time for criminal proceedings would be considered in 2000, but they were never adopted.

In 2000, amendments were also adopted to the Copyright Protection Act, effective September 1, 2000, giving the Czech Trade Inspection Bureau authority to fight copyright and trademark infringements (and providing fines for violators of up to two million Crowns (U.S.\$ 50,000). In 1999, important amendments (Act No. 191/1999 Coll.) were made that granted Customs officials broader *ex officio* authority to seize suspected infringing copies of intellectual property, including copyrighted material, and providing heavy fines of up to 20 million Crowns (U.S.\$ 500,000) for importing or exporting pirate product.

After one year in place, the law did not bring any expected improvement to the already weak customs enforcement regime because, among other things, the law imposes onerous burdens on rights holders (paperwork and a duty to provide a bond for counterclaims that can take years to resolve). The software industry's experience with Customs generally has been disappointing, and the BSA believes that the new law is proving unsatisfactory. The software industry reports that, among other burdensome procedural obligations, Customs regulations require rightholders to proceed to a court hearing before Customs will permanently seize infringing products. The recording industry reports similar problems. They report that the law that was supposed to fully implement the TRIPS Agreement border obligations has instead taken the Czech Customs officials out of IPR enforcement altogether as a result of these bureaucratic barriers.

In addition to the changes noted, provisions are needed to protect encrypted signals. The amended broadcast law that went into effect on January 1, 1996 did not provide such

protection. These provisions are necessary because of the threats posed to television markets by pirate smart cards and decoders; the law needs to prohibit the production, distribution, possession and use of unauthorized decoding devices. The Czech government has indicated for the past several years that the appropriate provisions would be added either to the media or the telecommunications law, but that has not transpired. The provisions must also fully protect conditional access (as provided for in Article 43 with the suggested revisions noted earlier) and new digital technologies, as well as address the significant collective (community) antenna problem that exists in many Czech cities. And the telecommunication laws must provide that broadcast and cable licenses will only be granted and maintained subject to compliance with these and other copyright provisions.

For years, Czech officials have contended that the Civil Code (Act No. 99/1963) permitted a rightholder to obtain a civil *ex parte* search order. The software industry, in testing these provisions, has had a very mixed experience. In one instance, the procedure required a Czech court to take two months to determine the viability of an application, and the industry was confronted with extremely onerous documentary requirements before a court would consider granting an application. On February 14, 2000, amendments to the Civil Procedure Code were finally adopted to make *ex parte* search applications less difficult to obtain, and to comply with the TRIPS (Article 50) obligations. Under the revised law, rightholders implicitly are permitted to conduct searches without the presence of an adverse party. The ministry responsible for the final text has assured the software industry that the law, as amended, allows civil *ex parte* searches. These amendments became effective at the beginning of 2001, and the BSA will be testing these provisions in 2001 to make certain that, they are in fact working.

Last, there were additional problems with the copyright law amendments adopted in 2000. The new law contains many problematic restrictions on the ability of audiovisual producers to efficiently exploit and distribute works in the Czech Republic. Also, the law fails to differentiate between analog and digital private copying; the private copying exception should not have extended to digital copying of works or sound recordings. Nor should any private copying exception (or any other exemption) interfere with the ability of rightholders to protect their works and sound recordings using technological protection measures.

Ratification of the Two WIPO Treaties

The Czech Republic was not a signatory to either of the two new WIPO “digital” treaties. The Cabinet of the Czech Republic did agree, on January 10, 2001, to accede to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). The Czech Parliament must now quickly approve such accession so that the Czech Republic can soon become a party to both treaties, and the Parliament must fully implement the treaties through the appropriate laws and amendments detailed above.

COPYRIGHT PIRACY

The rise of optical media piracy in the Czech Republic; production and distribution in the Czech Republic and regionally.

Again in 2000, the Czech Republic remained a country where optical media manufacturers were involved in steady large-scale production of illegal material, including CD stampers. This is true despite huge efforts by some industries to stop optical media piracy. As IIPA has detailed in past reports, the problem is the lack of cooperation from the plants. In sum, steps must be taken to regulate optical disc plants, and to improve border enforcement to contain the problem.

First and foremost, the Czech Republic must set up plant monitoring procedures, like those established in Bulgaria in 1998, to regulate the production, distribution and export of optical media. Such regulations would include provisions to close plants that are caught illegally producing copyrighted material, to seize infringing product and machinery, and to monitor the importation of raw materials (optical grade polycarbonate) used in the production of CDs, DVDs and CD-ROMs (and other optical disc media). Also, all of the plants must be required to adopt source identification (SID) codes, so that the source of illegally produced CDs can be traced and any necessary actions taken against infringing manufacturers.

A serious problem continuing to threaten the music industry in the Czech Republic is the overproduction of optical media (music CDs and CD-Rs, that is, recordable CDs) by at least two of the four known production plants. For the business and entertainment software industry, the problem is the production of compilations on CD-ROMs by these plants. The manufacturing capacity of the CD plants in the Czech Republic -- possibly over 40 million units annually -- is far in excess of domestic demand. For instance, the GZ Digital Media plant alone now operates 18 lines with a total daily output of 300,000 units; most of this output is in the form of CD-ROMs, not musical CDs. The activities of these plants are of growing concern to the industry because unauthorized product manufactured in the Czech Republic is being exported to other countries including the EU, Poland and elsewhere in Eastern Europe, upsetting markets in the entire region.

In 1998, the largest plant (GZ Lodenice) did agree to cooperate with International Federation of the Phonographic Industry (IFPI) and adopt SID codes; however, the other plants (CDC Celakovice, Eximpo Praha, and Fermata CD) did not reach such agreements. IFPI filed criminal complaints against CDC Celakovice in 1998, and the IFPI and the Business Software Alliance (BSA) are investigating the activities of a second plant suspected of being involved in large-scale piracy. In October 1998, a police investigation department officially charged the plant manager of CDC with copyright law violations. However, recently that police investigation department decided it was going to refuse to prosecute the manager and dropped the case entirely; the industries appealed to the district state attorney, who refused to intervene. This shows a very serious lack of enforcement commitment by the police department; the Czech government and the proper enforcement authorities must reconsider this decision.

ENFORCEMENT

Enforcement in the Czech Republic has been a source of frustration for many years, in large part because the legal regime is very good, but often unused. The copyright industries have made concerted efforts by their antipiracy groups to develop better cooperation with the police, with some success. However, beyond raids and seizures, cases often languish and there is an especially large backlog of cases that has not been addressed. Border enforcement also is a major shortcoming. In sum, the Czech Republic's enforcement regime, unlike its legal regime, remains incompatible with its TRIPS enforcement obligations due to: the failure to impose deterrent criminal penalties in commercial piracy cases; lengthy delays in bringing and completing both criminal and civil infringement cases; the lack of availability of deterrent civil damages; and ineffective border measures.

The growth of optical media material, produced and distributed in the Czech Republic and in the region, coupled with the failure of the judicial system, is the most serious threat to the health of the copyright industries in an otherwise healthy market. The failure to properly apply deterrent penalties in the judiciary allows piracy to remain widespread in this country and regionally, especially harming the market for business application computer programs and for video and audiovisual public performances. For a number of years, the U.S. government has pressed the Czech government to work with industry representatives to address the optical media production problem and the case backlog problem. Hopefully, these issues will be addressed in 2001.

One way for the Czech government to address wide-scale problems was the establishment (in 1996) of an Inter-Ministerial Task Force, chaired by the Ministry of Industry and Trade. The copyright industries' experience to date has been that the Task Force has not devoted sufficient attention to implementation of existing laws to realize significant and deterrent action against commercial pirates. IIPA reiterates its longstanding request for a Czech government directive to get the Task Force to operate effectively. IIPA suggests that such a directive, to implement proper enforcement, would require regular meetings and reporting on cases by the Task Force, as well as an opening up of Task Force proceedings to the private sector. By all accounts, the Task Force remains ineffective.

Better Cooperation on Criminal Raids by Police, but Lengthy Delays in Moving Cases, Incomplete Investigations, and An Ongoing Failure to Impose Deterrent Criminal Penalties at the Judicial Level Hamper Effective Enforcement.

It is true in the Czech Republic (and every other country with commercial piracy) that sophisticated piracy operations can only be broken by strong deterrent criminal prosecution. The Czech Republic continues to provide good police cooperation but there is an unwillingness by law enforcement authorities to pursue actions to their conclusion. The problem is twofold: (1) a backlog of cases; and, (2) those cases that do move forward have only weak penalties imposed. The problems are linked. The courts have not imposed the strong remedies available because police investigators, and especially the prosecutors, refuse to bring these cases to conclusion within any reasonable amount of time, so weaker penalties are imposed to dispose of cases.

The result is that the level of damages is inadequate and the fines imposed are too low, so there is no deterrence to piracy.

This problem could best be addressed if the Minister of Interior issued a directive instructing criminal police and prosecutors to act on *prima facie* cases of piracy within 30 days of receiving a criminal complaint, and for criminal charges to be announced and presented to the state's attorney for prosecution within a fixed period (less than 60 days) after the raid takes place. In addition, IIPA continues to recommend a directive to transfer *prima facie* cases of piracy to state prosecutors immediately upon the announcement of criminal charges; and for a special group of criminal police investigators to be dedicated to the preparation and investigation of copyright cases. Further, the Czech Republic could improve the investigation process by amending its law to permit tax inspectors to share information on illegal uses discovered in the course of audits with police and affected copyright holders. Criminal proceedings would be greatly improved by eliminating the current requirement that an independent expert report, which invariably causes lengthy delays, must be furnished to prosecutors in lieu of a report prepared by police.

In 2000, some industries, notably the motion picture industry and the business software industry, reported better cooperation with prosecutors and judges in moving current cases forward. But the backlog remains and, more significantly, the Czech government has not moved the "large" commercial piracy cases forward. IFPI is reporting that small routine criminal cases are being taken to and adjudicated correctly by the Czech courts; however, they report that the significant cases against large-scale pirates have not been moving. For example, the most important case for the recording industry against the CDC optical media plant manager was dropped, setting a terrible precedent regarding deterrent prosecutions.

The Business Software Alliance (BSA) reports that the overall speed of criminal and civil enforcement has improved, but still remains a problem. Weak criminal sanctions are another cause for concern. In the past, the average length of time for a decision before a criminal court of first instance has been between one to three years, with a second-level decision taking an additional year. Separate civil proceedings take an equal length of time. Nevertheless, there have been encouraging developments in the number of formal criminal accusations filed by prosecutors, and the fact that judges are issuing any judgments at all (including the first-time conviction in 2000 for end-user piracy). Police are becoming more proactive by conducting raids of both reseller and enduser infringers according to the BSA.

The Motion Picture Association (MPA) reports an improvement in the speed with which routine criminal cases were handled by the courts. However, the MPA also reports a continuation of the significant delays it has experienced in the past, with larger contested cases.

The BSA did recognize improvement in Czech enforcement in 2000, although more could be done. On the criminal side, Czech police conducted 16 raids of suspected software infringers, six of which were enduser raids. Some of the police targets were important Czech businesses, which marked a change from past years. Unfortunately, despite this increased activity the BSA was frustrated, as cases were halted while prosecutors and police sought expert reports, a necessary precursor to the issuance of a criminal accusation against a suspected pirate. In most cases, these reports produced a delay of up to half a year or more. The BSA reported this issue in last year's Special 301 recommendation; the problem persists.

The BSA has observed that following the preparation of expert reports Czech prosecutors are now filing a growing number of accusations. This is a very encouraging development. Prosecutors in Prague and Ostrava have been particularly diligent. This, in turn, has led to a number of criminal judgments for software infringement. The BSA has been disappointed at this stage of proceedings because judges typically impose weak sentences consisting of either suspended prison sentences, or small fines, or both. The BSA was aware of at least 10 criminal judgments for software infringement in 2000 leading to such judgments. In two enduser cases, the court refrained from imposing any fine because the defendants settled with the rightholders. In those cases, the typical sentence was a probationary sentence of between one and twelve months. In three reseller cases, the defendant was fined between U.S.\$100 and U.S.\$800, with only short probationary sentences.

With respect to civil enforcement, the Czech government (as noted already) clarified that *ex parte* searches are available to rightholders. Because the relevant provisions of the Civil Code did not become effective until January 1, 2001, the BSA refrained from testing the old provisions of Czech law in order to focus on the new provisions. Assuming Czech judges grant *ex parte* search applications, rightholders can, unfortunately, still expect to confront lengthy court proceedings.

On an encouraging note, the BSA reports that certain government entities are themselves demonstrating their commitment to using only licensed software by considering the implementation of software asset management policies. Overall, the BSA reported losses of \$19.2 million in 2000 in the Czech Republic; the estimated piracy rate was estimated at 39%.

As in past years, the Interactive Digital Software Association (IDSA) reported wide-scale piracy in the Czech Republic of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products). Estimated trade losses are not available. The number of raids and cases commenced in 2000 was reported at 39 (up from 33 in 1999), but there is no information on the disposition of these cases. In 2000, at least one factory was producing illegal entertainment software (video games), and there was also the discovery of master disks made in the United Kingdom being sent to the Czech Republic for production there and for distribution throughout the region. IDSA reports good police cooperation in raids against retail pirates, but, as with other industries, enforcement is not effective, especially border enforcement, which is almost nonexistent. For example, IDSA reports that approximately 20% of its criminal complaints ended up with the imposition of fines in the average range of 10,000 to 50,000 Crowns (U.S.\$ 270 to U.S.\$ 1,340), not enough to act as a deterrent to commercial piracy.

The major problem confronting IDSA members is the manufacturing and replication operations, including syndicates producing so-called "gold" recordable (master) disks in the Czech Republic, and prerecorded silver discs that are imported from Bulgaria, Poland, Hungary, Russia and the former Yugoslavia. There is one known factory producing discs in Bulgaria that is a major supplier of the Czech Republic with illegal material.

The IDSA also reports large-scale Internet piracy operations with very high piracy rates reported; these are operations that copy videogames on demand via the Internet and then deliver these copies through the mail. As a result of the growth of these operations, IDSA reports a sharp drop in the number of illegal copies seized and in a flattening of the legal market. Overall, the IDSA reports losses of \$45 million in 2000 and a piracy rate estimated at 81% (these are preliminary figures for 2000 that will be finalized later in 2001).

The International Federation of the Phonographic Industry (IFPI) reports that for the recording industry the principal enforcement complaint is the inability or unwillingness of police investigators (not the criminal police) and state attorneys (the prosecutors) to thoroughly investigate in-depth major criminal cases brought to them by the criminal police. Thus, the evidence presented to the courts is incomplete and ignores important details, such as the channels of the supply and distribution of illegal material. This information, which could shut down piratical operations, is therefore not brought to light in criminal cases.

The IFPI continues to report large-scale seizure of illegal material, almost all of it in the form of CDs (about 20% of this total is now recordable CDs). For example, in one case in July 2000, over 27 million Crowns' worth (U.S.\$ 723,220) of material was seized, but there has been no disposition of the defendants in that case. In the past year, there were other successes for the recording industry. For example, four organized groups of pirates were broken up and their members brought to court; there has been no final adjudication of these cases, either. As in 1999, the recording industry also reports that there are now three major markets selling CDs and CD-Rs of German repertoire operating just over the German border.

Since the 1996 copyright act amendments passed, the once-problematic CD rental problem diminished as the number of rental shops declined significantly; however, that problem was replaced by the more serious CD and CD-R production problem, and by the problem of recordings made from infringing music Websites. Another problem lingers. As of December 1, 2000, the copyright law fixed the problem of the protection for preexisting sound recordings; however, the law permitted a two-year sell-off period of back-catalog inventory. This means that this back-catalog repertoire will linger as a problem for a number of years and continue to be a hindrance to effective enforcement until the material is finally removed from the marketplace.

The level of recorded music piracy in the Czech Republic has climbed from only about 8% last year, to 20% this year. The jump is the result of the growth in the number of CD-R materials being produced for the public on a commercial basis flooding the marketplace. Several owners of establishments offering this material have been charged under the criminal law but none of these cases has reached the courts to date. Estimated losses due to the piracy of sound recordings and music was \$35 million for 2000, much of it exports of pirate Czech product to other countries due to lax border enforcement.

For the motion picture industry, traditional video piracy, involving high-quality copies of video release titles, continues to be a major, if somewhat reduced, piracy problem. Although the enforcement efforts by the local anti-piracy organization, CPU, and the police have progressively improved the situation over the last couple of years, flea markets in the Czech-German border region, particularly those run by ethnic Vietnamese gangs, offer pirate cassettes to German tourists. Some "casual" counterfeit copying also takes place in otherwise legitimate rental outlets. While the video piracy problem in the retail sector has been greatly reduced in major cities, like Prague and Brno, it has nonetheless given way to other forms of piracy, particularly illegal public performances (in buses, restaurants and clubs), pirate optical disks and mail order operations.

Cable and television piracy is also a problem that is seriously impeding further market development. Although the number of active cable operators has decreased in the last few years as the market has consolidated, many cable television stations continue to retransmit a large number of foreign (especially German) satellite and terrestrial broadcast signals. Legal

ambiguities in Czech legislation complicate the situation. The government has little will to address this problem, and the Czech Broadcasting Council has taken a very timid stance toward fighting such piracy. As noted earlier in the report, illegal Web transmissions made a novel appearance in 2000, but the CPU and MPA managed to settle the case without resorting to the authorities. Pirate smart cards and decoders used mainly by private citizens continue to damage the pay television industry.

For the motion picture industry, CPU cooperation with police forces remained good in most cases, although it proved difficult to secure cooperation with certain police departments, especially in western Bohemia. In 2000, the CPU, police and Customs conducted 203 investigations, 86 raids, and seized approximately 6,374 pirate videocassettes, 125 pirate VCDs and numerous counterfeit sleeves. The CPU's cooperation with prosecutors and judges also improved in recent years. The slow judicial process is partly due to languorous police investigations and delays in forwarding cases to the prosecution services. While many routine criminal cases can be disposed of in months, larger contested cases often take over two years to complete and the courts ultimately impose minimal sentences. Civil cases take even longer, making civil lawsuits a completely impractical method to protect copyright. However, the prosecution rate is improving: 72 new criminal cases were launched in 2000.

The book publishers (Association of American Publishers, AAP) report that unauthorized copying and piratical translations into English of college textbooks, as well as scientific, technical and medical publications, is a problem in the Czech Republic. As a result, estimated losses to U.S. publishers were at \$4.5 million in 2000 (up from \$4.0 million in 1998).

In sum, as in years past the enforcement situation for all IIPA members could best be characterized as one of overall good cooperation with the police against small-scale retailers, with such cooperation varying widely from region to region in the country. And, as in years past, the most consistent enforcement deficiency was the failure to move cases toward satisfactory conclusion, especially to address the growing backlog of cases, combined with the inability or unwillingness of the judicial system to properly and effectively prosecute large-scale piratical operations.

Protection and Enforcement Obligations

The Czech Republic currently participates in the U.S. Generalized System of Preferences (GSP) program, which offers duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . ." At the same time that the Czech Republic caused millions of dollars of losses to the U.S. due to piracy, it imported \$225.4 million worth of products without duty, or over 29.9% of its total imports into the U.S. in 1999 (the last full year of available GSP statistics). The Czech Republic should not continue to expect such favorable treatment at this level if it is not providing adequate and effective protection and enforcement of copyright material.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

EL SALVADOR

EXECUTIVE SUMMARY

Given the serious defects in civil and criminal enforcement and the legislature's efforts to eliminate criminal enforcement altogether, IIPA recommends that USTR place El Salvador on the Special 301 Watch List this year.

In November 2000, USTR completed a Special 301 out-of-cycle review of El Salvador to assess that government's efforts to improve enforcement procedures and promote the use of authorized software in all government ministries. At that time, the business software industry reported that progress was being made to work with Salvadoran criminal authorities to bring software anti-piracy actions. USTR acknowledged this development and noted, "Nonetheless, software piracy in El Salvador remains a serious problem, and it is vital that El Salvador maintain this new momentum and reduce current levels of piracy."¹

Despite increased raid activity by law enforcement authorities during the last six months, piracy levels remain high. For the business software industry, the estimated piracy rate in El Salvador is 82%, one of the highest in Latin America. To make matters worse, a bill is currently pending before the Salvadoran Legislative Assembly which would effectively eliminate criminal enforcement of copyright infringement altogether. This bill would leave copyright holders without any avenue whatsoever to enforce their rights. Such denial of criminal and civil remedies for copyright enforcement would conflict with El Salvador's multilateral and bilateral obligations.

Because of evidentiary burdens and delays in the civil system, rightsholders basically have had to rely on the Salvadoran criminal process to enforce their rights. Prosecutors and the courts do not move forward on copyright cases; there simply is no deterrence in the system. Rightsholders have to fight to prove their standing in some criminal cases. The Salvadoran government should amend its civil and criminal enforcement procedures to comply fully with the WTO TRIPS Agreement, and amend its copyright law to implement the requirements of the WIPO treaties. Until these reforms are made, both copyright owners and Salvadoran authorities will lack the protections and remedies necessary to combat the extremely high levels of piracy in El Salvador.

¹ Press Release 00-77, Office of the U.S. Trade Representative, "USTR Announces Results of Special 301 Out-Of-Cycle Reviews," November 8, 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2000

INDUSTRY	2000		1999	
	Loss	Level	Loss	Level
Business Software Applications ²	13.5	82%	13.6	83%
Motion Pictures	2.0	50%	2.0	80%
Sound Recordings / Musical Compositions	5.0	40%	5.0	40%
Entertainment Software ³	0.1	50%	NA	NA
Books	1.0	NA	NA	NA
TOTALS	21.6		20.6	

In October 2000, the U.S. Senate approved the Bilateral Investment Treaty with El Salvador, which was signed in March 1999. At the time of the BIT negotiation, El Salvador was required to have in place TRIPS-level protection, both in terms of its substantive intellectual property law requirements plus the enforcement obligations by the end of April 1999.

El Salvador is a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs; both these programs contain criteria requiring adequate and effective protection for U.S. copyright owners.⁴ Recently, El Salvador also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA).⁵ To maintain these CBTPA benefits, El Salvador must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater criteria. As a WTO member, El Salvador also is currently obligated to meet both its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement.

² BSA estimates for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

⁴ In 1999, \$3.1 million of Salvadoran imports to the United States benefited from the GSP program, accounting for less than 1% of its total imports to the U.S. An additional \$59.1 million worth of goods entered the United States under the CBI in 1999, representing 3.7% of its total imports to the U.S. For the first 11 months of 2000, \$19.9 million of Salvadoran goods entered the U.S. under the duty-free GSP code, representing a 276.6% increase over the same time period last year. Another \$41.9 million of goods entered the U.S. under the CBI.

⁵ Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000). USTR subsequently determined that El Salvador has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. This determination made El Salvador fully eligible for the CBTPA trade benefits. See Press Release 00-68, Office of the U.S. Trade Representative, "Caribbean Basin Trade Partnership Act: Customs Procedure Designation," October 5, 2000.

Much more work needs to be done by El Salvador to meet its TRIPS and bilateral obligations, especially with respect to improving effective enforcement within the country and at its borders.

COPYRIGHT PIRACY IN EL SALVADOR

Business software piracy by both resellers and end users is rampant in El Salvador. The estimated level of piracy of U.S. business applications software in El Salvador in 2000 was 82%, one of the highest piracy rates in Latin America. Estimated trade losses in El Salvador due to business software piracy were \$13.5 million.

The sound recording and music industry reports estimated trade losses due to piracy of \$5.0 million, with a 40% level of piracy in 2000.

The home video market in El Salvador is experiencing a sharp decrease in piracy, now considered to be between 40% and 50%. The pirate video clubs used to announce the new releases in the media, but now that Blockbuster is present in the market with four stores, it is Blockbuster who announces its releases every week with a full-color page. Annual losses to the U.S. motion picture industry due to audiovisual piracy in El Salvador are estimated to be \$2 million in 2000.

The book publishing industry reports book piracy exists in the country, and is particularly noticed at the National University. Estimated losses due to book piracy are placed at \$1.0 million in 2000.

The estimated piracy level of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in El Salvador is 50%, causing an estimated \$100,000 in trade losses due to piracy in 2000.

COPYRIGHT ENFORCEMENT IN EL SALVADOR

Inadequate and Ineffective Criminal Enforcement

Because of onerous evidentiary requirements and excessive judicial delays, business software publishers are denied an effective civil enforcement mechanism to combat piracy. As a result, software publishers are completely dependent upon criminal enforcement by the *Fiscalía* to protect their rights. Up until May 2000, the *Fiscalía* refused to conduct almost all of the raids against software pirates requested by BSA, even though a special IP unit was created in 1997 to enforce intellectual property rights. However, during the second half of 2000 the *Fiscalía* became far more aggressive in combating piracy, conducting 14 criminal actions at BSA's request, including five reseller raids and nine end-user raids. In El Salvador, most of BSA's criminal cases have been settled out of court.

Although BSA applauds the recent increase in prosecutorial activity, there are still several problems that need to be addressed to achieve TRIPS compliance in El Salvador. Under Article 41 of TRIPS, procedures for the enforcement of intellectual property rights may not be

unnecessarily complicated or entail unreasonable time limits or unwarranted delays. Moreover, enforcement procedures must be effective and constitute a deterrent to further infringements.

El Salvador's criminal enforcement procedures fail to comply with these TRIPS requirements. Despite increased raid activity in El Salvador, the courts have thus far refused to convict or punish software pirates; thus, criminal enforcement provides no meaningful deterrent to piracy. For example, in January 2000, a criminal complaint was filed by BSA against a reseller who sold pirated software to an educational institution. After repeated requests by BSA, the *Fiscalía* raided the defendant's place of business in April 2000 and found evidence of software piracy. However, the judge provisionally found in favor of the defendant, claiming that the software publisher (a leading producer of widely used business software) had failed to provide sufficient evidence that it owned the copyright in the relevant software program. The court provisionally acquitted the defendant and ordered the software publisher to submit additional evidence of copyright ownership. Under Salvadoran law, an author's notice of authorship is sufficient evidence to be regarded as such and the burden is on the defendant to challenge such a presumption.⁶ In compliance with the court's request, the software publisher submitted sufficient evidence to merit a presumption of ownership under Salvadoran law; nevertheless, the court rejected the evidence, demanding further proof of ownership. The court's imposition of onerous and "unnecessarily complicated" evidentiary requirements illustrates the existing defects in the Salvadoran legal system.

In addition, Salvadoran law makes it difficult for U.S. copyright owners to obtain the legal standing necessary to file a criminal complaint or provide evidence in criminal proceedings. In particular, although Salvadoran law permits a U.S. copyright owner to assist the *Fiscalía* in prosecuting a criminal copyright offense, it requires the copyright owner to provide its legal representative with a special power of attorney for that criminal case. Based on this requirement, the *Fiscalía* has, in the past, refused to conduct criminal seizures requested by BSA's counsel, arguing that counsel's general power of attorney is inadequate, even though it clearly empowers Salvadoran counsel to represent BSA in all criminal infringement actions. For example, in December 1999, BSA filed a criminal complaint against a pirate reseller, providing direct evidence that the reseller had sold an investigator a computer with illegally installed software. Despite this evidence, the *Fiscalía* recommended that the judge deny BSA's request for an investigation of this target by law enforcement officials, arguing that BSA was not an interested party in the proceedings because it had failed to provide counsel with a special power of attorney for this particular case. The court decided in favor of the *Fiscalía* and was affirmed on appeal. The legal requirement of a special power of attorney for each criminal case results in significant delays and costs and plainly constitutes the kind of unnecessary complication prohibited under TRIPS.

BSA also has encountered situations where the procedures and actions of the *Fiscalía* have not been "fair and equitable" pursuant to TRIPS Article 42. In August 1999, BSA filed a complaint with the *Fiscalía* against a company that had refused to legalize its use of software despite repeated BSA warnings. The *Fiscalía* refused to grant BSA's *ex parte* seizure request and instead notified the defendant of the seizure request. Such notification violates TRIPS Article 50. This action, in effect, forced BSA to negotiate an "agreement" with the defendant. The *Fiscalía*'s actions in this case clearly denied BSA effective enforcement against an admitted pirate. However, since the appointment in mid-2000 of Ms. Berrios de Tablas as head of the *Fiscalía*'s IP crimes unit, BSA has not experienced these types of problems.

⁶ Ley de Fomento y Protección de la Propiedad Intelectual, Art. 32 *in fine*, and Berne Convention Art. 15(1).

Turning towards legislative threats, the Salvadoran legislature is considering a bill that would virtually eliminate criminal enforcement against piracy. The bill was introduced in September 1999 by three members of the Legislative Assembly in an effort to prevent BSA from initiating criminal raids against pirates. The bill would amend existing copyright law to require that copyright owners exhaust all civil remedies and obtain an initial finding in their favor *before* initiating any criminal proceedings. Given the inadequacy of civil enforcement under Salvadoran law (as described below) and the significant time required to obtain a civil finding (at least one year), this bill would effectively prevent any criminal enforcement against copyright infringement and leave copyright owners without any avenue whatsoever to enforce their rights. If enacted, this bill would clearly violate El Salvador's current obligations under TRIPS, as well as the GSP, CBI and CBTPA trade programs. BSA has been advised by local counsel that it is "unlikely" that this bill will move forward, although the legislation does remain pending in the Economic Commission of the Legislature.

Inadequate Civil Enforcement

Because criminal enforcement is not always feasible or appropriate, BSA member companies often utilize civil enforcement procedures -- particularly civil *ex parte* search authority -- to combat piracy. In El Salvador, however, software publishers have great difficulty obtaining civil *ex parte* search authority because of onerous evidentiary requirements. Moreover, the civil law fails to impose any time limits on the process for reviewing and approving civil seizure requests.⁷ BSA has found that, on average, it takes 45 days to obtain civil seizure authority in El Salvador, by which time news of the raid may have leaked to the defendant or BSA's evidence may have grown stale. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that remedies for copyright infringement be "expeditious." Due to these procedural obstacles, BSA conducted only one civil action in El Salvador during 2000.

In addition to unacceptable delays in the court process described above, BSA encounters the problem of the imposition of very high bond requirements. Bonds imposed before a court orders a search and seizure against a suspected pirate have been as high as \$20,000.. Such bonds are an obstacle to enforcement, in violation of TRIPS Articles 41.1 and 41.2 (remedies prevent effective action against infringement, are unnecessarily costly, and entail unreasonable delays), Article 53 (high bonds requirements are unreasonable deterrence).

Inadequate Civil Damages for Copyright Infringement

The Salvadoran copyright law permits only direct economic damages for civil copyright violations, and thus prohibits punitive, consequential or statutory damages. Without the threat of significant damages, the copyright law fails to provide an adequate deterrent to piracy, as required by TRIPS Articles 41 and 45.

In contrast, other countries have legislated a system of statutory damages which provide for an effective deterrent mechanism to combat piracy. In Brazil, for instance, the unauthorized reproduction or publication of a protected work may be subject to statutory damages

⁴ In contrast, El Salvador's copyright law does provide for some deadlines by which officials must act in processing a request for a criminal inspection of a suspected pirate.

equivalent to up to 3,000 times the retail value of the protected work.⁸ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁹ Bolivia is also considering such a solution in a bill prepared by the Ministry of Justice (between three to five times the retail value of the protected work).¹⁰

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1993

Copyright protection in El Salvador is based on its 1993 copyright law. As previously discussed, the two critical deficiencies with this law which result in little real copyright protection through civil channels in El Salvador are the lack of statutory damages and the absence of deadlines for government officials who undertake the various steps of authorizing a civil inspection of a suspected pirate. Both deficiencies are in violation of TRIPS Article 41.1, which requires that remedies for copyright infringement be “expeditious” and provide an effective deterrent to piracy.

Copyright Bill of September 1999

On September 27, 1999, three members of the Legislative Assembly submitted a bill that would virtually eliminate criminal enforcement of copyrights. This bill would reform existing copyright law to require that copyright holders first proceed through all civil avenues and obtain an initial finding in their favor¹¹ before any criminal process could be initiated against an infringer of a copyrighted work. Such civil litigation in El Salvador generally lasts at least a year.

This bill therefore would effectively eliminate all criminal enforcement of copyrights. Given existing deficiencies in civil enforcement, this bill would leave copyright holders without any avenue whatsoever to enforce their rights. It goes without saying that this bill, if enacted, would clearly violate TRIPS. Copyright protection in El Salvador must be increased, not decreased, in order for El Salvador to satisfy its multilateral and bilateral obligations.

Implementation of the WIPO Treaties

Internet piracy is increasingly prevalent throughout Latin America and a growing threat to software publishers and other copyright owners. El Salvador already has been commended for being the first country in the Americas to deposit its instruments of accession to the new “digital” treaties of the World Intellectual Property Organization: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). These treaties, like all international treaties, are considered self-executing under Salvadoran law. However, as a practical matter, specific implementation in domestic law is needed to provide explicit

⁸ Ley de Derechos de Autor, No. 9610, Article 103.

⁹ U.S. Copyright Act, 17 U.S.C § 504 (c).

¹⁰ Anteproyecto de Código de Propiedad Intelectual, Art. 175 I.

¹¹ Such an initial court finding is called a *dolo*, which means the judge determines that the defendant has an “intent to cause harm/damage” to the plaintiff.

guidance to the public and the judiciary on the specific obligations contained in these treaties. The government of El Salvador has yet to amend its copyright legislation to implement fully the obligations of both WIPO Treaties. As a result, copyright owners are not assured adequate protection of their rights in the digital environment.

Industry-proposed Amendments to the 1993 Copyright Law

The business software industry has been working with the Ministry of Economy to amend the Copyright Law of 1993. In December 2000, BSA submitted a proposal to the Ministry of Economy which aimed to: (1) implement the WIPO treaties under domestic law providing for a copyright owner's exclusive right of "making available" its works (or phonograms) to the public for on-demand access; (2) set a deadline on which civil magistrates must issue search and seizure orders; and (3) establish statutory damages in cases of copyright infringement. BSA is not aware of any developments in the Ministry of Economy to pursue the proposed changes.

To address the defects identified in the Salvadoran legal system and promote stronger copyright protection and enforcement, IIPA and its members continue to encourage the Salvadoran government to adopt the following reforms and improvements:

- Amend the Ley de Fomento y Protección de la Propiedad Intelectual (civil law) to establish a deadline for judicial action on *ex parte* seizure requests and lower the evidentiary threshold for obtaining such orders.
- Amend the Ley de Fomento y Protección de la Propiedad Intelectual to permit statutory or punitive damages for piracy.
- Encourage the government to adopt a decree (comparable to the U.S. Executive Order) requiring all government agencies and public institutions to use only legal software.
- Amend the Código Procesal Penal (Criminal Law Proceedings) to allow foreign companies to file complaints and assist the *Fiscalía* in prosecuting a case without the need for a special power of attorney for every case (i.e., a general power of attorney that authorizes local counsel to act on behalf of the company should be deemed sufficient).
- Encourage the government to reject/terminate the proposed legislation that would eliminate criminal remedies for copyright piracy.
- Encourage the *Fiscalía* to continue investigating and prosecuting criminal copyright offenses, in cooperation with BSA and other IIPA members.
- Encourage the Salvadoran judiciary to convict pirate resellers and impose sanctions that adequately reflect the seriousness of the offense and deter future acts of piracy.
- Implement a copyright owner's exclusive right of "making available" its works or phonograms to the public for on-demand access.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

ESTONIA

EXECUTIVE SUMMARY¹

Over the past several years, Estonia has made significant progress in reforming its copyright legal regime, including accession to the major treaties. The once major deficiency, the absence of a point of attachment for foreign sound recordings, has been corrected. But a problem remains beyond the legal reforms: enforcement. The Government of Estonia has correctly identified and agreed to crack down on the open-air markets and to effectively enforce its borders, especially who against “suitcase” pirates have plagued the industries for years. But not enough action has actually been undertaken to fully address these problems. Although Estonian officials have been very cooperative with the copyright industries, actual on-the-ground enforcement steps are needed to truly treat these problems.

In the past year, a new problem has come to light; it is now clear that there is discriminatory treatment of foreign sound recording producers in Estonia in contravention of the national treatment obligations of the U.S. -- Estonia Bilateral Trade Agreement of 1994. The Estonian Broadcasting Union (ERL) claims that American phonogram producers and performers should not enjoy the right of equitable remuneration for the broadcasting of their material in Estonia, although they provide these royalties for the broadcasting of Estonian material. In fact, U.S. repertoire has never been compensated for its broadcast even though it is eligible for such compensation. Estonia must address this very serious legal deficiency.

In 2000, Estonia acceded to the Geneva Phonograms Convention (effective May 28, 2000); it also acceded to the Rome Convention (effective April 28, 2000). This followed a series of legal reforms undertaken in 1999 including the adoption of numerous new laws, and adherence to the World Trade Organization (WTO) on November 13, 1999. In fact, the history of Estonian legal reform began soon after its independence with the adoption of a modern copyright law that went into force on December 11, 1992. On January 21, 1999, Estonia enacted additional amendments to the Copyright Act, as well as to the Criminal Code, the Code of Administrative Offenses, and the Customs Act, partly in anticipation of ratification of the WTO TRIPS Agreement. Those provisions went into force on February 15, 1999. Most significant in the package of amendments was a provision to give customs officials the necessary *ex officio* authority to seize infringing goods at the border. In addition, the increases in criminal sanctions especially for administrative offenses, were hailed as a very positive step by the software industry in particular.

On April 19, 1994, Estonia signed a bilateral IPR trade agreement with the United States, pledging to improve its level of protection and enforcement, and to join the Berne and Geneva Phonograms Conventions, among other things. Estonia did join Berne, and as of, 2000, the Geneva Phonograms Convention as well. When it acceded to the WTO in 1999, Estonia obligated itself to meet not only the substantive copyright provisions of the TRIPS Agreement, but

¹ For more details on Estonia’s Special 301 history, see IIPA’s “History” Appendix to filing.

the enforcement obligations as well. But Estonia is currently a very serious pirate market domestically, and serves as a major warehouse and exporter of material throughout the region. These commercial pirate activities are substantially damaging markets not only in Estonia, but also in the Scandinavian countries (Finland and Sweden) and other parts of Eastern and Western Europe. For this reason, IIPA recommends that Estonia be added to the Special 301 [Watch List](#) this year.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	60%	NA	60%	NA	60%	NA	99%	NA	100%	NA	100%
Sound Recordings / Musical Compositions	9.0	60%	9.0	70%	8.0	85%	4.0	80%	NA	NA	NA	NA
Business Software Applications	NA	69%	NA	72%	NA	NA	NA	97%	NA	NA	NA	NA
Entertainment Software ²	3.7	98%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Total	14.7		9.0									

COPYRIGHT ENFORCEMENT

The Need for Estonia to Act Against the Open Illegal Markets and to Better Police its Borders

The most serious enforcement problem in Estonia is its role as a regional distributor of illegal material, including optical media material. Pirated material – audio CDs, CD-ROMs containing entertainment and business software, videos and audiocassettes, and videogame cartridges – regularly moves between Estonia and neighboring countries due to poor border enforcement. Material that enters Estonia from other countries is warehoused there due to poor on-the-ground enforcement, and then shipped to other countries in Eastern Europe, and especially into Finland and the other Scandinavian countries. A significant amount of pirated material from Russia, Ukraine, Latvia and Lithuania reaches Estonia. Most of the material is produced elsewhere in the region, for example in the vast optical media production facilities now operating in Ukraine. The lack of effective enforcement in Estonia is significantly harming legitimate markets in Finland, Sweden and other countries in the region. In addition, department store sales of illegal material in the suburbs of Tallinn, as well as sales of some (albeit less) material at open markets, have hindered the ability of the legitimate markets in Estonia, Latvia and Lithuania to take hold.

² IDSA estimates for 2000 are preliminary.

In 2000, the Government of Estonia pledged to deal with the dual problems of the open illegal markets and lax border enforcement. In fact, in December 2000, several key ministers took a high profile fact-finding tour of the notorious Kadaka Market in central Tallinn to witness the piracy firsthand. They also observed that many of the illegal stalls were closed before their arrival, due to an organized “early warning system” that has repeatedly been used to thwart police and other enforcement officials. After the tour they pledged to take Cabinet-level steps to effectively shut down the market stalls, including amendments to the city’s rent laws, if necessary, to go after the landlords of the stalls as third party infringers.

In May 2000, the Tallinn police formed a special unit aimed at solving the problems with the Kadaka Market; the unit has been ordered to work directly with the private sector’s anti-piracy organization (Estonian Organization for Copyright Protection, EOCP – a joint effort of the Motion Picture Association, {MPA}, the International Federation of the Phonographic Industry, {IFPI}, and Sony Interactive Corporation). In fact, the number of stalls selling illegal material in the Kadaka Market has been dramatically reduced this past year as a result of police and private industry action (from an estimated 160 stalls to the current 6 to 10). Also, amendments are now pending to the Consumer Protection Act to close down the stalls found marketing pirate product. These certainly are all positive developments that must be fully carried out to finally put an end to this marketplace piracy.

Until this year, anti-piracy enforcement activity by the Estonian government had consisted of nothing more than sporadic raids and seizures at the open markets. In the past, to add insult to injury, confiscated goods from some industries (music and audiovisual material in particular) were sometimes returned to the pirates. Further, many confiscated goods remain in police custody and penalties are not imposed because the “owners” of the pirated goods cannot be identified; only the salespeople are apprehended and then released.

With the establishment of the Kadaka Market police unit, enforcement has improved significantly at that market; now, those same results must be sought, in other markets and other cities. In fact, while most of the copyright industries report good cooperation or at least a willingness of police to assist with enforcement, results are lacking because there are still not significant resources in place to conduct enforcement activity properly. As noted, the Kadaka shopping mall is the greatest offender. Hundreds of thousands of CDs and CD-ROMs (especially musical recordings and entertainment software) are sold there. These markets hurt not only the local copyright market, but also cater to tourists; the so-called “suitcase exports” to Scandinavia (especially Finland) are doing grave harm to the legitimate markets in these countries.

The market sales have been compounded in years past by the lack of effective customs activity. In 1999, the customs police were given proper authority to improve the situation. In October 2000, the customs police announced that they would start seizing outgoing material concealed in suitcases, and would prosecute offenders. Also, in a parliamentary reversal, the treatment of parallel imports as pirate copies was readopted as an amendment to the Copyright Act in October 2000, following the legalization of parallel imports in January 2000. The anti-piracy organization (EOCP) reports an increase in customs activity in light of the new border operations, a growing number of cases, and the introduction of a new officer designated specifically for IP investigations. The new regulations will permit suitcase seizures of material where under the old provisions such seizures were limited to copies confiscated in market transactions. These are all welcome developments, since more effective border enforcement is clearly needed. For example, the software industry reports only four seizures in all of 2000.

Beyond the sporadic seizures and raids, prosecutorial delays and legal roadblocks have so far prevented effective civil, administrative, and criminal prosecution. Evidentiary burdens block effective enforcement because they present significant hurdles to cases moving forward. For example, false contracts are presented to and accepted by the courts. Estonian officials have, so far, been unable to craft viable methods to verify documents. The EOCP has provided great assistance in this regard because of its around-the-clock availability to the authorities. Problems remain with false contracts, especially Russian "sub-license agreements" which are ubiquitous in the smallest kiosks and in video and audio shops. They lend a semblance of legitimacy to the trade, and impede effective enforcement by authorities because of the confusion created. Estonian officials acknowledged in discussions with IIPA members that they have been unable to devise an effective means to defeat them.

A serious problem for judicial enforcement is the fact that the courts are not applying a presumption of ownership or authorship. The police reported to IIPA officials numerous raids of significant quantities that could not be prosecuted because the police were required to get an expert opinion (at one time available from only one individual in the entire government) to determine proof of authenticity for each copy seized. It is not even clear under Estonian law whether legal entities can commence a copyright suit. The few cases that do move forward result in the imposition of inadequate civil and criminal penalties, a complaint heard by IIPA and its members and even by members of the police and customs officials in Estonia.

Administrative proceedings remain ineffective, in part due to the very short deadlines combined with the practical application of these provisions. Under the original provisions, a decision had to be taken within two months after the seizure, which did not leave enough time to submit all the necessary supporting documents, especially when mixed with the documentary evidentiary hurdles. The two-month timetable proved unreasonable because the police were not prompt in their submission of evidence to the right holder representatives; as of October 22, 2000 the deadline has been extended to a more realistic two years. Under the old provisions, time and again, administrative cases were dismissed and the pirate materials returned to the police. These administrative proceedings have been especially frustrating because the new administrative penalties are significant, providing for a maximum of 2 years' imprisonment and over 50,000 Crown (US \$2,750) in fines.

Customs officials reported to IIPA that there are many shipments of Russian materials that are entering Estonia, with the Russian distributor claiming the same invalid licenses to distribute there (i.e., "within the territory of the USSR"). Like the Police, Customs officials claim they have no means of verifying the validity of contracts, and no ability to stop this material. EOCP, however, has made itself readily available to assist in determining the authenticity of the Russian contracts, and the problem is reportedly becoming less common.

In 1998, the police did create a special IPR unit under the authority of the Central Criminal Police, but it has not been able to effectuate the type of enforcement necessary to stop organized criminal pirating operations. At the beginning of 2000, an individual police official in every regional police department (17 in total, in a country of 1.4 million people) was assigned to combat fraud, piracy and counterfeiting. The motion picture industry reports good cooperation with these units, although they remain limited in resources. Other industries, however, report that the IPR unit has not yet adequately addressed IPR issues, and has been side-tracked on other tasks.

The software industry reports that end-user piracy has received scant attention from the IPR unit, although the software industry has had good cooperation with the IPR unit on certain

enforcement actions and high-ranking officers in the unit and the Central Criminal Police consider end-user piracy to be a serious problem. The software industry hopes that additional training and the development of more expertise, combined with the political willingness of the government to take action, will lead to better results in 2001.

To date, there are still no known CD plants operating within Estonia. However, the Estonian market is flooded with illegal material manufactured in other countries, notably Ukraine and Russia. Two years ago, the police reported they would consider recommending adoption of optical disc production and distribution monitoring systems; but no such action was ever taken. In addition to traditional piracy, CD-R and Internet piracy is growing rapidly, especially because Estonia has a very high computer literacy rate. As the result of the lack of *ex officio* authority by the police and, to date, only sporadic actions by the customs officials (especially in some border regions), pirate material has flowed unimpeded into and out of Estonia from neighboring countries. It is hoped that the new customs activity, especially against "suitcase" piracy, will prove effective. The police need the proper authority and resources to do a better job, and there needs to be better prosecutorial follow-up of raids to deter pirates.

Piracy of sound recordings and music remains widespread in Estonia. The estimated level of audio piracy is 60% for 2000 (down from 70% a year ago). It was only in November 1999 that Estonia finally corrected the major obstacle to enforcement of sound recordings when it adhered to the WTO TRIPS Agreement and thus, for the first time, established a point of attachment for foreign sound recordings. Estonia also joined the Rome and Geneva Phonograms Conventions in 2000.

Trade losses due to the piracy of sound recordings and musical compositions in Estonia in 2000 were \$9 million (the same as in 1999).

The Recording Industry Association of America (RIAA) reports that the police have made some raids and seizures, mostly at outdoor markets, but that the absence of *ex officio* authority by police made their activity sporadic at best. Pirate products are still being sold in the two main markets in the Tallinn region (the Kadaka Market and Merekeskus), and along the Eastern Estonian border (with Russia). A local group of organizations (EFU) and, since early 2000, EOCP, continue to assist the police in developing production identification systems and preparing legal actions and evidentiary material. EFU and EOCP also work together in running educational seminars for police and customs officials.

Fortunately, a draft plan to create a government-imposed stickering system in 2000 was rejected by the inter-ministerial agency (and by the Parliament late in 2000). Such systems are counterproductive to effective enforcement. Instead, the copyright industries have been allowed to develop and maintain their own identification systems which are much more effective at fighting piracy. Video distributors today use and finance their own private stickering system that is administered by EOCP.

The recording industry reports that there have been barely any effective judicial actions - no effective civil judgments nor criminal convictions, and only a few administrative fines. Until 1998, Customs officials in Estonia were unable even to seize material because they lacked the necessary authority; starting in October 2000, they also agreed to seize the so-called "suitcase" materials as well. There were a number of police seizures of CD material (usually in the 3000 to 5000 CDs range) in 2000. In one series of raids on the Kadaka Market in November and December 2000, approximately 20,000 CDs were seized.

During the past several years many anti-piracy training programs have been conducted in cooperation with the copyright industries, including the IIPA and its members, the Finnish Copyright authorities, and EU PHARE. These programs included training for customs officials, police, prosecutors, judges and government officials (in the ministries and parliament).

For the Motion Picture Association (MPA), the domestic production of high quality Finnish-language pirate videos and their sale to Finnish tourists remains a grave concern in 2000. The main piracy centers are located in Tallinn and towns in the northeast. The importation of high quality pirate product from Russia and Latvia is also a major problem. Unauthorized parallel imports of Zone 1 DVDs (programmed for playback and distribution in North America only) and signal theft are also important problems.

The estimated video piracy level is 40%, with pirate videos available especially in retail outlets. Even with the closure of many stalls, the Kadaka Market just outside Tallinn (and the smaller scale Merekeskus Sea-Center in Tallinn) cater to tourists, selling thousands of high-quality counterfeit and pre-release (both theatrical and video) Finnish-language audiovisual cassettes, complete with color packaging and fake holograms. Many of these counterfeits are copied in Estonia from original Finnish-language videos. Pre-release titles imported from Russia and Latvia are sourced from camcorder recordings in U.S. cinemas, usually made a few days after U.S. release. The Finnish Anti-Piracy Center estimates that 6% of the Finnish video market is comprised of pirate copies brought from Estonia (that is down from 15% last year).

Cable and satellite television piracy are also present in Estonia (an estimated 20% and 90% respectively). Another major problem for the motion picture industry is the sale of pirate smart cards for satellite reception via the Internet. The law needs to be amended to protect against signal theft. Under law reforms made in early 1999, cable operators are required to abide by copyright law or lose their licenses. Unfortunately, the Cable Broadcast Law (1999) did not empower the Broadcast Department, the body responsible for issuing licenses, to conduct its own investigations. Currently then, a revocation results from a recommendation by the Broadcast Department to the Copyright Committee in the Ministry of Culture. This procedure is cumbersome, but can work.

As a result of the formation of the Kadaka Market special police unit, and good cooperation with industry, not only have the number of illegal stalls been reduced, but the Finnish authorities report a significant decline in the number of Finnish-language audiovisual materials leaving Estonia for Finland. With pre-raid tip-offs becoming less and less common, several successful raids have been run by police, according to the MPA. In May 2000, an interdepartmental contingent of 50 officers raided the Kadaka Shopping Mall, seizing 5,000 videotapes, a television, and a few VCRs. The number of stalls selling pirate product has to date been sharply reduced; as noted above, only eight stalls now remain.

As already noted, the MPA, the IFPI, local film and music distributors, and Sony Interactive Corporation, established a joint anti-piracy organization now called the Estonian Organization for Copyright Protection (EOCP). With its participation in the government Copyright Commission and the Kadaka Market special police unit, the EOCP has worked hard to raise anti-piracy issues with the Government of Estonia at the highest levels.

Estonian officials should be encouraged to continue to work with Finnish authorities and the Finnish Anti-Piracy Center to train police, prosecutors and especially judges, and to adopt effective enforcement operations, to continue to stop the flow of pirate videos from Estonia into Finland.

The Estonian courts have heard a few audiovisual piracy cases in which they have applied fines of between 10,000 and 15,000 Estonian kroons (US \$550 - \$800). As has been true in years past, judges still dismiss cases because pirates present false contracts as evidence of their good intentions. A more serious problem is the fact that the courts have not applied prison sentences in any audiovisual piracy cases to date.

The business software industry (Business Software Alliance or BSA) reports that Estonia made some enforcement progress in 2000, with a modest number of raids on resellers. For the most part, cooperation with the police, prosecutors and judges is reported to be good. In the case of the police, cooperation is much better at the lower levels than at the upper levels. Those who are actually conducting raids have been helpful. The problem is that the upper echelons of the police do not see IPR enforcement as a priority. The BSA reports good cooperation in Tallinn with the Central Criminal Police. However, the special IP group formed by the CCP has not been working. As other industries also reported, these police officials have been side-tracked with non-IPR business.

The BSA cooperated with police in a total of 47 raids in 2000: 17 concerned end-users of illegal business software; 30 involved resellers of illegal business software. Most of the raids took place in Tallinn. There were no raids in either Tartu or Parnu, both significant population areas. During the course of the 17 end-user raids, 105 personal computers were examined and 30 were seized; there were no personal computer confiscations ordered. As a result of reseller raids, approximately 6,300 illegal CD's were seized and confiscated. Several cases are still pending. The BSA estimates a total of 372,500 kroons (US \$21,517) was levied in fines in software piracy cases in 2000.

The 1999 amendments included many important enforcement tools for the business and entertainment software industries. The amendments expanded the definition of an infringing use; imposed liability for end-user piracy upon legal entities; increased the range of fines for copyright offenses; and made pirated copies and PCs subject to seizure. Also, the 1999 amendments made legal entities liable for end-user piracy with fines ranging from 150,000 to 500,000 kroons (US \$8,250 - \$27,500) depending on the conduct in issue. In practice, the fines are now imposed on a per copy basis, of 7,500 to 100,000 kroons (US \$433 - \$5775) per copy with a total not to exceed 500,000 kroons (US \$27,500).

In 2000, the business software industry estimated that 69% of business software in use in Estonia was unauthorized, down from 72% the year before, and making progress from the 92% first reported in 1997.

Enforcement efforts continue to be hindered by the fact that the present penalties for software piracy offenses are far too low to deter piracy and there are no statutory damages available. In most cases, software pirates are charged under the Estonian Administrative Code (as opposed to the Criminal Code). Penalties under the Administrative Code are mostly limited to fines (and, in certain instances, partial or total business closure), and the imposition of fines is low. The 1999 amendments raised the range of fines significantly. The BSA expected that these higher fines would be imposed in practice in 2000, but even with the statutory increases, the total amount of the fines levied in 2000 decreased, because of the application of the provisions by judges, and because diminished police cooperation led to less enforcement activity. The only encouraging sign was that there were no cases resolved in favor of end-users.

As with criminal remedies, civil remedies in Estonia are extremely weak. There is virtually no jurisprudence regarding the calculation of damages in IP cases. Estonia's failure to provide *ex parte* civil procedures also is a significant shortcoming. Unfortunately, the 1992 Copyright Law even with the 1999 amendments, does not include either a provision for statutory damages or a provision concerning *inaudita altera parte* searches. Another 1999 amendment to the Code of Civil Procedure, permitting judges to consider search order applications without the opposing party present, suggested that civil *ex parte* searches would be viable; but unfortunately, experience has shown that the provision did not work that way in practice. The BSA expects more tests of these provisions in the near future and would welcome clear and effective legislative amendments on applicable damages.

The Interactive Digital Software Association (IDSA) estimated trade losses due to piracy of entertainment software in 2000 at \$3.7 million and a piracy rate of 98%. The entertainment software industry, like the other industries, is hurt especially by lax border enforcement that allows material to flow freely into and out of Estonia. Much of this entertainment software material comes from Russia and Belarus and is controlled by organized crime groups. However, as a result of the closing of many of the stalls in the large open markets, the piracy of entertainment software has gone "underground" into small shops and stores. Illegal material is offered over the Internet and then distributed by mail. The EOCP has contributed to better enforcement as well as several training programs on the problems of the entertainment software industry.

The TRIPS Agreement Requires Effective Criminal, Civil, Administrative and Border Enforcement

While laudable, legal reforms alone have not been enough to deter piracy in Estonia. Estonia must adopt practices that result in effective criminal, civil, administrative and especially border enforcement, in order to comply with the TRIPS Agreement. Even though the Estonian market is relatively small, it is dominated by piracy in almost every sector. While most of the copyright industries report good cooperation by the police running some street market raids, the anti-piracy resources are thin, and judicial enforcement has been almost non-existent.

In fact, Estonia faces ineffective copyright enforcement on all levels: criminal, civil, administrative and border operations. The police and customs officials are willing to initiate anti-piracy enforcement activities, but in the past they haven't done so, because of administrative problems, ineffective authority, or a lack of proper resources. The raising of the anti-piracy problem to the inter-ministerial level of the Cabinet has been very helpful in calling the government's attention to the problem. Now, Estonian officials, working with industry, must act to stop the large-scale operations in the markets and the collectively large-scale losses at the border.

Enforcement is also hampered because the appropriate officials do not know the proper procedures to take in piracy cases. In some agencies, including the economic police and customs, high turnover rates due to low pay have added to enforcement inefficiencies. In addition to the procedural problem of the verification of documents, there is the problem of verification of legal vs. illegal copies. Administrative remedies have not been properly utilized. Businesses, especially illegal kiosks and stores that sell pirated material, are not fined often enough, nor are their business licenses revoked; either of these measures would represent important additional steps toward proper copyright enforcement and should be addressed by the inter-ministerial officials responsible for IPR enforcement.

Since a considerable part of the piracy problem in Estonia is due to heavy importation of infringing materials, it is essential that border measures be strengthened and enforced in practice. As already noted, Estonia did improve its Customs Code as part of its WTO accession package, giving customs officials the appropriate *ex officio* authority to seize suspicious material without a court order or at the behest of the right holder. Now that authority has to be effectively utilized. Customs officials admit to problems with the detection of illegal material; hopefully the numerous training sessions held in recent years by the copyright industries should improve this situation. Most encouraging is the announcement by the Customs authorities that they would seize the "suitcase" material and thus address this major border enforcement problem. This is crucial because the Finnish copyright law has a personal use importation exception. As a result, a flood of CDs and CD-ROMs (consisting mostly of entertainment software), as well as videos, is imported into Finland by tourists returning from Tallinn. It is essential that the Estonian police do a better job raiding and seizing material at street markets (especially closing the remaining stalls at the Kadaka Market and the other major markets); that they follow up with prosecutions; and that they seize this illegal material in Estonia at the border. The Criminal Code has for years included appropriate remedies against commercial pirates. However, convictions are very difficult to obtain. The Code was improved in 1999, but unless convictions begin, it will not yield any improvements.

In the past few years the copyright industries have undertaken many training and educational programs to assist Estonian officials in understanding both the substantive copyright law obligations as well as the importance of effective enforcement, and it is hoped that these programs will finally start to show some positive results.

Additional Protection and Enforcement Obligations

Estonia currently participates in the U.S. Generalized System of Preferences (GSP) program, which offers duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . ." At the same time that Estonia caused millions of dollars of losses to the U.S. due to piracy, it exported \$11.2 million worth of products to the US without duty, or over 5% of its total exports into the U.S. in 1999 (the last full year of available GSP statistics), and over \$10.4 million in the first 10 months of 2000. Estonia should not continue to expect such favorable treatment at this level if it is not providing adequate and effective protection and enforcement for copyrighted material.

LEGAL REFORM

Copyright Law Amendments

In 1999, the first of two expected packages of legal reforms to improve the legal and enforcement regime was adopted in Estonia. Included in the January 1999 amendments were provisions granting Customs the authority to seize goods without a court order; improvements in civil, administrative and criminal remedies (including a provision to make end-user piracy by legal entities an administrative offense); amendments relating to collective administration (including for retransmission via cable); and provisions necessary to implement the European Union rental directive.

The second set of amendments were originally scheduled for consideration in 2000, but they have been postponed. These amendments would have fulfilled Estonia's remaining obligations for compliance with TRIPS, the EU Directives, and the new "digital" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). Clearly, the latter set of amendments, for digital treaty ratification and implementation, it now appears that will await completion by the European Union of its own Copyright Directive.

One new legal issue that must be addressed immediately is the unfair treatment of foreign phonogram producers. When it ratified the Rome Convention, Estonia made a reservation under Article 16(1)(a)(i) concerning Article 12. The Ministry of Culture announced in November 2000 that it plans to withdraw this reservation by the end of 2002 (or early in 2003); the government believes that broadcasters need a transition period before paying royalties for the public performance of recordings. This full reservation is a violation of the European Union Accession Agreement (Article 66) that includes a right of equitable remuneration for neighboring rights holders. The Estonian Broadcasting Union (ERL) has repeatedly taken the position that according to the current Estonian Copyright Act, American phonogram producers and performers do not have the right to equitable remuneration for the public performance (broadcast) of sound recordings in Estonia. This position is completely contrary to Estonia's national treatment obligations set out in Chapter II, Article II, paragraph 1, of the U.S. Bilateral Agreement of 1994 with respect to the "protection and enforcement of intellectual property rights" which includes these neighboring rights. There is no reason for such a transitional period. Estonia should be urged to revoke this reservation and to fix the law to clarify that U.S. repertoire and producers are covered by the right of equitable remuneration.

In sum, IIPA lauds the substantial and significant improvements that Estonia has undertaken since its independence, and especially the 1999 amendments directed at IPR enforcement. Estonia should be encouraged to further amend its law to: (1) provide for minimum statutory damages, relieving the plaintiff of having to prove actual damages, in cases involving copyright disputes between all parties, including legal entities; (2) eliminate the compulsory notice requirement for sound recordings; (3) supplant the current right of remuneration for sound recording producers for the broadcasting, public performance and other communication to the public of their phonograms with exclusive right (as well as fix the unequal treatment noted above, even under the right of remuneration for foreign producers); (4) correct the current disproportionate sharing of the home audio tape levy between authors and producers; (5) add a right of presumption of authorship for sound recording producers (currently afforded only to "works"); and (7) delete Art. 62(2), the author's rights "safeguard clause" which is unnecessary and inconsistent with the Rome Convention (Art. 1). Finally, the

Estonian government should fully implement the ruling of October 2000 that Customs officials will seize parallel import material with effective border enforcement.

Estonian officials must make clear how the law does in fact treat pre-existing works and sound recordings. IIPA interprets current law and treaty obligations as providing for a minimum of protection for works and sound recordings first published with the past 50 years, and some copyright officials and academics have privately concurred with this view. For example, due to Estonia's entry into the WTO on November 13, 1999, a foreign sound recording is (per the WTO) entitled to protection under the Estonian Copyright Act if published on or after November 13, 1949. The same is true for works. The history of Estonian membership in the Berne Convention is complicated however. Estonia "joined" Berne on October 26, 1994; but, prior to the August 1940 occupation by the Soviet Union, Estonia was a member of Berne (Berlin) from June 9, 1927.

Estonian copyright officials claim that for "works" there is retroactive protection under Article 18 of Berne and under TRIPS. This was demonstrated, they argue, when an amendment to deny retroactivity was defeated at the time of the adoption of the copyright law in 1992. Clearly, the WTO TRIPS Agreement obligates Estonia to provide such protection for pre-existing works and sound recordings. But to date, there have been no cases; in fact, one court decision in 1997 denied retroactive protection for performers' rights, because the court reasoned that no neighboring rights protection existed before the 1992 law. In sum, Estonian officials should publicly and clearly state how these TRIPS obligations are being satisfied for both works and sound recordings.

Last, Estonia should be encouraged to ratify the two 1996 WIPO digital treaties and to adopt provisions to implement them in order to protect against Internet and other forms of digital piracy. Estonia was a signatory to both treaties, and preparatory work was undertaken in the Ministry of Justice to draft legislation to implement the treaties. IIPA encourages Estonia to move quickly with this ratification and implementation.

In particular, Estonian law must: (1) ensure that the right of reproduction covers temporary copies; (2) adopt a right of communication to the public including a right of making available; and (3) allow right holders to enforce their rights against the circumvention of technological protection measures. Technological protection measures are the tools that right holder use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. In addition, right holders need to be able to protect so-called "copyright management information" that is attached to or accompanies a work or sound recording, including protection against the alteration, removal or falsification of this information.

A Summary of the Criminal Code, Civil Code and Administrative Remedies Amendments (1999)

On January 21, 1999, a variety of amendments to the Criminal Code were adopted, as well as important civil and administrative remedies; these provisions went into force on February 15, 1999. The criminal penalties include: criminal seizure provisions; up to two years' imprisonment for certain moral rights or economic rights violations; up to three years imprisonment for piratical copying including import or export of pirate copies. (Crim. Code Arts.

277 – 280). In addition, the penalties include up to two years imprisonment for manufacturing, acquisition, possession or sale “of technical means or equipment designed for the removal of protective measures against the illegal reproduction of works or against the illegal reception of signals transmitted via satellite or cable.” (Crim. Code Art. 281)

In addition, the Copyright Act was amended (Art. 83(5), (6)) to provide end-user software piracy fines that can be levied against legal entities of between 150,000 to 250,000 kroons (US \$8,250–US \$13,750) for the “use,” including installation, of computer programs. These administrative remedies also include fines between 20,000 and 50,000 kroons (US \$1,100 – US \$2,750) for copyright infringements of any work or sound recording by legal entities. The fines increase to 250,000 to 500,000 kroons (US \$13,750 – US \$27,500) for the manufacturing of pirated copies by legal entities. The same amendments repealed the provision that made natural persons liable for infringement under the Administrative Code, and instead made natural persons liable for similar actions under the Criminal Code.

On December 9, 1999, additional amendments were adopted pertaining to software infringements. Under the December amendments, the maximum statutory fines in the Copyright Act for software piracy were raised from 250,000 up to 500,000 kroons (US \$27,500). The law was also clarified so that for each illegal program confiscated, the fines will now range from 7,500 to 100,000 kroons (US \$413 – US \$5,500), in addition to the permissible confiscation of the hardware.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

GUATEMALA

EXECUTIVE SUMMARY

The copyright industries continue to confront high piracy levels and inadequate copyright enforcement in Guatemala. Recent legislative reform undercut criminal sanctions and civil remedies for copyright infringement. In September 2000, amendments to the Guatemala copyright law were adopted in Decreto 56-2000, and entered into effect on November 1, 2000. On a positive note, this law reinstated "public" prosecution of copyright crimes; this issue had been at the top of the copyright industries' agenda for years. The Decreto also implemented certain requirements of the WIPO treaties. Unfortunately, the amendments also seriously weakened existing civil and criminal remedies. Criminal penalties were substantially decreased, and the statutory damages provision was removed entirely.

Unfortunately, the copyright law amendments have done little to improve copyright enforcement in-practice in Guatemala. The prosecutors (*fiscalías*) are overburdened and understaffed; it currently takes at least four weeks to obtain a search and seizure order to raid a suspected copyright infringer. This problem could be resolved with the creation of a Special Prosecutor's Office for intellectual property crimes; the Guatemalan government has until November 1, 2001 to create this office. Copyright piracy levels remain high. For example, the level of business software piracy in Guatemala is 79%, one of the highest in Latin America. In sum, Guatemala still has much work to do to meet its multilateral and bilateral intellectual property rights obligations. IIPA recommends that USTR place Guatemala on the Special 301 Watch List.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 – 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	60%	2.0	70%	3.0	70%	3.0	86%	NA	100%	NA	100%
Sound Recordings / Musical Compositions	4.0	60%	4.0	60%	4.0	60%	4.0	60%	3.0	50%	0.2	46%
Business Software Applications ¹	12.6	79%	12.7	80%	8.0	82%	6.3	86%	7.5	90%	7.5	94%
Entertainment Software ²	0.1	60%	NA	NA	4.0	85%	4.2	87%	4.0	79%	NA	NA
Books	2.3	NA	2.5	NA	2.5	NA	2.0	NA	2.0	NA	2.0	NA
TOTALS	21.0		21.2		21.5		19.5		16.5		9.7	

¹ BSA estimates for 2000 are preliminary.

² IDSA estimates for 2000 are preliminary.

In May 2000, USTR noted these copyright enforcement difficulties in Guatemala, stating: "Piracy, including by government agencies, is widespread, and the Government of Guatemala has failed to take effective enforcement action. The U.S. urges Guatemala to honor its WTO TRIPS Agreement commitments to enforce protection of intellectual property."³

Last year, in order to highlight the copyright industries' dissatisfaction with the 2000 legislation and inadequate enforcement, IIPA filed a petition on August 21, 2000 with the U.S. Trade Representative, requesting President to review the eligibility of Guatemala as a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs for Guatemala's failure to provide adequate and effective copyright protection for U.S. copyright owners.⁴ IIPA also noted at that time that it would be inconsistent for the U.S. government to grant new, additional benefits to Guatemala under the U.S. Caribbean Basin Trade Partnership Act (CBTPA) while conducting an investigation under GSP and CBI for Guatemala's failure to afford adequate and effective IPR protection to U.S. copyrights.⁵ Despite IIPA's requests, CBTPA eligibility to Guatemala was granted⁶ and our GSP/CBERA IPR petition was not accepted. The problems IIPA highlighted last fall remain the same in early 2001. As a WTO member, Guatemala is currently obligated to meet both its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement.

COPYRIGHT PIRACY IN GUATEMALA

Software piracy by both resellers and end users is widespread in Guatemala. The estimated level of piracy of U.S. business applications software in Guatemala in 2000 was 79%, one of the highest piracy rates in Latin America. As a result of widespread piracy in Guatemala, U.S. copyright owners of business software lost an estimated \$12.6 million in 2000. BSA believes that these losses are largely due to the fact that Guatemalan law (as discussed below) fails to establish effective deterrents for infringing acts. Within the last year, the business software industry has worked with the Guatemalan police to conduct raids. However, the police have no

³ Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000. Guatemala was kept on the Priority Watch List.

⁴ See International Intellectual Property Alliance, Request for Review of the Intellectual Property Rights Practices of Guatemala in the 2000 Annual GSP Country Eligibility Practices Review, Aug. 21, 2000, available on IIPA's Website at <http://www.iipa.com> and in USTR's Reading Room in Washington, D.C.

⁵ In 1999, \$14.1 million of Guatemalan imports to the United States benefited from the GSP program, accounting for nearly 1% of its total imports to the U.S., and \$285.3 million of Guatemalan goods benefited from the CBI program in 1999, accounting for 12.6% of its imports that year. For the first 11 months of 2000, \$28.8 million of Guatemalan goods entered the U.S. under the duty-free GSP code and \$224.7 million under the CBI. For further background on Guatemala's appearance on the Special 301 lists, see Appendices D and E of this 2001 Special 301 submission.

⁶ Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000). USTR subsequently determined that Guatemala has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. As a result, this determination made Guatemala fully eligible for the CBTPA trade benefits. See Press Release 00-68, Office of the U.S. Trade Representative, "Caribbean Basin Trade Partnership Act: Customs Procedure Designation," Oct. 5, 2000.

proactive role in the actions, but are merely required to be present to comply with criminal due process under Guatemalan law. During 2000, BSA conducted seven raids against end-users and one raid against a reseller. All of these cases were settled out of court.

With respect to motion picture piracy, Guatemala has achieved a minor reduction in cable piracy in 2000. Whereas in 1999, not one of the estimated 250 national cable operators was completely legitimate, many Guatemala City cable operators have now signed license agreements for MPA member company product. Nevertheless, there are still many cases of cable operators retransmitting unauthorized movies or programs. Underreporting of subscribers is a persistent problem, and rural operators still remain outside the legitimate system. Home video piracy continues to dominate the legitimate market, with back-to-back copying accounting for much of the 60% video piracy rate in the market. Unauthorized parallel imports of home videocassettes have increased via couriers importing tapes from the U.S. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Guatemala are estimated to be \$2 million in 2000.

Book publishers reports that there has been some improvement in the use of pirated books at universities. The availability of low-priced legitimate books through local distributors has improved. There remains a high level of photocopying of copyrighted materials in universities. Estimated losses due to book piracy in Guatemala dropped slightly to \$2.3 million in 2000.

Estimated losses due to sound recording and music piracy in Guatemala remained at constant levels in 2000, which were \$4.0 million, with a 60% piracy level.

The Interactive Digital Software Association (IDSA) reports that estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Guatemala are \$140,000 in 2000, with an estimated piracy level of 60%.

COPYRIGHT ENFORCEMENT IN GUATEMALA

The Guatemalan General Prosecutor's office has only 21 prosecutors (*fiscales*) for the entire country. The Guatemalan judicial system faces internal security issues (e.g., judges being threatened and kidnapped) as well as heavy backlogs of cases. BSA has reported significant delays in the issuance of *ex parte* searches, as well as breaches of confidentiality, by the Guatemalan judiciary. In particular, court employees have, in some cases, leaked news of *ex parte* seizure requests to the targets, completely destroying any element of surprise or opportunity to prevent the destruction of evidence.

While these are daunting difficulties, Guatemala is under both bilateral (GSP and CBI) and multilateral (TRIPS) obligations to take actions to respect and protect intellectual property within and at its borders. BSA is encouraged that some of these problems will be addressed once the Special Prosecutor's Office for intellectual property crimes is created as mandated by Decreto 56-2000. The Guatemalan government, however, has shown no progress to-date in creating of this office.

Unwarranted Delays in Criminal Enforcement

The Guatemalan judiciary has been extremely slow in issuing *ex parte* search orders, in part because only one court -- Tribunal No. 12 -- has jurisdiction over intellectual property matters. Moreover, judicial delays are further exacerbated by the fact that the government has yet to fill one of the three seats on the court. As a result, obtaining a search and seizure order in Guatemala is a process that may take several weeks, if not months, in criminal copyright infringement cases.

In August 2000, BSA filed a criminal complaint against a reseller who was selling burned CDs to the public. Because the court lacked one of its judges, the search and seizure order could not be issued. On December 14, 2000, a provisional judge was finally assigned to the court. The court, however, refused to issue the search warrant, stating that, under the new copyright law, copyright infringement actions should be commenced at the *Fiscalia*. BSA argued to the court that the case was filed well before the new law went into effect and, therefore, it should be prosecuted pursuant to the then - existing legal regime. The court rejected BSA's arguments and informed BSA counsel that it was sending the case to the *Fiscalia* for further proceedings; however, the court has yet to sign the order sending the case to the *Fiscalia*. BSA has not been able to conduct the raid against this suspected pirate, and it is very likely that due to leaks, any evidence of piracy may have been destroyed.

On December 22, 2000, BSA refiled 11 criminal complaints against suspected illegal end users and resellers of software. After petitioning the *Fiscalia* for three weeks to request a search warrant to the Court, the *Fiscalia* finally sent the request to the Court. These cases are pending in the Court waiting resolution. BSA was assured that the Court's decision would be issued within two days of filing the petition, but the orders have not been granted.

Lack of Deterrent Criminal Penalties

Under the new law in effect since November 1, 2000, both the minimum and maximum criminal penalties for infringing acts have been substantially reduced. Infringing acts that were subject to prison terms of four to six years and fines of 50,000 to 100,000 Quetzales (approximately US\$6,425 to \$12,850), are now subject to a term of imprisonment of one to four years and fines of 1,000 to 500,000 Quetzales (about \$128 to \$64,265). Lowering the minimal level of criminal fines sends the wrong message to the Guatemalan public and to the judiciary about the importance of protecting copyrights for unauthorized exploitation. Importantly, this does not satisfy the TRIPS Article 61 standard of providing for deterrent "criminal procedures and penalties to be applied" in cases of commercial piracy.

Inadequate and Ineffective Civil Enforcement

Because criminal enforcement is not always feasible or appropriate, BSA member companies often use civil enforcement procedures -- particularly civil *ex parte* search authority - - to combat piracy. In Guatemala, however, this legal tool is practically unavailable because information is often leaked and the surprise element of the *ex parte* search is lost. Court records are public and several companies report on a weekly basis the new cases that have been filed with the court. Unfortunately, under Guatemalan law a case cannot be filed under seal.

During 1999, BSA filed several civil complaints against illegal end-users and resellers. After numerous requests, the court finally issued the civil search and seizure order in one of the complaints. When BSA finally executed the order against the suspected illegal end user, it found that several PCs had been removed and that the illegal software originally installed had been deleted.

In addition to the leaks of information in the court process described above, BSA encounters the problem of very high bond requirements. Bonds are imposed before a court orders a search and seizure against a suspected infringer. These bonds, which have been as high as US\$20,000, are an obstacle to enforcement, in violation of TRIPS Articles 41.1 and 41.2 (remedies prevent effective action against infringement, are unnecessarily costly, and entail unreasonable delays) and Article 53 (high bond requirements are unnecessarily costly and unreasonably deter recourse to these procedures).

Inadequate Civil Copyright Damages

Before the copyright law amendments entered into effect on November 1, 2000, copyright owners were entitled to recover up to 10 times the retail value of the infringed work. With the enactment of the new copyright law, this system has been eliminated. This system was, in effect, a form of statutory damages, which prescribe that a court may use a fixed sum or multiple to determine damages in lieu of determining actual damages. Statutory damages are a feature of copyright legislation in a growing number of countries. For example, statutory damages incorporated in Brazilian copyright legislation -- and recently increased -- have resulted in penalties at deterrent levels.

Now under Guatemalan law, a rightholder is only entitled to recover direct damages for civil copyright violations. Without the threat of significant damages, the new copyright law fails to provide an adequate deterrent to piracy, as required by TRIPS Articles 41 and 45.

COPYRIGHT LAW ISSUES IN GUATEMALA

1997 Amendments to the Criminal Procedure Code

In late 1997, the Guatemalan Congress passed amendments to the Criminal Procedure Code which changed copyright infringement actions from public to "private" criminal actions (Decree No. 79-97 of October 15, 1997). As a result, copyright rightholders were forced to initiate and prosecute criminal copyright infringement cases on their own initiative. Most disturbingly at the time, the Guatemalan government justified such action by claiming that it was not the responsibility of the government to prosecute criminal cases of copyright infringement. At the time, Ministry officials told the private sector that this amendment was made to increase the speed of actions, since public prosecutors were overwhelmed with other cases.

Fortunately, this legal regime has changed with the 2000 copyright law amendments. Copyright infringement actions now considered to be "public" criminal actions. The copyright industries worked for years to achieve this result.

Copyright Law of 1998

The Guatemalan Congress adopted a new copyright law on April 28, 1998, which was published as Law No. 33/98 on May 21, 1998. The 1998 copyright law included amendments to modernize and strengthen the archaic 1954 copyright law. Unfortunately, the 1998 law omitted an amendment that would have reinstated “public actions” in the Criminal Code, as well as several other reforms needed to harmonize Guatemalan law with TRIPS and international copyright treaties.

Copyright Law Amendments of 2000

In September 2000, the Guatemalan Congress passed amendments to the Copyright Law of 1998, which were published as Decreto 56-2000. This new law represented a three-year effort to strengthen Guatemalan copyright law and to correct the omission of the “public action” in the Criminal Code. In brief, this bill:

- Recognized criminal copyright crimes as “public actions,” thus authorizing law enforcement authorities to arrest suspected infringers and seize illegal copies and manufacturing equipment.
- Recognized a copyright owner’s exclusive right of “making available” its works and phonograms to the public for on-demand access.
- Substantially expanded the number of infringing acts, which track the rights afforded to rightholders under the WIPO treaties. Specifically, it created new crimes that penalized the circumvention of copy-protection technologies and the removal or alteration of rights management information.
- Established procedures, including timelines, for the Public Ministry or an aggrieved copyright owner to request and obtain precautionary measures from the competent judicial authority. These procedures are critical to improving the efficacy of enforcement measures, both criminal and civil.
- Created a Special Prosecutor’s Office that would specialize in intellectual property offenses and have exclusive responsibility for prosecuting criminal copyright infringements.
- Revised the registration functions and expanded the scope of administrative authority for the Register of Intellectual Property.
- Clarified the work-for-hire provisions as they apply to computer programs.
- Revised the pertinent sections relating to the establishment and operation of collecting societies.

The WIPO Treaties

Guatemala has yet to deposit its instruments of accession to the new “digital” treaties of the World Intellectual Property Organization: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). IIPA and its members recommend that Guatemala move forward to ratify these treaties.

Decreto 56-2000 implemented several obligations found in the WIPO treaties. For instance, the new law provides for a copyright owner's exclusive right of "making available" its works or phonograms to the public for on-demand access. The new law makes clear that the traditional property rights of copyright owners apply in cyberspace and that only the copyright owner of a song, sound recording, audio-visual product, software program or video game can authorize it to be copied via the Internet, transmitted across the network, or downloaded by a computer or other device. In addition, the new law prohibits the circumvention of copy-protection technologies and the removal or alteration of rights management information.

Despite these reforms, however, the Guatemalan copyright law was significantly weakened by the amendments (described above) which reduce criminal penalties and eliminate statutory damages. Moreover, the government's failures to create the required intellectual property rights prosecutors office and address judicial delays have significantly hindered copyright enforcement in Guatemala.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

HUNGARY

EXECUTIVE SUMMARY

Hungary has made great strides in modernizing its copyright legal regime over the past several years. However, the copyright industries report mixed results at best, with on-the-ground enforcement operations in a market that could otherwise sustain good growth. That's because of the ongoing problem of prosecutorial delays, the ineffectiveness in moving criminal cases forward, and poor border enforcement. The growth of Internet piracy operating from within Hungary has hurt all of the copyright industries inside and outside the country so enforcement efforts need to concentrate on this form of piracy.

In the 1990s, Hungary made significant reforms to its copyright law. In June 1999, Hungary enacted major revisions to the Law that took effect on September 1, 1999. The revisions were aimed at completing Hungary's bilateral commitments with the United States and its eventual membership in the European Union, as well as to comply with the WTO TRIPS substantive copyright obligations. Included in the 1999 amendments package were provisions to implement Hungary's obligations under the two new WIPO copyright treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty). In fact, Hungary had already acceded to the WCT and WPPT in 1998, becoming one of the first countries in the world to do so.

While the 1999 legislative package of copyright amendments was lauded by the IIPA and its members for the substantive copyright changes, the amendments package was missing several important elements pertaining to copyright enforcement, especially civil and criminal code measures. In 2000, as in years past, the copyright industries experienced prosecutorial enforcement problems even as there remained relatively good police cooperation. The police conduct raids and seizures, but criminal enforcement breaks down at the prosecution and sentencing stages. Prosecution of infringement cases is slow, and the sentences imposed have not been at levels sufficient to deter piracy, especially to combat the sophisticated optical media and other piracy operations in Hungary, including Internet piracy.

Hungary needs fully to comply with its TRIPS Agreement enforcement obligations by fixing its criminal enforcement problems, including the need to impose deterrent penalties. To ensure that Hungary takes the appropriate steps to fix these problems, IIPA recommends that Hungary remain on the Watch List in 2001. We also do so to urge adoption of the necessary legislative reforms in the criminal enforcement system.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	18.0	40%	22.0	40%	19.0	40%	18.0	40%	26.0	60%	26.0	60%
Sound Recordings / Musical Compositions	3.0	20%	4.0	20%	7.0	20%	7.0	20%	7.0	23%	6.5	23%
Business Software Applications* ¹	21.0	50%	30.1	52%	30.8	57%	19.6	58%	32.9	71%	41.8	73%
Entertainment Software ²	9.6	86%	NA	NA	13.2	75%	NA	NA	NA	NA	12.0	64%
Books	4.0	NA	4.0	NA	4.0	NA	4.5	NA	4.5	NA	5.0	NA
TOTALS	55.6		60.1 ³		74.0		49.1		70.4		91.3	

COPYRIGHT PIRACY

For a country with a well developed legal system like Hungary, piracy remains moderately high, and contributes to the overall regional piracy problem due to poor border enforcement. The problem of optical media production and distribution in this region continues to grow. Hungary continues to face the importation of pirate CDs, primarily music CDs being produced in and imported from Ukraine. However, the nature of other pirated material in Hungary is changing somewhat from years past. Although CDs from Ukraine can still be found in Hungary, the flow of lower quality musical cassettes and CDs from Romania and Bulgaria have lessened; these are being replaced by CD-R pirate materials due to the relatively low prices of CD burners and blank CDs.

In years past, there was evidence of the production of pirate materials by CD plants in Hungary being exported to other Central and Eastern European countries as a result of poor optical media production control systems and lax border enforcement. Last year, the Business Software Alliance (BSA) reported that one of its investigations revealed that a Hungarian plant had manufactured stampers containing unlicensed business software and shipped them to the Ukraine, where they were used to manufacture disks ultimately seized in a raid conducted by Moscow police. However, both the recording industry and the software industry now report improvements in Hungary and neither consider Hungary to be a major producer of counterfeit CDs nor a producer of infringing stampers, used to produce disks in Hungary or elsewhere. So this problem, at least for now, has abated, even though optical media regulations were never adopted.

¹BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not available. These numbers were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

³IIPA reported overall losses to the copyright industries at \$30+ million in 1999. This number was adjusted upward to reflect the change in the BSA number in its mid-2000 adjustments.

For the Motion Picture Association (MPA) in 2000, the leading audiovisual piracy concern in Hungary is the high level of back-to-back copying of videos in small rental retail shops. Illicit copying and distribution are also being conducted in private residences, which are relatively secure from the threat of police searches.

Local television and cable companies regularly transmit titles to which they do not have broadcast or retransmission rights. Also, some pirate videocassettes are used for broadcast purposes by the television and cable companies. The level of unauthorized programming is estimated to be 45%; overall cable piracy rates have jumped from 40% in 1999 to an estimated 60% in 2000. The proliferation of pirate smart cards and cable/satellite decoders is also a serious issue, as levels of pay-TV signal theft are now at an estimated 60% level.

Pirates are also beginning to use the Internet to market their wares. Pirate VCDs and CD burners are starting to appear in Hungary, so this could be a problem for the sale of material via the Internet not only in Hungary but abroad. The 1999 Copyright Act amendments included important anticircumvention provisions as well as sanctions for signal theft.

Annual losses to the U.S. motion picture industry due to audiovisual piracy in Hungary are estimated to be more than \$18 million in 2000.

For the recording industry, as noted, Ukraine became the main source of pirated musical CDs entering Hungary once the flow from Bulgaria subsided when production there was halted a few years ago. There are still Ukrainian imports in Hungary, but fewer than there were last year. However, there are now more home-copied CDs appearing in markets and shops alike due in part to the falling prices of CD writers and recordable compact disks (CD-R).

As has been true for several years, the International Federation of the Phonographic Industry (IFPI) reports that one of the greatest threats to piracy in Hungary is ineffective border control. The border enforcement is ineffective because Hungarian Customs Law does not allow for the seizure of goods in transit, even pirate and counterfeit goods infringing intellectual property laws.

Internet piracy and MP-3 CDs continue to be a growing problem in Hungary. The recording industry and business software industry have, to date, received good cooperation in Hungary from Internet service operators, and the new treaty ratification and legislation should improve the remedial situation. But this is a serious situation that needs to be addressed by the courts and enforcement officials; so far there have not been any criminal cases concluded. The BSA reports that police cooperated on three separate raids in 2000 involving Internet resellers of infringing software. On October 13, 2000, the police raided a reseller and found 600 CDs worth U.S.\$ 9,000. This raid led to a second one, where police seized an additional 1000 CDs. Finally, on November 27, 2000 the police raided an Internet reseller and seized 10,000 illegal CDs. The cases are now with Hungarian prosecutors.

In the 1999 amendments, Hungary addressed the long-standing problem of protection for pre-existing sound recordings (pre-1974 recordings). The failure to take action for many years permitted back-catalog material to accumulate in Hungary even as this material was illegal in neighboring countries. Starting on September 1, 1999, when the new law went into force, a one year sell-off period for such material in existing stock was adopted; now that that period has ended, Hungarian police and enforcement officials must work with the recording industry to sweep this material off of the streets, and out of kiosks, flea markets, and retail stores so that it does not interfere with the market for legitimate product.

According to a 1976 customs decree, sound recordings could not be cleared without the relevant certification from the author's society and MAHASZ, the local recording industry association. Because of this clearance system, the import of illegal sound recordings has been significantly reduced and parallel imports stopped. Unfortunately, revisions to the customs code in 1996 eliminated the provision regarding the clearance of sound recordings. As noted, effective border enforcement is badly needed to prevent an influx of pirated materials. The level of audio piracy in Hungary remained at 20%. Estimated losses due to the piracy of sound recordings and music dropped to \$3 million in 2000. This drop was due in large part to an overall decline in the Hungarian market for sound recordings, and in part to the correction of the back-catalog problem, which has already seen some improvement as a result of the legislative fix in 1999.

The BSA was generally pleased by a number of encouraging signs indicating that Hungarian authorities were taking IP protection seriously, from the police to the judges. In 2000, a number of high-profile raids involving large corporate end-users occurred; there were four favorable civil court judgements, one before the Supreme Court, and some cases that proceeded more quickly than anticipated.

The predominant concerns for the software industry are threefold: (1) no *ex parte* search authority for right holders; (2) generally slow criminal and civil proceedings; and (3) inadequate sanctions proffered in many cases. According to the BSA, the average duration of proceedings for a first-level decision was between a year and 14 months for civil or criminal claims; and, they report that the sentences imposed in criminal cases generally involved modest fines and suspended sentences that do not deter piracy.

In 2000, the BSA lost an estimated \$21 million in Hungary; the piracy rate was estimated to be 50%.

The interactive entertainment industry still experiences high levels of piracy. While there have been some improvements controlling large-scale commercial optical disk production in Hungary, the Interactive Digital Software Association (IDSA) reports that the marketplace has seen an increase in the number of gold (recordable) disks produced there, meaning that there are more personal or small shop copies being made for distribution in Hungary, often by syndicates, that is, linked operations of burners, advertisers and those who deliver these materials. And far worse, there are large numbers of gold disks being produced and offered for sale via the Internet and through the mail. Some console material is imported from other countries as well, notably Russia and elsewhere in the region. All of these activities make it extremely difficult for entertainment software publishers to sell legitimate product. The industry is working with police and customs officials hoping to commence criminal cases against the syndicates in the near future to improve the climate for legitimate businesses.

Until last year, there was a large number of entertainment software disks made in Hungary (at the Videotone plant, the only optical media production plant in Hungary) and confiscated in other countries, including Israel, Poland, Germany and the Czech Republic. However, after a highly successful raid undertaken at that CD manufacturing plant in cooperation with other copyright industries, the plant operations there have significantly improved, and there have been no additional reports on entertainment software production problems in 2000.

The IDSA estimates that (according to its preliminary figures) trade losses due to piracy of entertainment software in Hungary in 2000 were \$9.6 million, and the level of piracy was at 86%.

The book publishers (Association of American Publishers, AAP) report no improvements in the Hungarian book marketplace in 2000. Piracy of educational texts, in particular the unauthorized photocopying of this material, continues to be a problem. Estimated losses to U.S. publishers were \$4.0 million in 2000, the same as it has been since 1998.

COPYRIGHT ENFORCEMENT

Criminal Enforcement

The ongoing high levels of piracy in Hungary are the result of the copyright industries' inability to get effective criminal enforcement. As they have for many years, the copyright industries continue to report good police cooperation conducting raids and seizing infringing product. However, the system breaks down after that, namely due to prosecutorial delays and the failure to impose deterrent penalties for those few criminal cases that do reach the judgment stage. The court system is overloaded with a large number of cases, and this contributes to delays in resolving pending copyright cases.

The criminal code is good but needs improvement. In May 1993, the Hungarian Criminal Code was amended to provide higher penalties for copyright infringement, including fines of up to 3.6 million Forints (U.S.\$38,000) and jail sentences of up to five years. In January 2000 further amendments to the Criminal Code increased the maximum jail sentence to eight years for some IPR offenses (such as piracy), with additional increases for other activities (such as two years for signal theft).

In addition, the 1999 Copyright Law amendments amended a 1994 Hungarian Law on Enforcement of Judicial Decisions to establish a special streamlined procedure for the enforcement of judicial decisions in all IPR infringement cases. While IIPA lauded these legislative efforts last year as a good first step, there have been no reports on the actual in-use progress of these new procedures.

As they have in years past, audiovisual antipiracy efforts in Hungary have been conducted by the police throughout the country in cooperation with ASVA, the local antipiracy organization. ASVA continues to report excellent cooperation with the police. Enforcement against duplication facilities in private homes, however, remains difficult. Searches of homes are based on "probable cause" but are undertaken on a very stringent standard which requires testimony from witnesses and documentation establishing that business activity is being carried out on the premises. Evidence of pirate cassettes and duplication equipment has proven insufficient in the past (with pirates claiming successfully that such material is for personal use). Hungarian police have been active in a number of raids and seizures but there are reports of "tip-offs" in smaller communities.

In August 2000, a video pirate was sentenced to 15 months' imprisonment. Unfortunately, even with the new laws and this one successful case, MPA reports that prosecutorial indifference remains a major impediment to combating piracy. In 221 raids conducted through the third quarter of 2000, ASVA reported the seizure of 3,952 pirate videocassettes, down considerably from 1999. ASVA initiated 168 new criminal actions in 2000 and 230 new investigations, both through the end of the third quarter of the year.

Enforcement against recording and music piracy, including production, importation and distribution of unauthorized back-catalog recordings, remained a significant problem for 2000. The 1999 amendments finally fixed the problem of back-catalog recordings, but the one-year sell-off provisions extended the inability to fully address the problem until late in 2000 and it will now take some time to get these illegal materials out of the marketplace. There are also fears that some pirates will try to export the back-catalog material to other markets unless the material is seized or stopped at the border. The recording industry reports limited enforcement measures undertaken against piracy in 2000. The Hungarian police did work cooperatively with the recording industry, but Hungarian authorities need to step up their enforcement activities. Prosecutorial delays and the failure of the Hungarian courts to impose deterrent penalties continue to hamper effective enforcement.

The BSA reported that police cooperation for crimes involving software infringement improved in 2000, with greater police involvement in conducting raids. Delays after raids have taken place still remain a significant problem. Police conducted 11 end-user raids, and seven reseller raids, in 2000 throughout Hungary, including raids in Budapest, Dabas, Szentendre, and Eger. Although other countries in the region performed more raids in 2000, the Hungarian end-user raids were typically large-scale raids. They included raids against one very important Budapest software publisher, one major computer firm, a games developer, a paper factory and one of Hungary's largest pharmaceutical firms. The reseller raids involved more significant hard-disk loaders. About half of these raids led to an indictment, which is a very poor rate and of concern to the software industry. Unfortunately, after an initial raid, in a number of cases, there was no additional action taken for a significant amount of time. For example, one software case that commenced with an important raid in November 2000 has seen no further action as of February 2001, while the police await an expert report.

The software industry reports that prosecutions, even those that did obtain final court adjudication, generally secured sentences involving probation and small fines. The average sentence was between one and twelve months suspended, and the software industry reports no fine above U.S.\$ 1,000; obviously, these are not deterrent penalties to commercial piracy. A Dabas court, for instance, sentenced a reseller to a twelve-month suspended sentence and no fine, despite the reseller causing approximately U.S.\$ 15,000 in damage.

Border Enforcement

Hungary adopted Customs legislation in 1997 in order to meet its TRIPS obligations (Decree No. 128/1997). The Hungarian government reports that this decree applies to both the exportation and importation of infringing goods. The copyright industries remain concerned about its effective enforcement in practice. Because of the ease in which pirated product, particularly pirated digital product (CDs and the like), is imported into and exported from Hungary, it is critical that Hungary's border enforcement system improve.

The entertainment software industry reported that in 2000, as in 1999, they were able to work with Customs officials to seize infringing product at the border. The industry is hoping to participate in additional training and cooperative meetings with Customs officials in 2000 to further improve the enforcement situation at the border.

As noted above, a 1976 decree ruled that sound recordings could not clear Customs without a certification from the author's society and MAHASZ, the local recording industry association. This clearance system significantly reduced the import of illegal sound recordings

and stopped the importation of parallel goods. Unfortunately, revisions to the code in 1996 eliminated the provision. Now, Customs authorities have difficulties distinguishing between legal and illegal products. Since Hungary is both a market and a transit country for pirated optical disks and Hungarian customs rules are not working, revisions to the customs rules must be fixed immediately to stop the cross-border trade in illegal products.

Civil Enforcement

There are still no provisions in the Hungarian law that can grant effective civil *ex parte* search orders. The 1999 copyright law amendments did not change the Copyright Act because Hungarian authorities insisted that such provisions already existed in the civil code. Since the 1999 revisions made no changes, the industry tried to use the provisions found in the Hungarian civil code even though these are not specifically intended to address IP crimes. These provisions are set out at articles 207-209 of the Civil Procedure Act, and permit the procurement of "preliminary evidence" before the commencement of an action. This uncertain and imprecise tool did not prove effective. After testing these old provisions, the software industry is convinced that new provisions are needed to obtain civil *ex parte* searches in practice. To date, the software industry has had one application for preliminary evidence refused by a Hungarian court. In a second case, a court order appearing to permit a civil search was shown to be unenforceable after the target refused to permit entry by an independent expert, leaving no recourse for rightholders, and a criminal raid was then undertaken.

While testing the purported civil *ex parte* provisions of Hungarian law, the BSA managed to achieve some positive civil litigation results in 2000, as they did in 1999. For example, the BSA prevailed in one civil claim against a large end-user, and received the full amount of the claim plus 20% interest. The court entered this judgment a remarkable four months after the initial raid. In another proceeding, the Hungarian Supreme Court ruled in favor of the software publisher in a case that the defendant had appealed. As for criminal proceedings, delay remains a concern. The software industry continues to find that cases take approximately one year on average to reach an initial court hearing, and then a further year on appeal.

Protection and Enforcement Obligations

Hungary currently participates in the U.S. Generalized System of Preferences (GSP) program, which offers duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . ." At the same time that Hungary caused millions of dollars of losses to the U.S. due to piracy, it imported \$304.3 million worth of products without duty, or over 16.1% of its total imports into the U.S. in 1999 (the last full year of available GSP statistics). Hungary should not continue to expect such favorable treatment at this level if it is not providing adequate and effective protection and enforcement of copyright material.

LEGAL REFORM AND RELATED ISSUES

Copyright Law

On June 22, 1999, Hungary adopted amendments to its copyright law; the provisions entered into force on September 1, 1999. The new law, Act No. LXXVI of 1999, was aimed at bringing Hungarian law into compliance with numerous bilateral, regional and multilateral obligations. On September 24, 1993, the U.S. and Hungary entered into a comprehensive bilateral Intellectual Property Rights Agreement, which obligated Hungary to make significant and important improvements in their copyright laws. The 1999 amendments were also aimed at implementing most, if not all, of the provisions of TRIPS and the European Union Directives (including software, rental/lending, satellite, duration and databases), plus the new WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

In 1994 and 1996, Hungary amended its copyright law in light of the WTO TRIPS Agreement and the 1993 Bilateral Intellectual Property Rights Agreement with the U.S. The 1994 amendments (Act VII, entry into force July 1, 1994) extended terms of protection and expanded the scope of protection for producers of sound recordings, performers and broadcasters.

On a positive note, Hungary ratified both of the WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, in October 1998. It deposited its instruments of accession with WIPO in Geneva on November 27, 1998. And in June 1999, in the copyright law amendments, it adopted provisions that, *inter alia*, implemented the two new digital treaty obligations. These developments are all very laudable, undertaken by the Hungarian government to lay the legal framework to combat digital piracy.

In sum, the 1999 amendments addressed the following major issues:

- Full retroactivity for sound recordings was provided, in compliance with the TRIPS Agreement. The 1994 amendments had failed to extend the term of protection for sound recording released prior to July 1, 1974 (twenty years prior to the effective date of the 1994 amendments). As a transition matter, the 1999 amendments provided for a one-year sell-off of existing stock that ended on September 1, 2000. Hungary is also obligated under TRIPS (articles 9 and 12) and Berne (Article 18) clearly to provide such protection for pre-existing foreign works as well. To date, there have been no judicial decisions, but the Hungarian government has assured the U.S. government and IIPA members that such protection is afforded by the existing Hungarian copyright law.
- Exceptions to the exclusive rights of copyright owners were narrowed to comply with the TRIPS Agreement. The 1999 copyright law also established a private copying levy; this provision came into force on September 1, 1999 (the exceptions are the provisions in Articles 21 and 22 relating to devices used for reprography which came into force on September 1, 2000). The Hungarian government should be urged to limit the private copying exception to ensure that it does not extend to digital copying of works or sound recordings. Nor should any private copying exception interfere with the ability of rightholders to protect their works and sound recordings using technological protection measures.
- Communist-era provisions that prevented employers from exercising all economic rights with respect to software created by employees were eliminated. Employers are now able to exercise all economic rights for software created by employees in certain circumstances,

and economic rights are fully transferable (assignable). The law's old provisions of fixed royalty rates in favor of author/employees were removed. The old provisions had acted to discourage foreign and local investment in software development and publishing and inappropriately interfered with the marketplace.

- Protection for encrypted signal was adopted, prohibiting the unauthorized retransmission of signals, and prohibiting the manufacture, distribution, possession, sale, rental and use of unauthorized descrambling devices.

However, the 1999 amendments did not solve the following matters that have been highlighted in previous filings by the IIPA:

- Civil *ex parte* search procedures are still not clearly available as required for Hungary to meet its TRIPS obligations (Article 50). Hungary is required to provide this expeditious remedy to prevent infringements as an effective tool against end-user software piracy in particular. For years, the Hungarian government has argued that this remedy is available under existing law; however, these provisions have not proven as reliable and effective as officials have claimed it to be, and further amendment to the law and/or its implementation in the copyright act are needed to create an effective and streamlined process, as has been promised by the Hungarian government for several years.
- The law currently does not include a presumption of ownership of rights in sound recordings.
- The law currently does not have provisions for the calculation of damages; the Act only refers to general civil law rules on damages, which will not help to adequately compensate copyright owners or producers of sound recordings for infringements.
- The compulsory license for cable retransmissions of copyrighted works was not eliminated. It should be deleted or amended to comply with international treaty obligations, or, at the very least, implemented in full compliance with these obligations.
- Amendments to the Customs and criminal codes to comply with TRIPS to improve border enforcement were not adopted.

In January 1996, the copyright law was amended by the Law on Television and Radio (the "media law") with respect to the broadcasting compulsory license; it entered into force on February 1, 1996. This law requires compliance with copyright as a condition for obtaining and maintaining broadcast licenses and is an important tool in the fight against broadcast piracy.

However, this 1996 law revised, but did not eliminate, the unfair compulsory license that exists for cable retransmissions and certain satellite signals of copyrighted works. The 1996 law eliminated the compulsory license with respect to broadcasters, but not for original rightholders (by amending but not eliminating Article 50G). IIPA had hoped that the 1999 amendments would eliminate the compulsory license altogether because it unfairly allows satellite signals and audiovisual programming to be cable retransmitted without the consent of authors. Unfortunately, this did not happen. Under Section 28(2) of 1999 Copyright Act, cable and pay service operators are authorized to retransmit any film or program received in Hungary. Authorization from the right holder is considered "granted" if the company performing the retransmission has paid a stated fee to ARTISJUS, the state copyright-collecting society. In accordance with the provision of the copyright act, the collected fees are shared, unless otherwise agreed to by the affected parties, among the groups and in the specific proportions as set out in the law.

It should be noted that the European Union Cable and Satellite Directive requires that rightholders have the right to freely negotiate agreements providing for the retransmission by cable of their works. The Hungarian law as drafted precludes free negotiation by effectively setting a tariff rate. The Directive also requires that rightholders have the right to grant or refuse authorization to a cable operator for a cable retransmission thorough a collecting society, a provision not satisfied by the current Hungarian law. Moreover, imposition of a compulsory license for satellite retransmissions is problematic in view of the EU Directive's requirement that states ensure that right holders authorize satellite communications of their works only by agreement.

Criminal Code

In January 2000, Hungary amended its criminal code, increasing the maximum jail sentence to eight years and making signal theft a criminal offense that carries a maximum sentence of two years. The criminal code provisions should improve enforcement if they utilized; also added into the Code were provisions to improve the evidentiary presumptions of copyright ownership. Improvements for border enforcement are still needed.

Government Software Management

The software industry was very pleased when in 1999, sections of the Hungarian government voluntarily engaged in a software management, i.e., legalization program, to ensure that only licensed software was in use. In August 1999, officials in the Hungarian Prime Minister's office disclosed to the industry that that the ministry had legalized its software, and had issued a detailed decree within the ministry in doing so. Under the terms of the decree, the ministry adopted a procurement plan to avoid unlicensed software use. Representatives of that office agreed to move to extend the legalization beyond their ministry. In 2000, the Ministry of Finance issued a similar decree, which applied both within the ministry and to all of its subsidiary offices. By these actions, the Hungarian government has shown that it wants to cooperate with the software industry.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

INDIA

EXECUTIVE SUMMARY

India has a large, significant indigenous copyright industry, across all of the artistic, literary and computer fields. These industries are growing very rapidly despite high levels of piracy. The software industry is expected to grow to a \$90 billion industry by 2008 (with predicted exports of \$50 billion). That industry was also predicted to contribute 7.5% to GDP growth by this period; software exports would account for 30% of all Indian exports by 2008. The music and motion picture industry is predicted to become a \$15 billion industry by 2005. A study done in 1995 concluded that the copyright industries represented over 5% of GDP.¹

With these significant prospects for strong economic growth in the copyright field, it is unfortunate that piracy levels continue to hinder that growth and that the primary obstacles to reducing these rates are police corruption, lack of resources and an overcrowded and ineffective court system that prevents conclusion of even the simplest criminal case. Larger pirates are often protected by the police, and it has become commonplace for only smaller pirates to be raided. Even if these problems were to be solved, the Indian court system continues to present an issue that seems almost incapable of a solution. This problem alone, we believe, significantly hampers Indian economic development.

The criminal system is slow, cumbersome, and fraught with delays and unnecessary expense. To IIPA's knowledge there have only been four criminal convictions for video piracy in India since the effective date of the new copyright law in 1995, and a few convictions for music piracy including two in 2000 with prison sentences of three and two years for music piracy. Most music piracy cases have not reached the trial stage and those that have involved only small fines. There have been no convictions for software piracy. Surprisingly, one industry -- the motion picture industry -- has had better fortune using the civil route by getting countrywide injunctions against cable pirates, even though civil cases take even longer to get to judgment than criminal cases. Judges have been willing to issue contempt citations for violations of these injunctions which have brought some deterrence, though it is estimated that it will take five years to adjudicate a contempt citation through to actual enforcement. What is crystal clear from all of this is that the enforcement system is inadequate to the task of dealing with piracy and must be substantially reformed.

At the end of 1999 India adopted a number of amendments to bring it into compliance with its new TRIPS obligations. While it generally did so in the copyright area, the Parliament also passed new, unanticipated exceptions to protection for computer programs which do not pass muster under the tripartite test of article 13 of TRIPS. A new Information Technology Law was

¹ However, a study conducted in 1997 for the Indian government by the National Productivity Council set the number at only 1%, which even the authors thought was too low due to the unavailability of adequate information.

adopted in May 2000 and while it deals with some aspects of ISP liability, it is reported that it is not meant to deal with copyright issues.

India's new government has established a core group to study WIPO treaties ratification. It is expected that a report will be issued in spring 2001. It is hoped that the core group will follow the lead established in the DMCA and E-Commerce Directive, but that is uncertain at this time. It is strongly in India's interest to implement these treaties correctly and fully, and to ratify them.

Because of India's continued inability to bring deterrence into its enforcement system, IIPA recommends that it be kept on the Watch List for 2000.²

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	47.0	60%	66.0	80%	66.0	80%	66.0	80%	66.0	85%	58.0	99%
Sound Recordings / Musical Compositions	6.0	40%	8.0	40%	6.0	30%	6.0	40%	7.0	30%	10.0	30%
Business Software Applications ³	195.2	63%	160.2	61%	158.0	65%	148.7	69%	182.4	78%	114.6	78%
Entertainment Software ⁴	NA	80%	42.8	86%	36.8	84%	35.9	82%	31.4	78%	25.8	76%
Books	36.0	NA	35.0	NA	30.0	NA	22.0	NA	25.0	NA	25.0	NA
TOTALS	284.2		312.0		296.8		278.6		311.8		233.4	

COPYRIGHT PIRACY IN INDIA

Piracy pervades all the copyright industries – domestic, U.S. and international. For the film industry, unauthorized cable television transmission remains the predominant form of piracy. As many as 40,000 cable systems exist in India, and these systems continue frequently to transmit U.S. films without authorization, often using pirated videos or video CDs (VCDs) for their transmissions. These cable systems seriously undermine the entire business, including theatrical, home video and legitimate television. Since 1999, MPA has brought civil actions in an attempt to limit cable television piracy. This has been effective in reducing piracy for U.S. films, but Indian films continue to suffer significant losses at the hands of pirate cable operators. The passage of the amendments to the Cable Television Networks (Regulation) Act, 1995, discussed below in the

²For India's long involvement with the Special 301 process, see the history in Appendix E.

³BSA loss numbers for 2000 are preliminary.

⁴ IDSA estimates for 2000 are preliminary.

legislation part of this survey, has reportedly had some effect in deterring piracy, though no actions have yet been brought under it.

Pirate videos and VCDs are available in major cities well before the local theatrical release of the title. Video piracy rates of U.S. films have dropped somewhat, to around 60%, owing to the continuing enforcement activities by MPA. The piracy rates for Indian motion pictures continues to remain very high, from 80% to 90%. There is hardly any Indian film title which is not readily available in pirate video format within a few days of its theatrical release.

VCDs are mostly imported from elsewhere in Asia, many from Malaysia and now Pakistan. This pretheatrical-release piracy has devastated the Indian film industry to such an extent that Indian producers have made simultaneous theatrical and video releases of their titles, unique to almost anywhere else in the world.

In November 2000, MPA undertook its first raid on a CD plant in Rajasthan, where 40,000 VCDs were seized of pornographic and Hindi blockbusters. Fortunately no U.S. product was found, but the size of the seizure indicates the growing threat of optical media piracy in India. Another investigation led to the discovery of one of the largest distribution channels for pirate films in India.

The recording industry reports that piracy rates stayed steady in 2000 at 40% nationwide. Most of the audiocassette piracy is not in the retail shops, but limited to street vendors. A very large percentage of pirate unit sales in India continue to be in the cassette format. CD piracy tends to be limited to international repertoire and pirate copies are generally imported, like VCDs from the rest of Asia and predominantly Malaysia, though the problem of local pirate production is increasing. In addition, other industries have reported the sourcing of some pirate production in the export market from India. Many shops in major cities now use CD burners and are able to make compilations of music at the request of a customer – an increasing problem.

The recording industry also reports increasing instances of Internet piracy in India. The local industry estimated in April 2000 that there were over 30 Indian sites containing infringing MP3 files for download. A complaint was filed by IMI, the local recording industry trade association, against a Web portal and IMI now reports that the site has applied for a license to stream Indian-origin music.

With respect to business software applications, India is still the third largest producer in the world. The incredible growth noted in the summary above may be attributable in part to the strong emphasis on anti-piracy activity spearheaded by NAASCOM. The business software piracy rate in India has dropped consistently, from 78% in 1995 to 63% in 2000, a 2% increase from 1999. It can be reasonably expected that further reductions in piracy would only benefit the burgeoning software industry and the American companies that work and partner with these companies. Piracy is mostly concentrated in the end-user category with major Indian companies not purchasing legitimate software. However, piracy at the retail and wholesale level is also prevalent.

Interactive Digital Software Association (IDSA) members continue to report moderate levels of piracy in India, including the manufacture of pirate games, some pirate exports, and difficulties with enforcement. Losses for 2000 are not yet available and the piracy rate is 80%.

The Association of American Publishers, which had teamed up with the British Publishers Association and the Federation of Publishers and Bookseller Association of India in 2000 to commence a joint enforcement program, estimates that for each genuine book sold in India, four copies are unauthorized, either pirate reprints or commercial photocopies – a piracy rate of 80% for foreign works, up significantly from prior years. Piracy covers all lines, trade, textbooks and professional and scholarly publishing, including journals. Exports of India-only reprints, found in large quantities throughout the Middle East and southern Africa, particularly South Africa, and traditional piracy of books continues. A recent raid in Mumbai, described below, resulted in the seizure of over 19,500 trade books and 800 technical books.

COPYRIGHT ENFORCEMENT

Criminal Enforcement and India's TRIPS Obligations

As noted above, criminal enforcement has been the most frustrating problem for the copyright industries. While all industries have reported occasional good cooperation from the police, this is far from the norm, and the situation has appeared to deteriorate. Police are often responsible for leaked information before raids and are generally slow to act. Raiding has been at a relatively high level, and often arrests are made with defendants spending some time in jail before posting bail – bringing some deterrence into the system beyond mere product seizures. Moreover, criminal enforcement in India is a state matter; there is no national coordination of enforcement, leading to wide variances in capabilities and results throughout India. Many Indian right owners are now calling for an IPR court system and a better trained and broader based IPR police force. Both the courts and the police are considered to lack basic knowledge and sensitivity to IPR issues.

There are many procedural hurdles at the police level which hamper enforcement. For example, even though police can act on their own to seize pirate product under some laws, they invariably require a complaint from the rightholder. The police will then only seize the product of that rightholder, even though the presence of other pirate product is open and obvious. Following a raid, police can take up to a year to prepare the charge sheet on a defendant and then leave out pertinent information. Often investigations are cursory, with no attempt being made to follow the source of supply or find out pertinent details from the shop owner. When the charge sheet is presented in court, cases are routinely dismissed due to the insufficiency of the charge and the evidence supporting it. The police also often insist upon the complainant producing copyright registration certificates for each film found at the time of the seizure. Such a requirement is contrary to Indian law.

Because criminal cases proceed so slowly, the investigative officers have often been transferred to a remote location and the trial is delayed further by the task of securing their presence. With such long delays, the evidence is often missing or unusable. These investigative officers must be present at the trial, which may be many hundreds of miles away. If he does arrive, the defendant can easily postpone the hearing or trial.

As reported in last year's IIPA submission, as a result of these problems, in 1999 the motion picture industry decided that the criminal system no longer was proving useful to the industry in fighting its major problem, cable piracy, and moved to a civil litigation strategy. As described in part above, the problems encountered were manifold, including severe delays in closing criminal cases (up to seven years), corruption and leaks of information, the need for timely raids

with police resources not being available on short notice, the need to have investigators and complainants present at every hearing, in spread out locations for the entire period of the pending case, the need to track multiple hearings in diverse locations, frequent continuances for depositions, etc. (There is no continuous trial in India).

In moving to a civil strategy, the industry was able to obtain broad injunctive relief, backed by contempt powers. Rather than be at the mercy of the police, public prosecutors and defense counsel who regularly continued proceedings, civil cases, because of these injunctions, have proven more effective – a result almost unique in the global enforcement against copyright piracy. Nevertheless, while these procedures have had a deterrent effect, defendants regularly challenge these injunctions and MPA reports that it will take up to five years before a contempt citation is actually enforced. In one of the injunction and contempt proceedings undertaken above, the injunction was issued in August 1999 and the first hearing was not scheduled until August 2000.

The record in criminal cases has been appalling, despite a strong law with penalties of no less than six months imprisonment and minimum fines. In the film field, reported convictions have not exceeded four, all discussed in last year's submission. There were three convictions under the pre-1995 amendments (e.g., before the higher penalties were adopted): the first in January 1997 in a Bangalore court where a video pirate was sentenced to three years hard labor in a case from 1993; the second in May 1997 when a New Delhi Magistrate sentenced a cable operator to six months imprisonment, to be served in hard labor, and ordered a fine of Rupees 5,000 (U.S.\$115); the third in early 1999 (involving a raid conducted in 1986!) where the sentence was one-year imprisonment and a fine of U.S.\$118. The May 1997 conviction was the first conviction against cable piracy. A fourth case was decided in December 1998 against a video pirate – the first case under the new 1995 law. It is reported that some of these cases were then reversed on appeal.

The statistics go downhill from here and there has been little change in 2000. Despite bringing a large number of cases over the years, the recording industry has obtained only a few criminal convictions in the south of India subject to small fines – reportedly at a maximum of Rupees 25,000 (U.S.\$605), far below the minimum required in the law. However, as noted above, there were recently two convictions with jail terms of three and two years, respectively – a positive sign. BSA has undertaken many criminal raids against retail and wholesale pirates between 1995 and 2000, in which 118 people were arrested and considerable pirate product seized. Over 70 criminal cases are pending with none having proceeded past the most preliminary stages, much less to trial or conviction. In 2000, 26 raids were run and 74 criminal cases are pending. MPA ran 104 criminal raids in 2000 with only limited results. Trials in these cases have yet to commence and it is too early to predict whether there will be convictions. MPA currently has 505 cases pending in the courts. Thus, in 2000 there have been no trials and no convictions.

The joint publishing industry enforcement effort bore fruit in November 2000 with one of the largest criminal book piracy raids in Indian history. Over 19,500 trade books were seized in Mumbai, along with 800 scientific, technical and medical books and two photocopiers. Seven persons were arrested and the magistrate gave each six days of pretrial detention. Further investigation, growing out of this one, may turn up an even larger ring. Raids have also been conducted in New Delhi (together with the Federation of Indian Publishers) and in Hyderabad. Seven arrests, two large truckloads of books and five high-speed photocopiers were seized. Additional raids in other cities are planned. All this activity seems to have had a deterrent

effect, but this has not yet been reflected in lowered losses and rates and likely will not be until deterrent convictions are secured.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000

ACTIONS	MPA	IFPI	TOTALS
Number of Raids conducted	104	1054	1158
Number of indictments filed	96	600	696
Number of defendants convicted (including guilty pleas)	0	NA	
Ratio of convictions to the number of raids conducted	0%	NA	
Ratio of convictions to the number of indictments	0%	NA	
Total number of cases resulting in jail time		2	2
1 to 12 months	0		
13 to 24 months	0	1	1
25 to 36 months	0	1	1
37 to 60 months	0		
Over 61 months	0		
Number of cases resulting in criminal fines	0	NA	
Total amount of fines levied	0	NA	
U.S.\$0-\$1,000	0		
\$1,001-\$5,000	0		
\$5,001-\$10,000	0		
\$10,000 and above	0		
Total amount of restitution ordered in how many cases	0	NA	

CIVIL ENFORCEMENT

The failure of the criminal system, as noted above, has led one IIPA member – MPA -- to alter its enforcement strategy from criminal cases against cable pirates to bringing civil cases. The association was able to obtain a number of broad injunction orders, backed by the threat of a contempt conviction if the orders are violated, which have been effective in the fight against cable piracy. To date MPA has filed eight civil actions against some of the largest cable networks in the country. The injunctions cover these cable networks in over 45 cities consisting of in excess of eight million cable homes. Three contempt proceedings have also been initiated against these networks for violating court orders, but as noted above, these cases have been substantially delayed. Nevertheless, these contempt orders have had a deterrent effect and MPA's estimates that cable piracy has been brought down by 50%. Encouraged by this initial success, MPA has filed civil actions against other forms of piracy as well. In one of these, against shop owners in Palika Bazaar in New Delhi (these shop owners were part of a larger network supplying pirate product throughout Northern Indian and even Pakistan), an initially successful civil raid turned sour when the shop owners protested and the police returned over 40,000 seized

VCDs back to them. The police openly conspired with the shopkeepers to ensure that the seizures could not take place. However, the court ultimately issued injunctions and the shop owners remain in jeopardy. The court is now conducting hearings for return of the seized property as well as for contempt of court for obstructing the local commissioners. The shopkeepers have been asked to be personally present in court to explain how the goods were allowed to disappear. At least for the time being, the shopkeepers are not engaged in piracy of U.S. videos.

BSA and NASSCOM have also filed nine civil cases against corporate end-users since 1998 and all but two have been settled. There are also 31 active civil cases against counterfeit resellers and hard disk loaders. These cases are costly to maintain and difficult to settle due to the slowness of the system and the lack of jeopardy points during a noncontinuous trial process.

**CIVIL COPYRIGHT
ENFORCEMENT STATISTICS
2000**

ACTIONS	MPA	IFPI	TOTALS
Number of civil raids/searches conducted	5	0	5
Post Search Action			
Cases Dropped			
Cases Settled			
Cases Adjudicated			
Value of loss as determined by Court (U.S.\$)			
Judgment Amount (U.S.\$) in how many cases			
U.S.\$0-\$1,000			
\$1,001-\$5,000			
\$5,001-\$10,000			
\$10,001-\$20,000			
\$20,001-\$50,000			
\$50,001-\$100,000			
\$100,000 and above			
Settlement Amount (U.S.\$) in how many cases			

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

1. Maximum statutory fines are too low to deter major infringements and the reported requirement that actual knowledge be proved in criminal cases violates TRIPS articles 41 and 61.
2. There have been negligible criminal convictions for piracy in India since 1995 and after 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. Civil *ex parte* searches are available and are reported to be more readily available than as reported in last year's submission.

Lack of Customs Enforcement

The import of motion pictures into India is covered by the Restricted List of the Export and Import Policy of India. Subject to certain exceptions, imports even of legitimate films are not permitted without an import license, a market access issue that has been the subject of industry complaint for years.

Import of any pirated films into India is specifically prohibited under the Export and Import Policy 1997-2000. This includes import in any format, including on videotape, VCD, LD or DVD. Import of pirate motion pictures in any form is considered smuggling and the goods are subject to confiscation. The Customs Act establishes a maximum jail term of up to three years makes the person who acquires possession of, or is in any way concerned in, carrying, removing, depositing, harboring, keeping, concealing, selling or purchasing or in any other way dealing with any goods he knows or has reason to believe are smuggled, equally liable for punishment.

Despite the strength of this law, the Customs authorities almost never enforce it against importers of pirate motion pictures.

DEFICIENCIES IN THE STATUTORY AND REGULATORY REGIME

Copyright Law and Enforcement Provisions: India's TRIPS Legislation

The Copyright Act of 1957 was amended in 1994, and was implemented on May 10, 1995, resulting in one of the most modern copyright laws in any country. In 1995, a number of significant changes were made, including to the enforcement provisions. Minimum penalty provisions (sections 63, 63A and 63B) provide for a mandatory six-month minimum jail term for commercial piracy, with a maximum term of three years, and a minimum fine of 50,000 rupees (U.S.\$1,210) and a maximum of two lakh rupees (U.S.\$4,840). The minimum jail term was doubled to one year and the minimum fine increased to one lakh rupee (U.S.\$2,420) for a second and subsequent offense. "Use" of an infringing computer program now carries a minimum jail term of seven days and a minimum fine of 50,000 rupees (U.S.\$1,210). With the exception of the level of fines, which should be increased, these are among the toughest criminal provisions in the world. Unfortunately, they have not been implemented.

Overall, the new law was TRIPS-compatible from the standpoint of substantive rights, except that the term of protection for performers needed to be increased from 25 to 50 years. At the end of 1999, the Indian government drafted and the Parliament adopted a number of further amendments intended to bring its IP laws, including the Copyright Act of 1957, into compliance with TRIPS. These amendments were signed by the President of India on December 30, 1999 and went into force on January 15, 2000.

India Backslides in Protecting Computer Programs

The TRIPS-related copyright amendments fixed the remaining deficiencies in India's statutory law in the area of substantive rights. However, three new amendments, added at the last minute and not related to India's TRIPS obligations, severely compromise the high level of protection that India has always afforded computer programs. The amendments added three new exceptions to the protection for computer programs in sections 52(1)(ab) – (ad). Subsection (ab) grants an overbroad exception permitting the decompilation of computer programs; subsection (ac) provides an exception apparently permitting unauthorized reproductions to observe the functionality of a program without the proper safeguards of TRIPS article 13; and another broad exception in subsection (ad) allows the making of multiple copies and adaptations of programs "for non-commercial personal use," again without article 13 safeguards. Subsection (ad), unless narrowly interpreted by a court, would permit such uses to substitute for the normal licensing of software to home and even business customers, so long as the copies are used for "personal" purposes. IIPA and BSA believe these new and unexpected changes to India's regime for protection of computer programs violate TRIPS article 13 establishing a tripartite test for measuring whether exceptions to protection are legitimate or not.

Cable Law Amendments

In a further effort to reduce film piracy by cable networks in India, the Government has adopted certain far-reaching amendments to the Cable Television Networks (Regulation) Act, 1995 on September 9, 2000.

The new rules prohibit cable operators from carrying or including in their cable service any program that has not been granted a license in writing by the owner(s) of the copyright in respect of such programs. Such transmissions if made, shall constitute a violation of the "Programme Code" [Rule 6(3)]. The District Magistrate/Sub-Divisional Magistrate and the Commissioner of Police have been designated as "Authorized Officers" to enforce the Programme Code. If any of these "Authorized Officers" have reason to believe that the Programme Code has been or is being contravened by any cable operator, they have been empowered to seize the equipment being used by the cable operator for operating the cable television network. These "Authorized Officers" are also empowered to prohibit any cable operator from transmitting or re-transmitting any program or channel which violates the Programme Code. This is clearly a positive development and the law fills a lacuna in the Cable Act wherein previously there was no specific prohibition against exhibiting pirated films on cable networks. As noted above, not a single action has been brought under these new amendments.

A proposed Communications Convergence Bill will replace the Cable Television Networks (Regulation) Act 1995 and its amendments. IIPA has not reviewed this bill but it apparently contains good IPR provisions including (a) granting the Communications Commission of India the same power vested in a civil court under the Code of Civil Procedure 1908 while trying a suit; (b) requiring every service provider to ensure that no program infringes a copyright; and (3) imposing penalties for violation of up to rupees 10 crores (U.S.\$24,000).

The WIPO Treaties and the New Information Technology Bill

With its powerful and growing software and IT industries, the largest and most sophisticated entertainment industries in all of Asia, and a large English language publishing industry, India is a prime candidate for early ratification of both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. India has signed the treaties and the government has appointed a “core group” of academics and private sector representatives to review India’s possible ratification and implementation of the treaties. IIPA has also heard that some drafting may even have been done. IIPA has no current information on what tack the “core group” is taking but a report is expected to be released this spring.

Fortunately, India is a long way down the path of implementing the provisions of the treaties and should take the lead in Asia in the area of ecommerce by adopting this critical element of infrastructure. India’s copyright law already conforms to many of the key provisions of the treaties. For example,

- The Copyright Act’s provisions on the reproduction right can already be read to cover temporary copying in accordance with the treaties’ “agreed statement” on the reproduction right. A simple amendment avoiding any ambiguity on this important point would be advisable, however, and involve merely the addition of the words “whether permanent or temporary” after the words “in material form” in Section 14(a)(i) of the act.
- The act also appears to implement the treaties’ “right of communication to the public,” including the making available right in Section 14. The making available right could also be made a feature of the Act’s distribution right through a simple amendment to that right in Section 14.

However, the Copyright Act cannot be read to implement the treaties’ obligations with regard to technological protection measures (TPMs) nor with respect to protection of electronic rights management information (RMI). We are informed, however, that Section 25 and 107 of the Penal Code may cover some, but not all, of the elements of this obligation.

In 2000, India adopted its “Information Technology Bill.” While IIPA has not reviewed the bill as finally adopted, it reportedly contains provisions to deal with the fast-approaching world of electronic commerce, deals in major part with electronic signatures and authentication, and establishes a certification regime. In addition it sets out new offenses for various types of computer crime. The new law does not fully implement the WIPO treaties’ requirements on TPMs or RMI, though there are apparently provisions touching on part of those obligations. It also reportedly contains provisions on ISP liability, but apparently not with respect to copyright infringements which may be covered in the core group report and dealt with, if at all, in the copyright law amendments implementing the WCT and WPPT.

Generalized System of Preferences

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide “adequate and effective

protection of intellectual property rights.” In 1999, \$1.02 billion of India’s imports to the United States benefited from the GSP program, accounting for 11.2% of its total imports to the U.S. For the first eleven months of 2000, \$1.1 billion of Indian goods entered the U.S. under the duty-free GSP code, representing an 11.9% increase over the same time period last year. At the same time, India caused losses to the U.S. due to piracy of \$284.2 million (not counting entertainment software losses which are not yet available) in piracy losses in 2000.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

ITALY

EXECUTIVE SUMMARY¹

With the passage of the Anti-Piracy Bill ("AP Law") in July 2000, there is increased hope that Italy's massive piracy problem can finally be reduced. However, the law became effective on September 19 and, while the preliminary indications are that the law is becoming more aggressively enforced, more time is needed to determine whether it will be fully implemented, including the imposition of the new higher level fines and jail terms, and whether appropriate regulations will be issued.

Piracy rates exceed 20% and higher across the board – still among the highest rates in Western Europe.

USTR reviewed Italy's Special 301 status in September 2000 and lowered it to the Watch List in recognition of the passage of the AP Law. But the jury remains out on whether the Italian authorities will fully and aggressively implement the new law, though initial indications are positive. Incorporating real deterrence into the Italian legal system remains the key enforcement issue.

IIPA is also concerned that Italian officials may not implement appropriate regulations – or apply those regulations in an appropriate way – to exempt high technology products (particularly software) from a burdensome and TRIPS-inconsistent "stickering" provision of the new law. For all these reasons, Italy should remain on the Watch List in 2001, and an out-of-cycle review should be conducted within six months to determine whether significant progress on these outstanding issues has been made.¹

¹For more details on Italy's Special 301 history, see IIPA's "History" Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	140.0	20%	160.0	25%	200.0	30%	220.0	30%	278.0	35%	294.0	40%
Sound Recordings / Musical Compositions	50.0	25%	60.0	25%	60.0	20%	60.0	20%	51.0	22%	128.0	33%
Business Software Applications ²	NA	NA	338.4	44%	276.5	45%	216.4	43%	291.9	58%	386.5	61%
Entertainment Software ³	NA	52%	60.9	52%	58.2	50%	61.8	53%	65.0	55%	73.0	52%
Books	23.5	NA	23.0	NA	21.0	NA	20.0	NA	20.0	NA	20.0	NA
TOTALS	213.5		642.3		615.7		578.2		705.9		901.5	

COPYRIGHT PIRACY IN ITALY

While Italy is to be commended for passing the long-awaited Anti-Piracy Bill in 2000, piracy rates in Italy across all industries remain at 20% or higher, as has been true for the last 10 years. These high piracy levels have been fueled by Italy's having had among the lowest statutory criminal penalties in Western Europe and a judicial system infamous for crushing delays. This had been combined with a national attitude, reflected in the Judiciary, that even serious economic crime does not deserve high fines and jail terms where intellectual property is concerned. The AP Law contains all the elements necessary to start the downward trend in piracy rates and losses, with higher maximum criminal penalties making it a serious crime, clarification of the criminality of business end-user piracy, the addition of administrative sanctions and a number of other provisions specifically targeted at copyright piracy. IIPA and its members have praised the Italian government for finally taking this important legislative action, but the copyright industries remain concerned about implementation and the failure to date to further fix certain deficiencies by regulation that seriously impact the business software industry. On the positive side, however, as will be discussed below, enforcement actions by the authorities have increased, and in some cases, significantly, following passage of the AP Law.

Video piracy of motion pictures before and during their Italian theatrical release remains a serious piracy problem in 2000 and continues to cause the film industry's highest losses in Western Europe. The rate of piracy has not come down and remains at 20% in the northern region, and 30%-40% in the south. Pirates normally use stolen theatrical prints as masters, or they duplicate directly from cinema screens. The areas of Italy most affected by this kind of piracy are Campania and Lazio, Puglia, Calabria and Sicily in the south, as well as Veneto and Lombardy in the north. Organized criminal groups dominate this prerelease video piracy. Back-to-back copying of videos for copy depth in video shops is also a persistent problem, particularly in the high demand period immediately after a title's video release.

²BSA loss numbers for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

Other problems facing the motion picture industry include unauthorized public performances in social centers and private clubs both of pirated prints of theatrical films and of rented and purchased videos; broadcast TV piracy, particularly in southern Italy and Sicily; and significant growth of satellite signal theft of commercial pay television. The two Telepiù terrestrial channels (Telepiù White and Telepiù Black) and the three Telepiù satellite channels (Telepiù White, Telepiù Black and Telepiù Grey) and their digital "bouquet" "D+", as well as other encrypted satellite channels from abroad, are received and descrambled without authorization using illegal decoders and smart cards. The trade in illicit smart cards has increased significantly over recent years, and more pressure from pirates on the legitimate industry is expected.

Piracy of sound recordings, both locally manufactured pirate cassettes and local and imported pirate CDs, remains at 25%, the same as in 1999 and still the second highest in Western Europe. Especially in the south (Naples area), organized criminal gangs are responsible for most of the audio as well as video piracy. The music industry is plagued by major imports of pirate product from countries like Ukraine and increasing use of CD burners to produce pirate product. Much of the piracy is associated with the Camorra and other Mafia gangs in southern Italy, and involves major CD-R "factories" with an intricate distribution network including "megastores" in which the front men operating retail facilities are paid by these gangs to "take the rap" when raids are conducted and arrests made.

Piracy of entertainment software has continued at high levels, both in sales of hard copies of PC and console games, as well as through persistent hacking and Internet piracy. This piracy is also under the tight control of the Mafia, not just in the South but throughout Italy. The entertainment software industry experiences, like the music industry, high levels of importation of pirate product into Italy from production centers in Eastern Europe, the C.I.S. and Asia, particularly Ukraine, Russia, and Malaysia with Malta and Croatia continuing as transshipment points for pirate game product.

Internet piracy continues in 2000 as the Web penetrates Italian society. There appears to have been little enforcement in this area to date.

Piracy of business applications software by corporate end-users -- the major concern of and problem for the business software industry in Italy -- remains among the highest in Europe. As described below, however, there have been recent positive developments on the enforcement front since passage of the AP Law. However, these gains could be substantially eroded, if not nullified, by a burdensome and TRIPS-inconsistent provision of the new law that Italian officials are interpreting to require that certain software products bear a sticker of the Italian collecting society, SIAE, in order to benefit from the protections afforded by the new law. This issue is discussed in greater detail below.

Wide - scale photocopying piracy has been a constant problem in Italy and has gotten noticeably worse every year. This is due to the failure of the enforcement authorities to take action. Frustrated by the breadth of the problem and the failure of the government to combat it, the publishing community sought and received in the new AP Law the authority to require remuneration for the act of photocopying. Thus, the new AP Law now requires payment per photocopy made. An accord was signed between the copy shops and the Italian Publishers' Association on December 18, 2000, setting payments at 65 lire (\$0.0311) per page after January 1, 2001. This will increase to 85 lire (\$0.0407) per page from September 1, 2000 and increase every year until 2005, when it will be 135 lire (\$0.0646) per page. No agreement has yet been reached with librarians, so copying in universities continues. It is hoped that this agreement will be reached shortly, and that the situation in 2001 will improve for the book market.

All these industries are also united by the common problem of a judicial system that is in dire need of reform so that caseloads can be reduced and brought to final judgment. Italian judges must also take more seriously the need to set deterrent – level fines and, in particular, significant jail time for major organized crime elements. With the increased penalties, the judges have the tools. The question is whether they will be used. While the Anti-Mafia police and prosecutors have generally done a good job in raiding and prosecuting organized crime, resources are insufficient and the courts have been a continuing problem.

COPYRIGHT ENFORCEMENT

Criminal Enforcement and Italy's TRIPS Obligations

Effective criminal enforcement has been hindered for years by the weakest statutory criminal penalties in Western Europe and the continued unwillingness of judges to impose them. Now, with the significant increases in statutory penalties, Italy is poised to attack the piracy problem anew with the proper tools. Police have generally been cooperative despite the frustration of criminal cases rarely being concluded, or any eventual penalties being so low that there is virtually no disincentive to be in the piracy business. It remains to be seen whether under the AP Law, the judges will impose these new penalties as a precondition for the piracy rates and losses to begin falling in Italy. All industries use the criminal system; the civil system is even slower and less efficient.

The new AP Law raises maximum fines from 3 million lire (\$1,450) to 30 million lire (\$14,505). Minimum prison terms are increased from three months to six months but still, may be suspended at this higher level. Maximum prison terms are raised from three to four years, rendering piracy a more serious crime as a result. In a precedent – setting decision, the Parliament established consumer fines in the law for possessing infringing material, to be imposed instantly, of 300,000 Lire (\$145).

Despite these salutary changes, there remain many enforcement deficiencies common to all industries:

- Failure to impose deterrent criminal penalties in commercial piracy cases: Before the new AP Law, Italian courts did not impose even close to the maximum penalties now available resulting in minimal deterrence to infringement. This was often the result of plea bargains agreed by prosecutors anxious to remove cases from their workload. Before the new Law, penalties *actually* imposed on pirates remained among the lowest in the EU. When jail terms were imposed, they are nearly always suspended or, in past years, pirates were subject to general amnesties, reducing the deterrent effect of these actions. Perhaps most pernicious was that recidivism was rampant with examples of pirates being convicted numerous times with no increase in penalties. The recording industry gives the example of one person in Naples having been denounced 84 times. In order for Italy to meet its TRIPS obligations, the prosecutors and judges must ensure that the new penalty structure is *actually* implemented. So far most industries have little evidence that this has happened.
- Absence of expeditious criminal remedies and avoiding unwarranted delays: Under the old law and continuing in 2000, it takes many months following a raid before charges are filed commencing a criminal case in court. Rightsholders often have difficulty obtaining

any information about the progress of cases and learn of plea bargains months or years after the fact with no opportunity for comment. This is reflected in the absence of reports from industry on the actual progress of criminal cases. Once filed these cases can drag on, often taking two to three years or more, significantly reducing the deterrent value of any increased raiding activity undertaken by the police. When the case gets too old (five years), it is simply dismissed. Defendants are aware of this five-year limit within which to conclude the case and their lawyers merely delay the proceedings until this limit is reached. This failure violates TRIPS Article 41.

- Conditioning criminal remedies for software infringement on using an SIAE sticker: The new AP Law in Article 13 may be misinterpreted to legalize all pirate software that merely bears a SIAE sticker. Worse, the criminal remedies provided in the current version of Art. 171*bis* for software infringement are arguably not available if a work does not bear the SIAE sticker. As discussed further below, this stickering requirement violates several provisions of the TRIPS Agreement by constituting an impermissible formality to copyright protection, denying the availability of efficient criminal remedies in cases of copyright piracy, and erecting a costly barrier to legitimate trade.

Italy has not been in compliance with its TRIPS enforcement obligation for years, with respect to low criminal penalties in its law, the failure to impose deterrent penalties, and long delays and cumbersome court processes. The AP Law solves the first of these problems but the others remain. These new penalties must be applied in practice and judicial reform must be taken seriously. As was recommended in last year's submission, Italy should establish a national, well coordinated antipiracy campaign. Such a campaign would be instrumental in establishing the proper atmosphere, as would the establishment of regional coordination groups in each prefecture with the participation of special IPR – trained prosecutors. All of these initiatives must be supported by an extensive public information campaign to convince enforcement authorities and the public of the damage being done to the Italian economy from failing to effectively fight piracy.

The deficiencies in the Italian criminal enforcement system, which IIPA and its members hope will be remedied as the AP Law is implemented, are perhaps best illustrated by the following partial enforcement statistics:

**CRIMINAL COPYRIGHT
ENFORCEMENT STATISTICS
2000**

ACTIONS	MPA	IFPI	BSA	TOTAL
Number of Raids conducted			257	257
Number of indictments filed		309	130	439
Number of defendants convicted (including guilty pleas)	19		NA	19
Ratio of convictions to the number of raids conducted			NA	
Ratio of convictions to the number of indictments			NA	
Total number of cases resulting in jail time			NA	
1 to 12 months	12			12
13 to 24 months	5			5
25 to 36 months				
37 to 60 months				
Over 61 months				
Number of cases resulting in criminal fines	2			2
Total amount of fines levied				
US\$0-\$1,000				
\$1,001-\$5,000				
\$5,001-\$10,000				
\$10,000 and above				
Total amount of restitution ordered) in how many cases (e.g. \$XXX in Y cases)				

The motion picture industry reports that in the 24 criminal cases in which FAPAV assisted the prosecutor and that ended in 2000, 71% resulted in a prison term and virtually every sentence was suspended. Only 8% of the convictions resulted in fines (or jail terms commuted to fines) and 21% were acquittals. 50% of the cases involving fines resulted in fines of less than L 600,000 (\$285).

The recording industry reported a major victory in September with the arrest of a major and long-sought-after Mafia boss, Ettore Bosti, the nephew of the emerging Camorra gang leader Patrizio Bosti. The operation was led by the military police and led to the seizure on an entire CD-R plant and 120 CD burners, 15,000 inlay cards, 10,000 CDs and 10,000 jewel cases. Three other high-level gang members were also arrested. Over all of 2000, the industry reported seizing 798,927 CDs, 115,307 audiocassettes, 593 CD burners. Ninety-six people were arrested and 309 cases were commenced. The industry reports that actions in the last four months of the year 2000, particularly against street vendors, increased 600%, holding out considerable hope

that the new AP Law will result in reduced piracy levels in the future, which remain the same as last year at 25% of the market.

The business software industry reports some positive developments on the criminal enforcement front. In 2000, the Guardia di Finanza, the national fiscal police, demonstrated an unprecedented level of support for the business software industry, conducting roughly 250 criminal raids throughout the nation (mostly on a regionalized basis), with strong industry support. Local carabinieri and the national Telecommunications Police also engaged in substantial criminal enforcement activities directed at software pirates -- including a carabinieri sweep of one entire city's suspected end-user population. In all, roughly 130 individuals were charged with criminal piracy and counterfeiting of business applications software in Italy last year, and hundreds of thousands of illegal products were seized and destroyed. Much of this increased activity occurred in the fourth quarter of the year, after the AP Law took effect. Efforts in the South produced noticeably improved results over prior years. And overall, several industry members did notice appreciable gains as the year wound to a close. Unfortunately, however, the lack of transparency to the software industry in the criminal system has not permitted accurate cataloguing of the progress of a case and the fines and jail terms ultimately imposed.

Nonetheless, as noted above, business software piracy rates remain too high; and the business software industry also suffered some setbacks in 2000. For example:

- A highly regarded court in Turin refused to recognize the *per se* criminality of business end-user piracy, a problem hopefully cured by the new AP Law but that should have been clear even under prior law. (Notably, the court helpfully modified its reasoning after the industry voiced objections, but the concern remains, and prior courts likewise have experienced this unhappy result.)
- A high-impact national television campaign designed to dispel complacency and alert the public to the increased criminal penalties imposed by the new AP Law was deemed unfairly intimidating and misleading, because the crime depicted -- business end-user piracy -- was not deemed likely to result in imprisonment (as depicted) and may not (under erroneous interpretations) even be a crime. Indeed, the industry continues to report that criminal sentences are suspended virtually as a matter of course, even since the enactment of the higher, new penalties in the AP Law.

Civil Enforcement

Civil enforcement is also slow, cumbersome and difficult in Italy. The law does provide for effective search and seizure orders, which are usually granted one to two weeks after the petition has been filed. However, to obtain definitive injunctive relief and/or compensation for damages, plaintiffs are obliged to commence full-fledged proceedings on the merits, which have often been paralytically slow and difficult, despite the recent modification of the civil procedural code. Furthermore, Italian courts still award damages on the basis of the "reasonable royalty" or "license fee" criteria, which lack any deterrent effect, as the infringer still benefits from his misdeeds. However, in one recent software piracy case in Milan, a court did award civil damages at full retail price and further, deemed the illegal reproduction and use of the software to be morally compensable in an equivalent sum. Whether this decision becomes a trendsetter remains to be seen.

The software industry does report, however, that in the latter part of the year, civil enforcement improved in efficiency in the issuance and execution of civil search orders and in the closure of cases on acceptable terms. But there were also some bad results:

- The High Court of Rome refused to award damages after a finding of infringement in a case dating from 1998, concluding that compelled deletion of the illegal software was itself a sufficient remedy and a form of rightholder compensation.
- A civil court in the North imposed a prohibitive bond requirement (c. \$250,000) for the issuance and execution of a search order against a major local employer and curiously limited the scope of evidence obtainable under the search order to exclude licenses and invoices.

Overall, the civil court system remains in need of reform. Among the problems are:

- Absence of expeditious *civil* remedies and unwarranted delays: The civil courts still remain notoriously slow, with cases taking up to six years to reach a decision on the merits. There appear to be no statutory deadlines and inordinate delays in civil cases have substantially undermined the deterrent effect such actions might otherwise have.
- Lack of deterrent civil damages: As noted above, there are concerns that Article 2043 of the Italian Civil Code, concerning how civil damages are measured may not permit, in software end-user cases, damages which exceed the lost profit to the right holder -- a measure that is inadequate to deter infringers. Profit to the *infringer* may not be recoverable. To the extent that this reading of the law prevails, Italy is in violation of TRIPS articles 41 and 45, as piracy remains a rational business for infringers.

Civil case statistics from the business software industry are shown below.

**CIVIL COPYRIGHT
ENFORCEMENT STATISTICS
2000**

ACTIONS	BSA
Number of civil raids/searches conducted	7
Post Search Action	
Cases Dropped	2
Cases Settled	8
Cases Adjudicated	4
Value of loss as determined by Court (\$USD)	\$20,900 ⁴
Judgment Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)	\$20,900; 4 ³
US\$0-\$1,000	
\$1,001-\$5,000	
\$5,001-\$10,000	
\$10,001-\$20,000	
\$20,001-\$50,000	
\$50,001-\$100,000	
\$100,000 and above	
Settlement Amount (\$USD) in how many cases	\$105,000

⁴Inclusive of cost awards; also note that one of four judgments reported provided for no damages, as discussed in the accompanying text.

COPYRIGHT LAW DEVELOPMENTS

Need to Fully Implement the AP Law and Adopt Regulations Eliminating the SIAE Sticker Requirements for Software

Passage of the AP Law with its various copyright law amendments and correcting the other TRIPS enforcement deficiencies constituted a major advance in the long fight against piracy in Italy. That law made a number of substantive, enforcement and administrative reforms:

- In reforming the criminal provisions, the AP Law provides prosecutors with a comprehensive array of possible charges. The offense of commercial production, distribution and exhibition of infringing copies is extended by the prohibition of importation of possession of infringing copies with intent to sell, distribute, transmit or exhibit.
- New offenses are created of producing, importing, selling (or possessing for sale) devices for defeating copy protection or decoders permitting access to encrypted programming without due payment. The unauthorized retransmission of encrypted programming is made an offense. The promotion, importation, sale and use of decoders for circumventing conditional access to transmissions, analogue or digital, also become offenses, whether the use intended is public or private. If no more serious violation is involved, the mere use of a pirate copy of a work or sound recording, or the reception of a transmission infringing copyright, attracts an administrative penalty of 300,000 lire (\$145), confiscation of any infringing materials and the publication of the offender's name in a national newspaper. Where the offender has a previous record for such violations or the case involves a large-scale infringement, the penalty may be as much as 2,000,000 lire (\$967), with revocation of any applicable trading licenses.
- The maximum punishment for unlawful commercial duplication or distribution of works goes up from three years, imprisonment and a 6,000,000 lire (\$2,900) fine to four years and a fine of 30,000,000 lire (\$14,504).
- The court is required in every case to confiscate infringing copies, together with any tools or materials used in the commission of the crime. In addition, the convicted offender can be prohibited from carrying on a specified trade or from being a company director. Where applicable, any broadcasting license he holds may also be suspended for one year.
- The promotion, sale and installation of illegal circumvention devices attract imprisonment from six months to three years and a fine of 5,000,000 to 50,000,000 lire (\$2,417 to \$24,174). Where the facts of the offense disclose aggravating features, the court must impose a sentence of at least two years' imprisonment and a 30,000,00 lire (\$14,504) fine.
- With this significant strengthening of criminal and administrative penalties, IIPA and its members have some reason to be hopeful that a downward trend in piracy rates will

result. Moreover, this general increase in the severity of penalties comes with an incentive for cooperation from the criminal: If he voluntarily reports his offense, or provides information permitting the identification of ringleaders or the substantial seizure of infringing products, the main penalties may be reduced by one-third to one-half. This immunity/plea bargain analogue may prove very important in helping to conclude cases more expeditiously.

- Without prejudice to the criminal sanctions, an administrative penalty may also be imposed in respect of the offending conduct equal to twice the market price of the copy and in any event not less than 200,000 lire (\$97). Where the market price is uncertain, a penalty in a sum between 200,000 and 2,000,000 lire (\$97 and \$967) may be imposed.

As noted earlier, book piracy is now subject to the criminal provision and photocopying in commercial copy shops as well as within educational institutions is now subject to remuneration to the copyright owners.

Unfortunately, these positive reforms do not tell the whole story. The AP Law contains a provision that could essentially nullify many of the law's otherwise helpful provisions with respect to the software industry. Article 10 contains an extremely burdensome requirement that could require software producers to physically place a sticker on each work sold in Italy -- or else potentially forfeit their right to pursue criminal remedies against infringers of their works. Even worse, legitimate producers who fail to "sticker" products are themselves subject to severe criminal penalties. Thus, absent an exemption for business software products as contemplated under the law, the owners of perfectly legitimate copyrighted works will be subject to criminal sanctions, while pirates who wish to copy and sell such works without authorization are potentially not liable under Art. 171*bis* of the law.

In addition to turning the notion of effective copyright enforcement on its head, the stickering provisions of the law violate several provisions of the TRIPS Agreement, namely articles 9, 41 and 61. Article 9 of TRIPS requires compliance with the provisions of the Berne Convention, including Article 5(2), which prohibits countries from subjecting the "enjoyment and the exercise" of copyright rights to any formality. Italy's stickering requirement, as well as its associated fee, represent a prohibited formality. Moreover, given the unavailability of effective criminal remedies to enforce a copyright on unstickered works, the stickering requirement also violates articles 41 and 61 of the TRIPS Agreement. Finally, the burden imposed by the requirement makes criminal enforcement unnecessarily complicated and costly, and creates a barrier to legitimate trade, contrary to the requirements of TRIPS Article 41.

In addition to its TRIPS inconsistency, the stickering requirement has absolutely no logical relationship to the business software industry. There is no collective administration of business software copyrights in the EU. The industry is not represented by SIAE (the quasipublic royalty collections agency charged with implementing the stickering regime), nor do business software copyright owners receive any royalties from this agency.

For this reason, the Italian legislature recognized that the stickering scheme should not be extended to business software by proposing an exemption for a category of computer programs that would include business software. Article 10(4) of the law provides that, subject to regulations published by the Presidential Council, following consultations with the involved parties (i.e., SIAE and the high technology industry), "the sticker-label . . . may not be placed on carriers containing computer programs" . . . that are (1) used only on a computer; and (2) do

not contain sounds, voices or sequences of moving images that [a] constitute entire phonographic, cinematographic or audio-visual works, not expressly produced for such programs, or [b] excerpts or parts thereof that exceed 50% of the entire work so excerpted." These regulations are scheduled to be published on March 19, 2001. A broad coalition of high-technology industries in Italy has held extensive discussions with SIAE officials over the past several months to develop a consensus that would implement the exemption contemplated in the AP Law. As of the date of this submission, negotiations with SIAE are ongoing and industry remains hopeful that a solution can be reached. IIPA believes that the U.S. government should, as soon as possible, convey to Italian authorities the importance of the issuance of an appropriate regulation exempting business software from the stickering requirement and associated TRIPS-inconsistent formalities. Furthermore, if the negotiations with SIAE do not result in a TRIPS-compatible solution to this problem, the U.S. government should also take steps to pursue its remedies in the WTO.

Related Legislative Issues

As IIPA noted in previous submissions, a question remains unresolved following implementation of the EU Duration Directive and the Rental Directive. With respect to non-European sound recordings, the decree implementing the Duration Directive is silent with respect to protecting pre-existing non-European sound recordings. With the entry into force of TRIPS, Italy is obligated to protect sound recordings made since 1950 whose term of protection has not already expired in the country of the recording's origin.

* * * * *

Having adopted the AP Law, Italy must now implement it fully, including adopting implementing regulations which fix the SIAE sticker problem for the business software industry. Enforcement should proceed in a TRIPS-compatible manner with deterrent penalties. Enforcement should be targeted also at the piracy by organized criminal enterprises in the South and the full panoply of new remedies applied against the real owners and operators of pirate enterprises. Judicial reform should be expedited to chip away at the long delays that have caused problems not only in the anti-piracy area, but which have made Italy's system a subject of scrutiny within the entire EU. IIPA recommends that Italy remain on the Watch List for 2001, and that an out-of-cycle review be conducted within six months to gauge progress on the issues raised in this filing.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

LATVIA

EXECUTIVE SUMMARY

In the past few years, Latvia has taken very positive steps to reform its legal regime including the adoption of a new Copyright Law in 2000; acceding to the Berne Convention in 1995 and the Geneva Phonograms Convention in 1997; joining the World Trade Organization (WTO) on February 19, 1999; and acceding to both digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT) on March 22, 2000.

Now that it has put the necessary substantive laws into place, it must reform its copyright enforcement regime. As the WTO TRIPS Agreement requires, it must improve its Criminal Code and Criminal Procedure Code, and it must implement its new Customs Code so that border enforcement is compatible with the TRIPS enforcement obligations. Latvia adopted new customs regulations effective July 1, 1999, consistent with the European Union Anti-Counterfeiting Regulation and the WTO TRIPS statutory obligations, but there are no signs that border enforcement has improved as a result. So the biggest challenge Latvia faces is making its copyright enforcement regime effective on all levels: criminal, civil, administrative, and through the use of its new border measures. And, as noted, there are still additional legal reforms that Latvia must make to be fully in compliance with TRIPS, especially regarding enforcement.

The history of Latvian copyright reform began in 1993, when Latvia overhauled its old Soviet-style copyright law; after a series of revision efforts in 1998 and 1999, a new Copyright Law was enacted in April 2000, effective April 27, 2000 (with some provisions in force on January 1, 2001 and others on January 1, 2003). Latvia now has a relatively modern copyright law. Still, the law has several significant shortcomings, including no provision for civil *ex parte* search procedures, and a right of remuneration only for the broadcasting, public performance, or other communication to the public of sound recordings. Plus, good laws without effective enforcement are not sufficient in the fight against commercial piracy.

The Latvian market is overloaded with pirated cassettes, videos, game cartridges and optical media product either produced by or shipped through its neighbors, Lithuania and Ukraine. All three of these countries have very poor border enforcement, and since Lithuania and Ukraine are known for their export capabilities, the Latvian market with its own border enforcement problems is ripe to receive this illegal material. The Latvian government must immediately address this piracy problem by significantly bolstering its on-the-ground enforcement measures especially at the border, and through the criminal justice system acting against organized piracy activities. As a result of the enforcement deficiencies and industry concern, the IIPA recommends that Latvia be added to the Special 301 [Watch List](#) this year.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2000

INDUSTRY	2000		1999	
	Loss	Level	Loss	Level
Motion Pictures	1.5	85%	NA	100%
Sound Recordings / Musical Compositions	4.0	65%	4.0	65%
Business Software Applications ¹	NA	77%	NA	84%
Entertainment Software ²	NA	NA	NA	NA
Books	NA	NA	NA	NA
TOTALS	5.5		4.0	

COPYRIGHT PIRACY AND ENFORCEMENT

Effective Criminal, Civil, Administrative, and Border Enforcement is Necessary to Comply with the TRIPS Agreement.

Now that Latvia has made important strides with its legal reforms, it must implement effective criminal, civil, administrative, and border enforcement measures to stop commercial piracy and to comply with its new WTO TRIPS Agreement obligations.

Certainly, Latvia has taken legal and some structural action to improve its enforcement mechanisms, but now these steps must be used to deter piracy. In the past few years, Latvian authorities have increased their organizational efforts to combat piracy. The Ministry of the Interior (MOI) has the authority to enforce the copyright law and other laws on intellectual property. IIPA understands that MOI continues to hold monthly meetings on IPR protection with other Latvian agencies (e.g., the financial police, the economic police, customs officers).

Last year, a coordinator for IPR cases was appointed within the Latvian police, and apparently other coordinators were also appointed at the regional level. Unfortunately, these authorities still appear to be reluctant to initiate anti-piracy enforcement activities, due to administrative problems, ineffective authority, or a lack of proper resources.

In 2000, an interministerial and copyright industry council was established to deal with IPR enforcement and to help coordinate strategies to combat piracy. It is unclear whether this body has resulted in improvements to establish clear lines of authority for domestic enforcement, and the establishment of a single specialized department to coordinate such enforcement, both of which are needed for effective action against commercial pirates. Also it was encouraging to see that when the IIPA's Latvia country report was published in February 2000, the Latvian Copyright Agency agreed with our requests for better enforcement and they

¹ 1999 business applications statistics for Latvia are not yet available.

² IDSA estimates for 2000 are preliminary.

publicly stated their need for additional governmental support to effectively protect the works of Latvian and foreign authors.

The ongoing problem is that enforcement officials, in general, appear to be uncertain about the appropriate procedures in piracy cases, and there are many obstacles to procedures for the verification of legal versus illegal copies, false licenses and the like. In addition, there have been considerable investigative and prosecutorial delays in moving cases forward, and administrative remedies have not been properly utilized. Businesses, especially illegal kiosks and stores that sell pirated material, are not fined, nor are their business licenses revoked; either of these measures would be important first steps toward proper enforcement of the copyright law.

The Business Software Alliance (BSA), for example, reports that they have experienced significant delays in several of the cases that were referred to enforcement officials. For example, evidence sent to a prosecutor's office in June 2000 has yet to result in the commencement of a prosecution, much less a conviction. In general, it appears that the overall Latvian enforcement machinery is still not at the stage where effective prompt enforcement action can be undertaken.

Given that much (but not all) of the piracy problem in Latvia is due to the heavy importation of infringing materials, it is essential that border measures be enforced in practice. As part of Latvia's WTO accession package, several laws and decrees were passed to improve substantive border enforcement measures. Two laws form the basis for Customs enforcement measures in Latvia: (1) the 1997 Customs law (of June 11, 1997); and (2) a Cabinet of Ministers Regulation on Customs measures for IPR protection (of February 9, 1999) which entered into force on July 1, 1999). Latvian officials have repeatedly stated that these measures fully comply with TRIPS and with European Union obligations. Further, two years ago, the government announced plans to create a new Customs supervisory institution. In fact, a dedicated intellectual property protection unit was created within the Latvian Customs Office, but there is no information on how this unit is functioning. And unfortunately, there have been no signs of progress with border enforcement since these measures were adopted.

An ongoing problem has been that Customs has refused to seize suspect product without a court order, and Customs officials have admitted problems with the detection of illegal material. It is encouraging that in late 2000 in St. Petersburg, cooperative meetings were held with Russian, Estonian, Latvian and Lithuanian Customs officials responsible for IPR enforcement. The Russian Customs officials, for example, agreed to cooperate and share cross-border information beginning in 2001. Further, the Latvian Anti-Piracy Organization (LAPO) supported by the Motion Picture Association (MPA), and the Russian Anti-Piracy Organization (RAPO) plan to coordinate their activities as well to keep their respective governments working together.

One step the Latvian government could take to improve enforcement would be to establish better coordination of customs authorities between Latvia's neighbors in Estonia and Lithuania. This would be especially helpful to stem the tide of pirated Russian material entering Latvia (and the other countries). In this regard, the IIPA and its members have worked with Latvian (and Estonian and Lithuanian) Customs and other government officials to better train and staff enforcement efforts. For example, in 1999 a three-part training program was conducted with police, customs officials, prosecutors and judges and U.S. and European industry representatives. The program included a well-attended Riga seminar as the culmination of a multiyear program funded by the U.S. Information Service in cooperation with IIPA and its members.

Unfortunately, enforcement progress has been slow. For example, litigation, especially criminal cases, takes considerable time in Latvia. While administrative cases are described as relatively simple and can proceed in two to four months, criminal cases take 18 months to two years just to begin the trial. This is because criminal cases must proceed through three stages: First, the police review the preliminary records; then there is a police investigation; and finally, the prosecutor must review and then get the Prosecutor's Office to issue a formal charge before the case can commence. Once it does commence, the procedures are complicated and can be considerably delayed. For the past two years, it was hoped that a new criminal procedure code drafted by the government would be adopted and implemented to improve and simplify the process, but this has not yet been undertaken.

The BSA reports that enforcement authority cooperation on actions in 2000 slackened off from previous years. The Economic and Finance Police conducted a total of 14 raids in 2000 with the cooperation of BSA; eight of these concerned end-users, six were of resellers. As a result, nine actions were commenced by the police and forwarded to the courts for disposition. However, because of the delays in the enforcement process, only one of these cases has to date resulted in a judgment with the imposition of a modest fine of 100 Lats (U.S.\$164) being imposed. Another problem that hinders effective enforcement is the relatively low level of administrative fines.

In general the software industry has had good cooperation, albeit on a limited number of cases, from the Economic and Finance Police; mostly this has focused on end-user raids. However, the software industry believes that significantly more resources need to be devoted to this important area of enforcement for it to be properly effective.

The Rise of Optical Media and Other Forms of Piracy in Latvia

Latvia's geographic location between two countries known to export pirated audio and videocassettes, game cartridges and optical media products --- Lithuania and Ukraine --- places it at great risk for being overwhelmed by large quantities of pirated product which can crush the market for legitimate product. Pirated material --- pirated audio CDs, CD-ROMs containing entertainment and business software, videos and audiocassettes, and videogame cartridges --- regularly enters Latvia from Lithuania. A significant amount of pirated material from Russia also reaches Latvia; the material is produced there, in Ukraine, and elsewhere in the region. For example, the same legitimate Russian-dubbed video selling in Russia for under \$3 is marketed in Latvia for \$5.50 to \$7.50. That is why effective border enforcement is so critical.

There are no reports of optical media production in Latvia at this time. Most of the illegal optical media material in Latvia is coming from Russia.

Piracy of sound recordings and music is widespread in Latvia. The estimated level of audio piracy is 65% for 2000; the piracy rate is estimated to have been at 65% (both of these figures remaining constant from 1999) -- around 80% for international repertoire. The main distribution points are in Riga, at two bazaars in the city which have 60 to 100 sales points that sell pirate audio product. The prices of the pirate music CDs are approximately \$6. Most of these CDs are imported from Russia, Lithuania, and Ukraine. The recording industry reports that the police have generally not taken decisive action against the open markets; there are not seizures or raids, much less prosecutions. A new piracy trend in Latvia involves CD-R piracy, where compact discs are customized using a personal computer. Another disturbing trend in

2000 was the appearance of counterfeit material being sold in respectable supermarket chain stores.

In 1999, piracy had so flooded the Latvian market that the largest radio stations in Latvia refused to broadcast musical recordings for one hour on a given day as a protest against piracy. Record stores opened late and television stations refused to air music videos that day. Such public protests followed a similar effort in September 1998 when a "Rock Against Piracy" concert was held. Unfortunately, even after years of these public protests, there were no signs of progress in the fight against piracy in 2000.

One particularly disturbing practice consists of the sale of illegal recordings as a part of a "private collection." This argument is used by pirates at the open markets to avoid the seizure of goods and prosecution; they claim that they are selling material initially made for such "private" use. This practice is incompatible with the TRIPS Agreement enforcement standards and must be eliminated as an excuse for the police and prosecutors to permit illegal activity from continuing. The recording industry also reports a growth of Internet piracy; that is, material offered for sale on the Internet that is distributed as physical disks through the mail. Several Websites have been operating with impunity for over three years without any prosecutorial action to shut them down. The Economic Police have either been unwilling or unable to address this problem to date.

A major concern for the recording industry is the fact that Latvia (and Lithuania and Estonia) is being used to transship pirate CDs into the EU; frequently sea links with Finland and the other Scandinavian countries are used. The transshipment is moving material into and out of other parts of Central and Eastern Europe as well as Russia.

The recording industry, and all the other industries, are very concerned that the customs authorities must use their essential tools to provide effective enforcement. In this regard, they must take *ex officio* action when they detect border trade and domestic enforcement violations and they must work in cooperation with the European Union and Russian customs authorities to improve their efforts to stop the trafficking of material.

The entertainment software industry (Interactive Digital Software Association, IDSA) concurs that border enforcement is a major problem in Latvia. They note that this problem must be addressed to cutoff the flow of material from organized crime syndicates in Russia shipped into or through Latvia, and especially that such action must be undertaken before these operations are able to get a foothold in Latvia and use it as a base for distribution of illegal material into other neighboring countries.

The Motion Picture Association (MPA) reports that for the audiovisual industry, video piracy continues to be a serious problem in Latvia in 2000, with the piracy rate estimated to be about 85%. Pirate videos are duplicated locally from "masters," which can be U.S. cinema camcordings, prints stolen directly from Los Angeles production rooms (via Russian and Israeli-based sources) or hacked DVDs.

Although audiovisual piracy is not as overt as it has been in the past, some street traders still discreetly solicit customers with pirate catalogues. Piracy is still a major problem and police corruption has been a major barrier. Pirate copies are also available in video rental stores as early as two months before their Latvian theatrical release. As a result of the sizeable Russian population in Latvia (estimated at almost 40% of the country's total population), there is a very large market for pirate and unauthorized Russian-language videotapes. Parallel imports of

Russian-language videocassettes are a significant problem given that a legal retail price of U.S.\$3 in Moscow is much lower than in Riga; pirate tapes in Riga sell for U.S.\$4-7. The MPA notes that the Customs authorities must make special efforts to identify and halt pirate product crossing not only the Russian, but also the Belarus, border. In this regard, MPA has been working with the World Customs Organization (WCO) to conduct training for police and customs officials in Latvia (and elsewhere in the region). MPA has also been supporting a local initiative aimed at creating a full-fledged Latvian anti-piracy organization. Coordination meetings have already been set up between RAPO and Russian and Latvian Customs officials.

The MPA also reports that Web-based piracy is starting to appear. In 2000, three pirate sites marketing hard goods were uncovered by LAPO, the nascent local anti-piracy organization.

Television and cable piracy is becoming less of a problem in Latvia than previously reported. That's because in 1999, an agreement regarding the payment of royalty fees became effective among 34 Latvian cable television stations and AGICOA (the international collecting society for cable retransmissions). The agreement was signed in cooperation with the Ministry of Culture and the Latvian Copyright Agency.

The MPA estimates its losses in Latvia were \$1.5 million in 2000. The video piracy rate is estimated to be 85%, down from the 100% rate in 1999. There are no available figures for the broadcast piracy or theatrical piracy rates.

The BSA reports that most of its illegal material enters Latvia from Russia, Belarus, or neighboring countries. The same is true for material entering Lithuania and Estonia. In particular, poor border enforcement and the lack of cooperation between neighboring countries (especially Estonia and Lithuania) are problems that need the most attention. The BSA has no loss figures for Latvia but estimates piracy rates were at 77% in 2000 (down from about 84% in 1999). In 2000, BSA reported some signs of border control points being better regulated, but they report that overall border enforcement remains poor.

Protection and Enforcement Obligations

Latvia currently participates in the U.S. Generalized System of Preferences (GSP) program, which offers duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . ." At the same time that Latvia is causing millions of dollars of losses to the U.S. due to piracy, it imported \$5.1 million worth of products without duty (the last full year of available GSP statistics), and over \$10 million worth in the first 10 months of 2000. Latvia should not continue to expect such favorable treatment at this level if it is not providing adequate and effective protection and enforcement of copyright material.

LEGAL REFORM

Treaty Accessions and the Copyright Law of 2000

In the past several years, Latvia made significant progress with the adoption of new laws and its accessions in important copyright and neighboring rights treaties.

Latvia became a member of the Berne Convention (August 11, 1995) and the Geneva Phonograms Convention (August 23, 1997); it also became a member of the Rome Convention (August 20, 1999). On January 21, 1999, the Latvian Parliament adopted a package of amendments to permit Latvian accession to the WTO and the TRIPS Agreement by passing minor amendments to the Copyright Act, the Code of Administrative Offenses, the Criminal Code, the Consumer Protection Act and the Customs Act. As a result, Latvia acceded to the World Trade Organization (WTO), effective February 10, 1999, thereby obligating itself to meet all of the TRIPS Agreement provisions. In February 2000, the Parliament approved accession to the two digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT); Latvia acceded to these treaties on March 22, 2000.

In its bilateral relations, Latvia signed an important trade agreement with the United States on July 6, 1994, and later ratified it; this agreement required significant legal changes in Latvia's IPR regime by the end of 1995. In fact, Latvia did adopt a series of copyright amendments aimed at meeting its bilateral and multilateral obligations. Latvia enacted a copyright law, effective May 15, 1993, to replace the old Soviet civil code. That law, while providing good levels of protection, needed additional amendment to meet international standards.

Working with WIPO, and foreign copyright experts, amendments to modernize the copyright law were passed on August 14, 1998. These 58 amendments to the 1993 law reportedly included:³ copy protection measures; provisions vesting rights in audiovisual works in natural authors (with apparent exceptions for the treatment of foreign works, this would have reversed the 1993 Act, which vested rights in audiovisual works initially in the producer); provisions relating to the implementation of the term rental and software EU Directives; a new blank tape levy; collective administration reform; and transitional provisions regarding retroactive implementation of these changes. The August 1998 amendments were accomplished under unusual circumstances: they were considered a "Regulation of the Cabinet Ministers," subject to parliamentary approval. Under this proceeding, the amendments became effective upon issuance, but only for six months. Because the Latvian Parliament never approved the amendments within this period, they were effectively repealed. Instead, those amendments were used as the template for the package of amendments finally adopted in 2000.

In lieu of the major package of amendments "adopted" in August 1998, several minor amendments to the copyright law were accomplished in January 1999, as part of Latvia's WTO accession package.

³ The substance of these 1998 amendments was described to IIPA in several meetings with Latvian officials and local copyright experts, but IIPA was never given an official version for translation.

On April 27, 2000, the new copyright law was adopted by the Parliament replacing the 1993 law, as amended. While many of its provisions went into force on April 27, 2000, some provisions entered into force on January 1, 2001, and others will go into force on January 1, 2003.

The copyright law of 2000 included many of the provisions of the expired August 1998 law. The new law made significant improvements to the 1993 law, including definitions of critical rights such as reproduction right (including temporary copies), and a right of making available. The new package of amendments also changed the penalties for software piracy offenses; for example, for end-user and reseller piracy offenses, the penalties were increased from 200 Lats (U.S.\$ 324) to 7,500 Lats (U.S.\$12,114) and possible imprisonment of five years.

Given the wide-scale sale of material in open markets, proposals were formulated to address this problem. One proposal would have revised the Administrative Code to ban the sale of music, audiovisual or computer program material at such open markets; unfortunately, this proposal was rejected by the Estonian government.

Even with the adoption of the very modern 2000 copyright amendments, several TRIPS issues remain outstanding, or require further clarification. These TRIPS-incompatible measures include:

- no civil *ex parte* search procedures; without these procedures, there can be no effective enforcement against end-user software pirates.
- no clear protection for pre-existing works and sound recordings. Such protection is not clearly spelled out in the Copyright Law for works or sound recordings, although many Latvian experts have offered their view that such protection does exist under current law and Latvian officials acknowledge that such protection is required under the TRIPS agreement (Articles 9, 12 and 14.6).
- low administrative penalties that do not deter piracy. The current is a maximum of 250 Lats (U.S.\$405).
- no deterrent criminal penalties (with the exception of provisions added for certain types of software piracy).
- Providing only a right of remuneration for the broadcasting, public performance, and other communication to the public for producers of sound recordings.
- an awkward provision in the civil law regarding the destruction of equipment used to produce illegal copies in that it requires that the equipment (and perhaps the illegal copies produced) can be given to charity. There was considerable confusion about this provision in discussions with Latvian officials; at the very least, it should be clarified. The criminal provisions do properly provide for the seizure and destruction of equipment.
- no presumption of "authorship" for audiovisual producers or sound recording producers (protected in Latvia under neighboring rights), even though such a presumption exists for the benefit of authors (meaning authors of all other "works").

In addition, now that Latvia has acceded to the digital copyright treaties, it must fully implement them. Some implementation provisions were adopted in the Copyright Law of April 2000, but many others still need to be enacted.

In order to fully implement the two 1996 WIPO digital treaties to protect against Internet and other forms of digital piracy, Latvian law must allow right holders to enforce their rights against the circumvention of technological protection measures. Technological protection measures are the tools that rightholders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. In addition, rightholders need to be able to protect so-called "copyright management information" that is attached to or accompanies a work or sound recording, including protection against the alteration, removal or falsification of this information.

The International Federation of the Phonographic Industry (IFPI) reports that MP-3 piracy in Latvia is an ongoing concern. There are many illegal sites hosted by government-controlled servers offering illegal MP-3 format musical material. This makes the early implementation of all the WIPO treaty obligations even more important. In 2000, a Latvian Internet Association was formed to help local and foreign producers of music police illegal activity and in order to work with the local Internet service providers (ISPs). As noted, Internet piracy has not yet been properly addressed by the enforcement authorities.

There are no known plans to revise the current Administrative Code articles pertaining to intellectual property violations. Article 2046 sanctions the use of copyrighted material without a license and imposes a fine of up to 250 Lats (U.S.\$ 405). There are no known amendments to the current civil penalties pending. Articles 1770-1792 (Civil Code) and articles 54, 55, 57-8 (Law on Copyright and Neighboring Rights) include sanctions for copyright violations.

Criminal Code Amendments of 1998

Latvia passed a new criminal law in June 1998, which entered into force on April 1, 1999. Of the three provisions in these amendments which relate to IPR protection (in particular Arts. 148-9), the criminal law now includes: fines for manufacturing, selling, storing or concealing unauthorized copies; confiscation of infringing copies and equipment; prison terms of up to three years for repeat offenders (including activities related to unauthorized decoders and smart cards); and up to five years in jail for organized crime activity. The fines range from between 60 and 1,000 times the minimum monthly salary. There are still no known plans to amend the Criminal Procedure Code.

Even after almost two years, there are still no reports of any imprisonments under these revised provisions. Last year, there was a single report of fines being imposed in a case; the fines were reported to be of between 150 and 300 Lats (U.S.\$243 to \$487), that is, nothing that would act to deter commercial piracy. In sum, the slow pace of criminal enforcement activity at the prosecution stage accounted for the poor quality of enforcement in Latvia in 2000. Although some of the industries note matters that are pending, there are few encouraging signs of progress with criminal IPR enforcement cases to report.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

MACAU

EXECUTIVE SUMMARY¹

IIPA recommends that Macau remain on the Watch List, with an out-of-cycle review to evaluate Macau's enforcement progress.

Macau has taken some important steps in the battle against optical media pirate production, which but two years ago threatened to overwhelm the shores of Asia and elsewhere with export pirate product. The year 2000 was a good one for enforcement against optical media piracy. Raids, seizures and arrests led to favorable court judgments imposed on commercial pirate producers and distributors. A raid in June 2000 netted the largest year-to-date single seizure of pirated optical media in the world (over 635,000 discs), and hundreds of thousands of pirated discs netted from similar raids were destroyed in 2000. In December 2000, eleven optical disc production lines (estimated value U.S.\$7.05 million at original purchase price) ordered forfeited in an earlier court decision against a commercial pirate were destroyed. By these actions, the Macau government has demonstrated the willingness to effectively raid pirate optical media plants and downstream commercial distributors, seize and destroy pirate copies, and seize and destroy the tools of pirate production. As a result, most pirate optical media production has been driven off the Macau peninsula (and neighboring islands that together make up Macau SAR).

The main gap in Macau's antipiracy program is the continued failure to impose deterrent penalties. While defendants engaged in criminal piracy operations, whether production or downstream distribution, are indicted and convicted for their piratical activities, suspended prison sentences (for periods of one to two years) are the norm, and fines remain non-deterrent (one of the larger fines meted out for piracy was 120,000 Patacas (U.S.\$14,937), in a case involving the seizure of eleven optical media production lines and 229,584 pirated CDs and VCDs). Only more prosecutions proceeding to conclusion, with stiffer fines and imprisonments imposed on commercial pirates, will provide a lasting deterrent, driving out for good pirate optical media production that has scarred Macau's recent history.

IIPA recommends that an out-of-cycle review in September should evaluate whether Macau has:

- successfully prosecuted copyright infringers (especially manufacturers and distributors/exporters) through the courts within six months of a successful raid;
- implemented Source Identification (SID) code requirements for masters and optical discs, including systematic monitoring by Macau authorities; and
- effectively enforced the copyright law, regardless of whether those activities are under the purview of the soon-to-be-formed Customs Department or the existing Economic Services.

¹ For more details on Macau's Special 301 history, see IIPA's "History" appendix to filing.

MACAU ESTIMATED TRADE LOSSES DUE TO PIRACY IN 2000
(not available)

PIRACY AND ENFORCEMENT IN MACAU

Driving Pirate Optical Media Production Out of Macau

Optical media piracy — the unauthorized manufacturing and export of audio CDs, video CDs (VCDs), digital versatile discs (DVDs), and CD-ROMs containing computer software, multi-media products and literary material — arrived in Macau in 1997, as pirate syndicates fled China's crackdown on underground CD plants. This brand of piracy continues as the greatest threat to the markets in Macau and neighboring China (where much of the pirate product produced in Macau is exported), although, as already noted, the year 2000 witnessed sustained enforcement actions against optical media piracy in Macau that have successfully driven out much of Macau's pirate optical media production.² There remains some activity as pirate CDs and VCDs continue to be shipped out of the country, particularly flowing into China, and some materials have also been found in Hong Kong that are believed to be sourced in Macau. Macau Economic Services reports that there are currently only six active registered optical disc factories in Macau, but industry reports that the number is more like nine plants with ten production lines. Much of the piratical activity continues to be associated with organized enterprises engaged in exporting piracy to other parts of the world. There is always the concern that one or more of these plants might shift to the production of pirate DVDs.

As noted above, the main gap in Macau's antipiracy program is its continued failure to impose deterrent penalties. Defendants are prosecuted and convicted for piratical activities but receive suspended prison sentences (for periods of one to two years) and fines that barely even rise to the level of a 'cost of doing business', much less to the level needed for true deterrence in the market. Perhaps most significantly, it does not appear that anyone being prosecuted now or prosecuted in the past for optical media piracy in Macau has ever been sent to jail for his crimes. Lack of transparency of the Macanese court system makes a full evaluation even more difficult, but it is apparent that Macau's legal system must promptly deliver more prosecutions proceeding to conclusion, with stiffer fines and non-suspended imprisonments (where appropriate) imposed on commercial pirates. As noted in the introduction to this report, for 2001, IIPA looks to the Macau government to demonstrate that it can successfully prosecute copyright infringers (especially manufacturers and distributors/exporters) through the courts within six months of a successful raid, as one of a series of steps to be evaluated in an out-of-cycle review later in the year.

Government Legalization of Software Use

The government of Macau also made some important strides in coordinating its usage of software in its ministries, specifically entering into a private arrangement with business software industry representatives to obtain legal licenses for much of its software usage: Macau's

² As of December 31, 2000, the motion picture industry reported 18 joint operations with Macau Economic Services and successful raids on six registered optical media factories, resulting in the sealing of one DVD mastering line, five VCD production lines and four printing machines, the seizure of hundreds of stampers, 707,739 pirated VCDs, 3,780 pirated DVDs, and the shutting down of 81 pirate retail shops.

government entities have had no coordinated and transparent method of tracking software procurement or monitoring software use on their internal computer systems. While the arrangement is an important first step, the government of Macau must next work on the issuance of a high-level government decree mandating the use of legal software by all governmental and quasi-governmental entities and by all government contractors. The decree should be implemented through audits of the software usage practices of affected entities; adoption of coordinated and transparent procurement practices that both treat software as a separate asset from hardware, and earmark an adequate budget for software licensing to ensure full legalization; and establishment of effective software management practices going forward.

Additional Steps for 2001

Macau Government Must Implement Source Identification (SID) Code Requirements for Masters and Optical Discs

While Macau has adopted more stringent regulatory controls than almost any other jurisdiction on the importation of the main raw material for optical media production — optical grade polycarbonate — these controls have not yet been effective. For example, a December 1999 raid on an unregistered VCD factory in Macau turned up tons of polycarbonate, enough to manufacture nearly 200,000 units of pirate product. While most of the year 2000 passed without Macau implementing and monitoring Source Identification (SID) code requirements for masters and optical discs, finally, on December 15, 2000, Macau Economic Services signed an agreement with Philips and IFPI for the allocation of SID codes to the agency for the implementation of mandatory embossing of SID codes on all optical discs produced in Macau. There is a grace period of two months for the registered optical disc manufacturers to comply, which has just elapsed. IIPA, in conjunction with local industry representatives, will closely monitor the situation and the effectiveness of this implementation in 2001, as one of a series of steps to be evaluated in an out-of-cycle review later in the year.

Customs Department or Economic Services Must Continue Sustained Enforcement

Copyright enforcement is currently carried out by the Economic Services and Marine and Customs Police. The government appointed a Commissioner of Customs on July 1, 2000, and is looking to establish Macau Customs as a separate agency in early 2001. This new body will reportedly assume full responsibility for enforcement sometime in 2001. Economic Services investigates copyright complaints, and infringers are prosecuted at no expense to the copyright owner. As noted in the introduction to this report, in 2001, IIPA looks to the Macau government to effectively enforce the copyright law, regardless of whether those activities are under the purview of the Customs Department or the Economic Services, as one of a series of steps to be evaluated in an out-of-cycle review later in the year.

COPYRIGHT LAW AND RELATED ISSUES

Optical Media Regulations

In 1998 Macau put in place part of the legal structure needed to combat optical media piracy effectively. Its licensing and registration system for transactions in optical media production equipment, raw materials (polycarbonate) and finished product is, in some ways, even more comprehensive than that of its neighbor, Hong Kong. In October 1999, Macau adopted several essential improvements to this regulatory regime, including licensing requirements for all retail establishments dealing with optical media products, and requiring all optical media products manufactured in Macau to bear a Source Identification (SID) code. These new requirements should greatly enhance the ability to link seized pirate product with a specific Macanese production facility, to trace the path of pirate stampers and finished product as it migrates from Macau into other markets, and to crack down on distribution of pirate product within Macau.

Further improvements are needed, however. The system should include a title verification requirement, obligating producers to verify with representatives of copyright owners the legitimacy of customer orders to undertake mastering or reproduction activities, before beginning work on any such order, at least with regard to VCD products and sound recordings. Enforcement officers should also be given greater powers to conduct unannounced inspections of premises and production records (according to Macau law, the Department Head of the Economic Services has the authority to summon the Fire Services for forced entry, but there is no previous record to show that this authority has ever been used). At present, the Inspection Team from Macau Economic Services does not have the authority to force entry to the registered optical disc factories. If the factory does not voluntarily open its doors (mainly strong metal doors with television monitoring systems at the entrances), Economic Services needs to apply for search warrants from the prosecutor. The process is too slow, greatly detracting from the effectiveness of these raids (as pirates are tipped off by the initial visit and quickly dispose of all evidence). Enhanced legal tools, including those to provide for provisional measures (including the possibility of forced entry) to preserve evidence and avoid undue harm to right holders, should be implemented as soon as possible. If rigorously enforced, such measures would have a considerable impact on Macau's persistent optical media piracy problem.

Copyright Law

During 1999, Macau adopted a wholesale modernization of its outdated copyright and neighboring rights laws. On October 1, 1999, Decree Law No. 43/99/M went into effect. This legislation remains the governing law in the Macau Special Administrative Region that came into existence on December 20, 1999. In general, and with some notable exceptions, Macau's new law seems to meet international standards embodied in the WTO TRIPS Agreement and the Berne Convention, both of which are applicable to the Macau SAR.³ It even contains some provisions responsive to the more expansive WIPO Copyright Treaty, such as a broad right for copyright owners to control the "making available" of their works on demand, and provisions

³ Macau was, by virtue of its status as a Portuguese territory, a founding member of the World Trade Organization as of January 1, 1995. The Paris text (1971) of the Berne Convention applies to the Macau Special Administrative Region, by virtue of the membership of the People's Republic of China, with effect from December 20, 1999.

protecting the integrity of rights management information. In addition, some of the problems identified by IIPA in earlier drafts of the Macau legislation have been corrected. However, several highly problematic provisions remain. These include the following:

- A new provision (Article 57.3) seems to say that first publication (or “divulgarion,” essentially a first communication to the public) of a work without the author’s consent is acceptable if “the author, having knowledge of the publication or divulgation, does not stand in opposition.” If this reading is correct, the provision is clearly incompatible with Berne and TRIPS standards, which give the author exclusive rights to control these acts.
- The law still lacks an authoritative statement that the national treatment requirements of the TRIPS Agreement trump the otherwise applicable rule of “material reciprocity” which Article 50.2 establishes as the standard for protection of foreign works.
- The scope of some exceptions to protection need clarification, especially those for “private use” (Article 60) and “scientific or humanitarian purposes” (Article 61{!}).
- The copyright law’s detailed regulations governing contracts in protected materials contain a number of provisions that could interfere with the rights of copyright and neighboring rights owners to exploit their creations freely. These include, for instance, prohibitions against “manifestly disproportionate” profits, and an apparent compulsory license for reprinting of a sold-out work, which license is explicitly made applicable “to all forms of reproduction” and “any necessary adaptations,” when the authorized entity “does not make sure that the reasonable needs of the public are met” (Article 38).
- Provisions on protection of sound recordings under neighboring rights employ outmoded definitions, fail to align neighboring rights with copyright in the manner required by current international standards, such as the WIPO Performances and Phonograms Treaty, and include two objectionable provisions that appear TRIPS-incompatible. Article 175, which creates a “presumption of consent” to any use of a sound recording if the right holder cannot be located, after due diligence, within 8 to 20 days (depending on whether the right holder is within or outside Macau), essentially guts the producer’s neighboring rights, especially for a foreign producer. Article 179 creates a presumption that an authorized broadcast of a performance may be recorded and reproduced without seeking the performers’ consent, thus opening a loophole for trafficking in bootleg recordings.
- Macau authorities have previously indicated that they will use Articles 195 to 200, which were initially applicable only to collective rights management organizations, to require that all copyright industry antipiracy operations be registered with the government, establish domicile in Macau, and submit to other restrictions. If this interpretation is applied, the ability of the copyright industries to enforce their rights in Macau could be seriously impaired.
- While the criminal provisions have been considerably improved from earlier drafts of the legislation, it is still questionable whether the authorized punishments provide adequate deterrence, and for some reason no fine has been authorized for the key offense of counterfeiting (Article 211). In addition, the draft articles authorizing seizure and forfeiture of pirate product and the means of their production, and heavier sentences for

recidivists, have been omitted; at least the former, and preferably both, must be restored in order to achieve substantive compatibility with TRIPS Articles 41 and 61.

- Finally, civil enforcement provisions remain almost entirely lacking in this law. Macau authorities should be asked to spell out in detail which other provisions of applicable law they rely on to fill this huge gap.

While these and other aspects of Macau's new law need to be clarified and, where necessary, corrected to meet current international standards, this activity must not be allowed to detract from the attention needed to address the primary antipiracy challenge facing the Macau SAR: enforcement. Macau's current legal structure, while needing improvement, provides an adequate basis for the necessary vigorous and sustained enforcement against optical media piracy.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

OMAN

EXECUTIVE SUMMARY¹

IIPA recommends that Oman remain on the Watch List.

Once a market entirely dominated by piracy, Oman appears to have turned the corner, demonstrating the will and taking the enforcement actions necessary to deter commercial piracy. Not only has enforcement been sustained throughout 2000, including in the elusive area of the Buraimi Oasis, but Omani officials have taken all the steps needed to establish a strong legal framework for copyright protection. The issuance by decree of Omani Copyright Law No. 37/2000 on May 21, 2000 was one of the final pieces in Oman's WTO accession negotiations. With everything in place, Oman became the 139th WTO member in October (with obligations going into effect on November 9, 2000). Oman now qualifies for the benefits of participating as a full-fledged member of the global trading regime, and is bound to protect copyright in line with the obligations contained in the WTO TRIPS Agreement.

IIPA looks to the Omani authorities to keep the pressure on the pirates so that they will not devastate the Buraimi area and continue to threaten the Gulf region with pirate product. In addition, now is the time to start enforcing against business end-user piracy (the unauthorized use of copies of copyrighted works, including business software, in a business setting); raids against this brand of piracy have not been forthcoming. Finally, now that Oman has dealt with some of the requirements of the new WIPO "Internet" treaties, Oman's government should be encouraged to take the remaining necessary steps to join the WIPO treaties, thereby catapulting Oman into the lead in the Middle East on the protection of copyright over the Internet. On another positive note, Oman's government has begun taking steps to manage its software usage.

Estimated U.S. losses due to piracy were at least \$11.7 million in 2000.

¹ For more details on Oman's Special 301 history, see IIPA's "History" Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	50%	3.0	50%	4.0	99%	7.0	99%	7.0	99%	10.0	100%
Sound Recordings / Musical Compositions	0.1	25% ²	NA	NA	1.0	70% ³	1.0	80%	1.0	62%	NA	NA
Computer Programs: Business Applications ⁴	7.3	87%	7.8	88%	3.7	92%	4.3	93%	7.3	96%	7.3	96%
Entertainment Software	NA	NA	1.8	91%	2.0	90%	NA	NA	NA	NA	0.6	85%
Books	2.3	NA	2.3	NA	2.3	NA	2.3	NA	2.3	NA	2.0	NA
TOTALS	11.7		14.9⁵		13.0		14.6		17.6		19.9	

COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN OMAN

After years of frustration due to the failure of the government to enforce against blatant retail piracy, the Omani government (including the Ministry of National Heritage) has begun seriously to enforce its Copyright Law. Overt piracy has decreased dramatically and nationwide raids by the Omani government over the last couple of years have now resulted in the seizure of hundreds of thousands of pirated CDs, VCDs, DVDs, videocassettes, audiocassettes, the arrest of several serious commercial pirates, and the closure of several shops found to engage in the sale of pirated product.

Omani enforcement authorities have made some inroads in 2000 in fighting overt piracy in the historically difficult-to-enforce Buraimi Oasis (on the border between Oman and the United Arab Emirates). For example, in January 2000, Omani officials cracked down on pirate computer shops, seizing approximately U.S.\$500,000 in software, closing three shops selling new computers with illegal software (hard disk loading). In September 2000, another set of raids resulted in the seizure of over 50,000 pirated items, mostly software, accompanied by warnings to offenders not to repeat their offenses. Some level of deterrence has taken hold, as it is more difficult to find computer shops willing to sell new computers on which the hard disk is preloaded

² This number represents the overall piracy level for 2000.

³ This number represents the piracy level for international repertoire. The overall piracy level for all repertoires (Arabic, Indian and International) in 1998 was 45%.

⁴ BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$6.7 million were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

⁵ IIPA reported overall losses to the copyright industries at \$13.8 million in 1999. This number was adjusted upward to reflect the change in the BSA number in its mid-2000 adjustments, and the revised total of \$14.9 million is reflected above.

with illegal software. Omani government officials have also created greater awareness of the problem through publicizing raids and warnings given to shop owners, including through the press.

Two particularly noteworthy developments for the business software industry included the first-ever raids against pirate end-users (illegal users of software in a business) and the signing by the Omani government of a software legalization deal with a company in 2000. It is believed that the Omani authorities are prepared to carry out similar raids in the future.

Nonetheless, problems associated with piracy remain, and Omani officials must take opportunities presented to them over the next year to make further progress toward eliminating underground piracy. The Ministry of Heritage and Culture has begun conducting searches of companies suspected of using illegal software. However, to date, no criminal complaints have been filed and no deterrent fines or penalties have been imposed. The Omani government also continues (despite the positive progress noted above) to use some pirated software, and the business software industry looks forward to continuing to work with the government on legalization strategies.

The publishing industry reports that illegal imports continue of editions authorized for sale only in India. Anecdotally, one popular English-language teaching textbook in Oman was particularly prone to pirating – no reported legitimate copies were sold in Oman during 2000.

Another persistent problem remains under-the-counter sales of pirate audiocassettes and videocassettes in retail outlets, and notwithstanding the progress made, the Buraimi Oasis continues to supply pirate product to other parts of Oman and the UAE for downstream distribution. The motion picture and sound recording industries welcome the positive developments that have been seen in Oman over the last few years. Oman nonetheless still needs to improve its enforcement efforts (including outside the capital) and, in particular, take added measures with its police against video duplication sites in private residences. Copyright infringement cases should also carry criminal penalties.

COPYRIGHT LAW AND RELATED ISSUES

Oman's New Copyright Law

A new Omani copyright law came into force by the "Issuance of Protection of author's rights and related rights law" No. 37/2000, on the date of its publication, May 21, 2000. This law constitutes an improvement in the legal regime in Oman in many respects, and goes far to bring Oman's substantive law closer to TRIPS compliance. Included in the improvements made in this law are the following:

- a computer program is still protected in the same category as "writings" (and thus apparently complies with the TRIPS requirement that computer programs be protected as "literary works");
- audio works continue to be protected as works (and the legal person who coordinated the making of a collective work is deemed the holder of all the economic rights) (although, new provisions on neighboring rights with only TRIPS-minimum protections were also added);

- broad point of attachment is provided for any work published etc. in Oman or in “any foreign country”;
- duration of protection is brought into line with TRIPS (except that, while “audiovisual works” are protected as works, the law lists “motion pictures” as being protected for fifty years from the date of first publication; “motion pictures” must be given a TRIPS-compatible term like other audiovisual works, otherwise the law violates TRIPS);
- authors of works (including audio works) have an exclusive right to control the rental of their works;
- precautionary measures include the possibility of injunctions as well as seizures of infringing copies as well as materials and implements used in the infringement;
- criminal penalties (of up to two years imprisonment and a fine of up to RO2,000 (US\$5,222), or up to four years imprisonment and a fine of up to RO4,000 (US\$10,444) for repeat offenders) can be imposed for all infringements of rights under the law, including certain “special infringements” which include: an unauthorized communication to the public “through computers for commercial purpose”; the “export” with knowledge of an infringing copy; and the “elimination or deletion” of technological protection measures if the “aggressor is aware or [should] be aware” of the violation;
- the law provides for the possibility of “confiscation” of infringing copies as well as materials and implements used in the criminal violation;
- the law provides for the possibility of closure of premises where a criminal violation occurred.

Notwithstanding the improvements in the new law, some deficiencies as well as ambiguities remain, for example:

- while point of attachment is broad, reaching works (including audio works) published in Oman or “in any foreign country,” the provisions of the new Omani law do not explicitly provide point of attachment for unpublished works, nor do they provide explicit point of attachment for the owners of neighboring rights (which, if audio works are considered as works, and protected as collective works by the producer, may not need amending as to producers of sound recordings, but will not be adequate for performers or broadcasters); the point of attachment provision should be fixed to cover at least unpublished works and owners of all neighboring rights in countries that are members of international treaties to which Oman is a party, in order to comply with Oman’s international obligations;
- retroactive protection for pre-existing works (including audio works) or subject matter of neighboring rights remains unclear; the law provides that such subject matter shall be protected if it “existed by the time of enforcing this law . . . [t]he elapsed period of these works shall be included in the duration of protection from the date specified for the commencement of protection period until the date of applying this law,” but does not specify what that date of “commencement” of protection is, i.e., that it must be retroactive to at least the TRIPS-compatible term of protection;

- one of the moral rights provisions (Article 5(A)(2)) exceeds what is provided for in Article 6*bis* of the Berne Convention, and arguably nullifies the exclusive right of adaptation, which would be a violation of TRIPS Article 9.1;
- several of the exceptions to protection are overly broad and must be narrowed (e.g., by including in the chapeau to the exceptions paragraph that the exceptions apply to “special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder,” in order to comply with Berne/TRIPS standards); the “personal use” exception in Article 6(F) violates TRIPS and must be narrowed, perhaps by limiting it to “a single analog copy”;
- while it is assumed that collective works shall receive a TRIPS-compatible term of protection, the duration of protection for this class of works is not made explicit in the law;
- as mentioned above, while “audiovisual works” are protected as works with (apparently) TRIPS-compatible duration, the law lists “motion pictures” as being protected for fifty years from the date of first publication, which would violate TRIPS;
- the law does not contain express provisions for *ex parte* civil searches to be carried out, as required by Article 50 of TRIPS;
- Article 14(D) contains a provision that is totally incompatible with international standards and practice: namely, it permits the court to appoint a receiver to take possession of seized goods, sell them off and give the proceeds to the court for disposition; this provision amounts to a government-sanctioned sell-off of pirated products, and must be deleted;
- the law does not contain TRIPS-compatible border measures; Omani authorities should provide transparent access to indicate any and all other regulations related to the enforcement of copyright, including but not limited to border measures, *ex parte* civil searches, criminal procedures, court decrees, and the like.

In addition to the above changes that are needed to bring Oman’s law into full compliance with its international obligations (Oman has been subject to the Berne Convention (Paris text provisions) obligations since July 1999 and TRIPS obligations since November 2000), Oman should expressly clarify that the registration and deposit provisions of the 1998 Enforcement Regulations are voluntary as to foreign works and sound recordings, to ensure that Oman’s law is not inconsistent with Berne/TRIPS.

Oman Joins the World Trade Organization in 2000, the Berne Convention in 1999, Now Needs to Join Geneva (Phonograms) Convention

On October 10, 2000, the WTO General Council approved the accession of Oman to the WTO, effective November 9, 2000 (making Oman the 139th member of the WTO). Thus, Oman’s TRIPS obligations went into full effect on November 9, 2000. Oman became bound by the Berne Convention (Paris text provisions) on July 14, 1999. This means there is immediate and unambiguous “point of attachment” for U.S. works in Oman, and Oman must provide full retroactive protection for Berne-compatible terms for U.S. works. Oman must still join the

Geneva (Phonograms) Convention to shore up protection for U.S. sound recordings; Omani authorities should be encouraged to take this much-needed step as soon as possible.

Oman Should Accede to and Deposit the WIPO “Internet” Treaties

Oman is strongly encouraged to consider being the first country in the Middle East region to accede to the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which bring copyright into the digital age. IIPA urges USTR to call upon the Omani Government to take a leadership position regarding ratification of the WCT and WPPT. Certain provisions in Oman’s new copyright law (No. 37/2000) go far to implementing some of the requirements of the WIPO treaties. While there are possibly some clarifications needed in order to fully comply with the treaties, needed amendments are relatively minor, and should not stand as an obstacle to Oman’s accession and deposit of the WIPO treaties (e.g.: 1) there is no express “distribution” right for authors and owners of neighboring rights, as required by the treaties, although there is a general “utilization” right that might be interpreted to include such a right; 2) there is no express communication to the public right, including a “making available” right, although unauthorized communication to the public “through computers for commercial purpose” of a work or subject matter of neighboring rights is deemed a “special infringement” and subject to criminal penalties, which might be interpreted to cover some of the communications contemplated under the new treaties’ right; and 3) the new law does not prohibit tampering with voluntary rights management information used by copyright owners to identify and mark their works in the online environment; etc.).

Generalized System of Preferences

Oman currently participates in the U.S. GSP Program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Oman meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” At the same time that Oman caused losses to the U.S. due to piracy, Oman imported (during the first eleven months of 2000) \$45.1 million of products into the United States without duty (23.5% of its total imports into the U.S.). Oman should not continue to expect such favorable treatment at this level if it cannot meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

PAKISTAN

EXECUTIVE SUMMARY¹

IIPA recommends that the Pakistan be placed on the Watch List.

Notwithstanding the political upheaval in late 1999, cooperation from Pakistani authorities continued to result in some enforcement actions during 2000. Police forces in Pakistan have also established special intellectual property, anti-piracy task forces.

Seven known CD production plants (only three of which are registered with the proper authorities) threaten to devastate the entire legitimate market, and worse yet, change what was a small-scale domestic enforcement problem into an international export-piracy problem. Piracy levels remain very high for all the copyright industries, and estimated trade losses due to piracy increased to more than \$136.9 million in 2000. Pakistan's copyright law still violates TRIPS, and the Copyright (2000) Amendment to the the Copyright Ordinance, 1962, reportedly introduces an apparent new royalty-free government-imposed compulsory license for copying, translating and adapting textbooks that, if not deleted or drastically curtailed, could make Pakistan subject to an immediate TRIPS case. The amendment also reportedly makes some changes intended to bring Pakistan's law closer into compliance with TRIPS in other areas.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	10.0	60%	9.0	60%	9.0	60%	9.0	70%	10.0	80%	10.0	100%
Sound Recordings / Musical Compositions ²	65.0 ³	90%	3.0	90%	2.0	95%	2.5	95%	2.0	95%	5.0	94%
Business Software Applications ⁴	16.9	84%	14.1	83%	18.1	86%	16.4	88%	16.7	92%	10.5	92%
Entertainment Software ⁵	NA	NA	NA	NA	11.1	94%	10.2	92%	9.8	93%	8.0	90%
Books	45.0	NA	42.0	NA	40.0	NA	30.0	NA	30.0	NA	30.0	NA
TOTALS	136.9		68.1		80.2		68.1		68.5		63.5	

¹ For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to filing.

² The 1999 loss figure represents U.S. losses only, while the piracy level figure represents the overall piracy level for music and sound recordings (including Indian and international repertoire). The piracy level for international repertoire in 1999 was 100%. The 1998 figures should be read the same way. The piracy level for international repertoire in 1998 was 99%.

³ The estimated losses to the sound recording/music industry due to domestic piracy are U.S.\$3 million for 2000, but this number excludes any losses on sales of exported discs. Total record industry losses for 2000 (including export piracy losses) were U.S.\$65 million in 2000.

⁴ BSA loss numbers for 2000 are preliminary.

⁵ IDSA estimates for 2000 are preliminary.

PAKISTAN: CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	TOTALS
Number of raids conducted	31	22	53
Number of cases commenced	29	0	29
Number of defendants convicted (including guilty pleas)	284	0	284
Acquittals and dismissals	NA	0	0
Number of cases pending	625	0	625
Total number of cases resulting in jail time	0	0	0
Suspended prison terms	0	0	0
Maximum 6 months	0	0	0
Over 6 months	0	0	0
Over 1 year	0	0	0
Total Suspended Prison Terms	0	0	0
Prison Terms Served (not suspended)	0	0	0
Maximum 6 months	0	0	0
Over 6 months	0	0	0
Over 1 year	0	0	0
Total Prison Terms Served (not suspended)	0	0	0
Number of cases resulting in criminal fines	0	0	0
Up to \$1,000	284	0	284
\$1,000 to \$5,000	0	0	0
Over \$5,000	0	0	0
Total amount of fines levied	190400	0	190400

COPYRIGHT PIRACY AND ENFORCEMENT IN PAKISTAN

Little Has Been Done in 2000 to Curb Growing Optical Media Piracy in Pakistan

The most troubling development in Pakistan since 1999 involves the growth of optical media piracy and the government's failure for the most part to address it. While domestic legitimate demand for CDs is very limited in Pakistan, IIPA now has reports of up to seven optical media plants (at least four in operation now, with at least two others going into operation in the second half of 2001), only two of which are registered with the proper authorities. These plants have a reported installed capacity of 100 million units; 18 million CDs are reportedly sold domestically (with a 90% piracy rate for CDs sold in Pakistan), with the rest being exported. The sudden arrival of such extensive CD manufacturing capability in Pakistan demands swift action from the Pakistani government, as these plants supply the pirate market in Pakistan and export pirate product to other countries in the region. The pirated copies being produced are often made from foreign-produced, uncensored masters. Because of the rise of pirate production in Pakistan, imported or smuggled pirate optical discs from countries like China and Malaysia has decreased somewhat in 2000, compared with 1999.

As a result of this increase in optical media pirate production and the pirate import of optical media in 1999 and 2000, there has understandably been a sharp rise in the sale and availability of all kinds of optical media pirate copies, including pirate music CDs (which are pricing at about U.S.\$2.50 for international and Indian repertoire, and U.S.\$1.50 for domestic repertoire, compared with U.S.\$4 in 1999, and accounted for some 18% of total pirate unit sales in 2000, up from 15% in 1999), pirate VCDs, which are starting to appear in the Pakistani market in increasing numbers within days of a film's theatrical release, and pirate copies of business

software. In short, piracy produced in Pakistan is now decimating the legitimate markets domestically and abroad.

The Pakistani government must immediately take steps to implement effective measures against CD and CD-ROM piracy. In particular, the Pakistani government should introduce effective optical media plant control measures, including the ability to track the movement of optical media production equipment, as well as the raw materials (including optical grade polycarbonate), and also including the compulsory use of Source Identification (SID) codes, in order successfully to halt the production of pirate CDs and CD-ROMs. In addition, Pakistani authorities must conduct raids on plants producing unauthorized product, must seize infringing copies and machinery, and must impose criminal penalties to deter the organized manufacturing and distribution of pirate product.

The Pakistani market remains mired in software piracy, with an estimated 1998 piracy level of an unacceptably high 84% for business software applications. Presently, there are estimated to be over 10,000 illegal software kiosks throughout Pakistan, in cities such as Karachi, Lahore, Islamabad, Faisalabad, Peshawar and Quetta. These software retailers feed Pakistan's immense illegal end-user community, which includes major banks, financial institutions and government ministries. Recent raids indicate the scope of the problem. In 2000, the police conducted 20 raids against resellers, and two others against pirate end-users (businesses engaged in the unauthorized use of software). No fines or penalties were meted out as a result of these actions. While similar activities were carried out in 1998 and 1999, the trivial fines imposed in those cases made the enforcement efforts ineffective and non-deterrent.

Production of Analog Piracy (Videocassettes, Audiocassettes, Textbooks) Continues To Harm The Copyright Industries

Analog piracy, namely videocassette piracy, audiocassette piracy, and book piracy (mainly photocopying of medical texts, computer books, and business titles, but also including reprint piracy and commercial photocopying) continues to cause serious commercial harm to copyright owners in Pakistan. For example, pirate audiocassettes sell for as little as seven cents in Pakistan; not surprisingly, it becomes difficult in the face of such pirate prices to develop a legitimate local market. U.S. publishers report that the piracy situation in Pakistan continues to plague legitimate sales as the problem of illegal reprinting and commercial piracy of scientific, technical and medical titles increases. Computer and business books also continue to be popular with the pirates.

Back-to-back copying of videos in video outlets in Pakistan causes serious harm to the motion picture industry. An estimated 60% of the 35,000 to 40,000 shops carry pirated back-to-back videos. Pirated copies of movies are even found for sale in supermarket entertainment sections. There are three major duplicating centers in Pakistan; one of them, Rainbow Center in Karachi, was closed recently for a short time. The labs in these duplicating centers produce illegal copies of movies not yet released in theaters ("pre-release") as well as already-released home videos. The major source of the masters for these titles is copies reproduced on camcorders from the U.S. There are an estimated 50,000 satellite dishes in the country, and an undetermined number of small, in-house cable systems, creating the potential for large-scale unauthorized retransmissions of U.S. motion pictures. Finally, restaurants and other public establishments engage in the unauthorized showing (public performance) of motion pictures. In 2000, the motion picture industry reports unacceptably high piracy levels of 75% and 60% for cable/satellite piracy and public performance piracy, respectively.

Overall piracy of international and regional (Indian) sound recordings continues to be nearly 100%, while the overall rate of piracy is estimated at 90% (no change from 1999). In 2000,

there were no known enforcement actions taken by the authorities to protect regional (Indian) and international sound recordings.

Enforcement Efforts Continue Against Motion Picture Piracy And Software Piracy, But Deterrent Results Are Scarce

Despite the political upheaval of late 1999, and considering the other law enforcement priorities the government has faced, the Pakistani government has shown some commitment to enforce the laws against video and software piracy, although not without problems, and IIPA is particularly worried about statements made by the Pakistani government in recent months asking enforcement officials to cease engaging in enforcement actions. The enforcement environment remains difficult when factors of the general social instability and safety are considered, as well as a lack of education on the part of police officials charged with enforcement. Enforcement by the police has been effective when complaints are presented and evidence of infringement is produced in advance. However, there is no central administrative government body that focuses on copyright awareness and enforcement, exacerbating the difficulties already faced by right owners.

Evidence of continued commitment to engagement includes the government's activity in raiding optical disc factories in 2000, in conjunction with industry representatives. In addition, police forces in three major cities (Karachi, Lahore, and Islamabad) established special intellectual property anti-piracy task forces in 1999. Unfortunately, these task forces have not had the expected impact because of insufficient commitment by the government to this effort. In addition, enforcement efforts in general have been hampered by continuing civil unrest, which has required significant allocations of police resources.

For the motion picture industry, for example, in 2000, tens of retail video outlet raids were conducted nationwide, in cooperation with the the motion picture industry's local anti piracy program. As a result of all of these enforcement efforts, the level of video piracy has dropped over the years, from 100% in 1995 to approximately 60% in 1999.

For the business software industry, while the police have been actively engaged in conducting raids of illegal hard disk loaders, the Pakistani enforcement authorities have been less willing to act against pirate end-users (businesses engaged in the unauthorized use of software). Finally, in 2000, a court-ordered raid on a pirate end-user occurred for the first time; however, the effectiveness of the order was greatly curtailed in that the court refused to issue the order *ex parte* (i.e., an "Anton Piller" order, without giving notice to the defendant). *Ex parte* civil searches are essential to preserve evidence of illegal copying of software and therefore to the successful pursuit of civil infringement cases in Pakistan. Until Anton Piller orders are more reasonably granted in South Africa (consistent with Article 50 and Article 41 of TRIPS), right holders have few prospects for effective civil enforcement against software pirates in Pakistan. Because of the different nature of the problems faced by the software industry in this regard, and the fact that no deterrent penalties have been imposed to date on software pirates, business software piracy levels in Pakistan remain alarmingly high at 84% in 2000.

There has been no detectable enforcement against book piracy. Most textbook publishers lose whatever legitimate market they might enjoy to pirates. Groups like the National Book Foundation fail to comply with the already very weak regulations on notification and payment of royalties, driving losses up. Losses in Pakistan due to piracy of publishers' works are U.S.\$45 million, the highest per capita in the world.

Court Proceedings are Boggled Down By Delays, and Result In Non Deterrent Fines

Up until the political upheaval of late 1999, the courts, while seriously backlogged, appeared to be working piracy cases through the system. The courts require significant documentation to support criminal prosecutions, which delays anti-piracy cases even further. While maximum criminal penalties for infringement are three years, imprisonment and a fine of U.S.\$1,720 (Rp100,000), such punishments only exist on the books; they are never carried out in practice, and instead, typical penalties imposed on pirate video outlets are miniscule. Even though there has been some indication of increased fines over the past couple of years, the court system simply does not provide an effective deterrent to piracy. Cases brought in 1994 move along at a glacial pace (while the rare case is decided in days). There are several possible sources of delays, including: the failure of the raiding officer to submit the final chart sheet (or *chalan*), often due to the officer's heavy caseload or his transfer (a common occurrence); the nonavailability of the judge; the nonavailability of witnesses on hearing dates; and the nonappearance of a defendant's lawyer for several hearings in order to delay the proceedings.

COPYRIGHT LAW AND RELATED ISSUES

Pakistan's Copyright Ordinance Reportedly Amended in 2000

In September 2000, the Copyright Ordinance, 1962, was reportedly amended by the Copyright (Amendment) Ordinance, 2000. IIPA is still awaiting confirmation to determine if and when the amendment went into effect. This amendment reportedly deals with many of the TRIPS deficiencies noted in IIPA's 2000 Special 301 report. It also reportedly establishes neighboring rights in producers of sound recordings and performers. Specifically, the amendment reportedly would do the following:

- The amendment reportedly defines the term "copyright" in Section 3 to include the exclusive right to authorize the rental of computer programs and cinematographic works. "Rental" is now reportedly defined in Section 2 as "the authorization to use the original or a copy of a computer program or a cinematographic work for a limited period of time for consideration." While express neighboring rights are provided for in the amendment (a new Section 24-A), IIPA has not seen the amendment, and thus will await to confirm whether the exclusive right to authorize rental of sound recordings is afforded to producers of sound recordings, as required by Article 14 of TRIPS.
- The amendment reportedly provides for civil *ex parte* search orders (without notice to the defendant), essential to enforcement against end-user piracy and required by Article 50 of TRIPS. Specifically, Section 60-A reportedly provides "Special remedies for infringement of copyright," permitting the owner of an infringed work or subject matter to apply to the court for immediate provisional orders to prevent infringements and preserve evidence. The court would have the power to order the search without notifying the defendant if it determines that any delay would risk frustrating the proceedings; the copyright owner or other person seeking the order would reportedly be bound to file a suit or other civil proceeding within 30 days of initiating the provisional proceedings.
- An amendment to Section 58 reportedly broadens the Registrar's authority under the current Ordinance to prohibit, in addition to infringing imports coming into Pakistan, the export out of Pakistan of such infringing copies. A new Subsection 60-A(3) reportedly

provides for border measures (including the court's ability to refuse to release goods destined for import or export that are suspected of being infringing into the channels of trade, until the matter is decided by the court); adequate border measures are required by Articles 51-59 of TRIPS.

- The amendment reportedly adds similar prohibitions on import and exports, along with analogous border measures, of infringing copies of a work, "whether themselves or depicted or applied to any article or goods or in any other form," which might include labels, t-shirts and other merchandise.
- The amendment reportedly provides express protection for compilations of data as required by TRIPS Article 10.2.

Unfortunately, included in the reports is the disturbing news about an amendment that could devastate the publishing industry's ability to exercise and enforce its rights in Pakistan. Specifically, the amendment reportedly contains a provision whereby the Pakistani government or the Copyright Board (established pursuant to Article 45 of the Copyright Ordinance) may apparently grant a royalty-free, government-imposed, compulsory license for copying, translating and adapting any textbooks 'on a non-profit' basis. If true, and if not drastically narrowed by other provisions to make it consistent with international treaty and convention standards, this amendment would take Pakistan out of compliance with its international obligations, and possibly subject it to an immediate TRIPS case.

The following additional problems with the Ordinance (as amended through 1992), notwithstanding the reported amendments discussed above, include:

- unclear point of attachment for foreign sound recordings;
- other overly broad exceptions to protection;
- unclear full retroactive protection for works and sound recordings, as required by TRIPS,

Pakistan must further amend its copyright law to fix the problems identified, and is urged to ratify the 1971 (Paris) text of the Berne Convention, and join the Geneva (phonograms) Convention.

Motion Picture Ordinance Amendments

As of late 1999, proposed amendments to the Motion Picture Ordinance (to more clearly cover home video products) were with the Pakistani Cabinet. However, with the dissolution of the Cabinet, the draft went back to the Ministry of Culture, which has once again announced plans to amend the Ordinance. Motion picture industry representatives have reviewed and provided comments on drafts of the proposed amendments. Once approved, these amendments would need to be reviewed one last time by the Ministry of Law before going to the President for signature as an ordinance. This is expected within the next several months. As the Ministry of Culture has spent several years preparing these amendments, the government should take this final step without any further delay. Among other things, the proposed amendments would introduce a video outlet licensing requirement, would require the censorship of home video product and would impose meaningful penalties for trading in unauthorized home video product. These amendments are a critical supplement to the protection afforded under the Copyright Ordinance.

Pakistan Should be Encouraged to Adhere to the WIPO Treaties

In addition to the changes necessary to bring Pakistan's Copyright Ordinance into compliance with TRIPS, the goal of such amendments should be to modernize the copyright system, taking into account the latest technological developments, such as technological protection measures and modern digital distribution models. As such, Pakistan should ratify and implement the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Generalized System of Preferences

Pakistan currently participates in the U.S. GSP program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Pakistan meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." At the same time as Pakistan caused losses to the U.S. due to piracy and kept its law in violation of international treaty obligations, Pakistan imported (during the first eleven months of 2000) \$84.8 million of products into the United States without duty (4.4% of its total imports into the U.S.). Pakistan should not continue to expect such favorable treatment at this level if it continues to fail to meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

PERU

EXECUTIVE SUMMARY

Effective enforcement remains the copyright industries' primary concern in Peru.

Noticeable progress with Peru's administrative agency, INDECOPI, has been achieved. INDECOPI's institutional attitude towards the industry's enforcement efforts changed markedly during 2000. New government officials have undertaken several initiatives to improve intellectual property rights protection. Senior INDECOPI officials have committed to support the copyright industries' enforcement efforts and to participate in urging other agencies to participate in the IPR enforcement efforts. INDECOPI actively supported the development of the Special Commission against Counterfeiting and Piracy (*Comisión de Lucha contra la Falsificación y la Piratería*, known as CONTRACOPIA). INDECOPI invited several IIPA member associations to be members of this Commission as well as other government agencies, such as Customs, the tax agency (SUNAT), the police, and the prosecutor's office. This Commission should help confront the piracy problem with coordinated efforts, providing a unique forum for different industries to meet and discuss initiatives. INDECOPI has issued a legal report recommending that the Ministry of Industry ratify the two WIPO treaties, and a senior official has stated that Peru is working toward ratifying these treaties; all that is needed is Presidential signature. INDECOPI officials have repeatedly stated that it will support the appointment of a second specialized IPR prosecutor and of specialized judges. Resolution regarding outstanding issues regarding INDECOPI's administrative fines and levels of damages needs to keep moving forward.

Peru must devote much more attention toward improving its criminal enforcement system in order to meet its bilateral and multilateral copyright obligations. Many of the copyright industries rely on criminal enforcement to deter piracy in Peru. More police actions are needed. Prosecutors must bring and actively pursue the cases, and judges must impose deterrent sentences. The recent naming of a Special IPR Prosecutor appears to be a step in the right direction. To the best of our knowledge, not one copyright pirate received a criminal conviction with a jail term last year, despite the fact that Peru's copyright law contains high levels of criminal sanctions. Peru also needs to improve its border controls. Levels of copyright piracy remain high across all industry sectors. In turn, estimated trade losses due to piracy of U.S. copyrighted materials in Peru rose to \$93.8 million in 2000.

In recognition of the progress Peru has made on copyright matters, IIPA recommends that Peru be placed on the Special 301 Watch List this year. IIPA anticipates that high-level contacts on intellectual property issues between the U.S. and Peruvian governments will continue in 2001. It is imperative that tangible progress to improve copyright enforcement continue during this election year in Peru.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	4.0	75%	4.0	65%	4.0	50%	5.0	60%	4.0	60%	4.0	95%
Sound Recordings / Musical Compositions	55.0	96%	50.0	85%	50.0	85%	40.0	80%	NA	NA	16.0	83%
Business Software Applications ¹	21.5	61%	22.2	63%	30.5	64%	25.0	66%	29.4	79%	30.0	84%
Entertainment Software ²	3.8	70%	NA	NA	NA	NA	5.2	NA	NA	NA	15.0	76%
Books	9.5	NA	10.0	NA	10.0	NA	10.0	NA	10.0	NA	9.0	NA
TOTALS	93.8		86.2		94.5		85.2		43.4		74.0	

BILATERAL COPYRIGHT ISSUES WITH PERU

Because of the difficulties in obtaining effective criminal, administrative and border enforcement in Peru, IIPA requested in June 1999 that USTR initiate a review of Peru's eligibility as a beneficiary country under the Generalized Systems of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA) for its failure to provide adequate and effective copyright protection to U.S. copyright owners.³ Peru developed a plan of action for IPR issues in early 2000 which led IIPA to withdraw its GSP/ATPA petition on February 7, 2000.

IIPA understands that Peru currently faces an unstable political environment. Elections are slated to take place on April 8, 2001, and a new government will take office in July. Nevertheless, IIPA believes that progress on copyright enforcement matters can be achieved during this election year in Peru. The problems with enforcement in Peru have been apparent for years. Peru has made general commitments to address some of these problems, and now concrete action needs to be taken in order to enforce these rights and promote economic development. IIPA believes that Peru could make the following commitments, followed by specific actions on deadlines, with respect to

¹BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$21.4 million and 59%, respectively, were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

³ In 1999, \$54.7 million in Peru's imports to the United States benefited from the GSP program, accounting for nearly 2.9% of its total imports to the U.S. An additional \$631.2 million of Peruvian products benefited from the Andean Trade Preferences Act (ATPA) in 1999, accounting for 33.7% of total imports to the United States. For the first 11 months of 2000, \$40.5 million of Peruvian goods entered the U.S. under the duty-free GSP code and an additional \$776.3 million under ATPA, representing a 39.5% increase in ATPA benefits over the same time period last year. For more historical information about Peru's placement on Special 301, see Appendices D and E of IIPA's 2001 Special 301 report.

the following points.

- make the anti-piracy problem an issue of national priority;
- add additional resources dedicated to criminal IPR enforcement (e.g., adding at least one additional special prosecutor, making the appropriate arrangements with the responsible judicial bodies to create a judicial court which focuses on IPR issues). It is critical that the criminal justice system work effectively such that deterrent criminal penalties are actually imposed, which would require effective police action, effective prosecutions and the timely issuance of judicial judgments with deterrent sentences;
- INDECOPI should impose deterrent-level penalties in compliance with TRIPS in all cases. And in those cases involving the calculation of *derechos devengados* (rightholder's share of damages), the penalties issued must exceed the value of legitimate copyrighted products infringed;
- border enforcement needs to be improved. Customs' efforts at seizing suspicious copyrighted products as well as raw materials used in making those products should be considered a government priority; and
- the Peruvian government should not infringe the rights of copyright holders in its use of copyrighted products, particularly business software, in its ministries and agencies, and the Executive should issue a decree to ensure legal use of business software.

The American Chamber of Commerce has recently signed an agreement with MITINCI to coordinate and take actions which will improve commercial conditions and investment in Peru. AMCHAM will be providing proposals and initiatives for MITINCI consideration, and it is hoped that this initiative will generate positive results.

COPYRIGHT PIRACY IN PERU

The recording industry reports that Peru continues to have one of the highest levels of audio piracy in the world – approximately 96%, a significant rise over the last year. Pirate audio product in Peru appears in all formats – cassettes, CDs and now CD-ROMs. Recordable CDs (CD-Rs) were imported into Peru at a ratio of 10 to 1, when compared to the already diminished legitimate CD market in 2000. During 2000, the legitimate industry sold only 632,000 units, compared to the 5.6 million units sold in 1987. With Peru being the fifth largest country in population in South America, the sound recording market is only in 11th place in the region. Currently, illegal replication is mostly local. Regarding the cassette format, industry investigations show that every week thousands of blank tapes and recordable CDs make their way into the mainstream Peruvian market through Tacna in Chile (Iquique-Arica) and are then distributed for illegal duplication around the country.

Estimated trade losses due to audio piracy were \$55 million in 2000, reflecting an increase over the prior year due to the accelerated growth of CD piracy which is replacing cassette piracy. During the year 2000, many recording companies (at least 10) closed because they could not compete with the overwhelming levels of piracy. In addition, over 350 businesses which sold legitimate recordings have closed because there is, in effect, no market for legitimate recordings. In the summer of 2000, the recording industry established a new presence by opening "APDIF PERU" in Lima. This reinvigoration of the international industry's (IFPI) program reflects a concerted effort to improve relations with the government of Peru, which has historically challenged the recording industry's explanations and descriptions of the scope of the piracy problem in Peru. APDIF PERU also works with COPERF, the Peruvian Recording Industry Association, on this campaign.

Video piracy and television signal theft are the motion picture industry's primary concerns in Peru. In 2000, video piracy worsened to the degree that MPA member companies believe the video market has been irreparably damaged (that is, the market potential has been reduced and is not recoverable, primarily because of the increasing number of legitimate outlets that closed because of their inability to compete with pirate product). Ironically, that irreparable market reduction actually lowers the estimated loss for the video market, but should be understood as a dramatic consequence of the inability to control video piracy. In addition, this reduction in potential market is due directly to three causes: the inability to attack street piracy, especially the Polvos Azules market; the inability to achieve deterrent sentences; and the inability to effectively address video store piracy through administrative mechanisms (INDECOPi). As a result, MPA member companies now question the value of continuing to spend resources on video anti-piracy actions to the degree they have in the past and have, in fact, decided to reduce their investment in video anti-piracy actions. The estimated video piracy level rose to 75% in 2000.

MPA expects piracy in street markets to continue to grow and continue to damage the decreasing legitimate market, since 100% of the stock sold in this channel is pirated material. Of special concern is the Polvos Azules market. MPA's efforts to raid the most representative market have been unsuccessful. Although other street markets could be raided with the support of the Prevention Prosecutor and the Fiscal Police, Polvos Azules appears not to be in the government's priorities. The Special Prosecutor on IPR issues (recently changed) delayed the realization of a raid in Polvos Azules, claiming lack of police support. In video stores, back-to-back video copying is the most dominant form of nonauthorized use and the practice continues to grow because of the inability to address it through administrative means.

MPA is also concerned with signal theft piracy in cable television systems. This practice has recently begun to grow. MPA has discussed the issue with INDECOPi and officials of the Telecommunications Franchise Unit of the Telecommunications Ministry to establish a mechanism to address the issue administratively. No action was taken in 2001, however. Nevertheless, the market for television product is of increasing concern and potential, in contrast to the video market, and MPA expects to take legal action on the issue in 2001. Estimated trade losses due to motion picture piracy in Peru remain at \$4 million in 2000.

The Business Software Alliance (BSA) reports that illegal duplication of business software within larger Peruvian private sector companies has declined significantly over the past three years, but remains a serious problem inside smaller companies. However, academic institutions have implemented few controls against the theft of intellectual property. Despite an impressive number of raids by the criminal justice authorities, pirate business software and other copyrighted products are flagrantly available in commercial centers such as Galerías Garcilazo and Wilson, Lima.

The level of illegal use of business software in Peru was 61% in 2000, with estimated losses due to the piracy of U.S. business software in Peru placed at \$21.5 million. These drops are due to the industry's effective anti-piracy program, despite only modest growth in the market for legitimate software. It is important to keep in mind that more than half of the programs used on new systems in Peru last year were illegal.

There is a ray of light for book publishers in the use of illegal copies of translations at universities in Peru. LIBUN, the distribution organization for BIS titles (former RTAC), has convinced university authorities in most institutions to prohibit illegal books and publications to be used in their classes. It is hoped that this will reduce college textbook piracy in 2001. Estimated trade losses due

to book piracy in Peru dropped to \$9.5 million in 2000. The more damaging forms of piracy -- commercial book piracy and photocopying -- still remain at high levels. Trade books of U.S. origin now appear as pirated translations. There continue to be pirated translations of college texts, which have resulted in cheaper pirated editions. In addition, AAP has received reports from local publishers who have attempted to achieve action by both prosecutors and INDECOPI against book pirates, but report dissatisfaction with the level of cooperation and action by these authorities.

Trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) in Peru are estimated to be \$3.8 million for 2000. The Interactive Digital Software Association (IDSA) indicates that the estimated level of piracy of entertainment software was 70% last year in Peru.

COPYRIGHT ENFORCEMENT IN PERU

Difficulties in obtaining effective enforcement remain the copyright industries' primary concern in Peru. The 1996 copyright law covers a broad range of economic rights in favor of the author/producer, as well as some of the highest levels of criminal penalties in Latin America. Criminal and administrative actions can be filed at the same time. Some of the copyright industries, primarily the music and motion picture industries, prefer to use criminal procedures through the Public Ministry. They perceive that INDECOPI does not have the resources, equipment or authority to be of much assistance in the fight against video and audio piracy.

In April 2000, many copyright industry associations in Peru joined along with several Peruvian governmental entities in establishing a special commission called the Comisión contra la Adulteración, Falsificación y Piratería (CONTRACOPIA). Functions of this commission include analyzing the problems of each industry sector, proposing solutions to combat piracy, conducting economic studies on the extent of piracy and counterfeiting, reviewing present legislation and proposing public education campaigns. So far, this Commission has sponsored an informal forum for the exchange of ideas between the government and industries on intellectual rights initiatives. The Commission has presented a bill to modify the criminal code to increase penalties imposed for intellectual property crimes. The bill proposes sanctions as high as the ones imposed in copyright crimes. However, the Commission has not yet found a way to address INDECOPI's enforcement weakness.

Peru's Criminal Enforcement System Fails to Deter Piracy

Deterrent criminal penalties and effective enforcement action by the police, prosecutors, and the judiciary are essential. Sadly, the special police unit trained in IPR enforcement matters is ineffective in handling street piracy, and only of limited effectiveness in fighting piracy in video clubs. For example, the Mesa Redonda neighborhood of Peru remains flooded with all kinds of pirate product. The IPR industries agree that there is a strong need to create a special IPR unit in the police in order to conduct effective anti-piracy investigations. In fact, there already is a special unit for pharmaceutical crimes.

More police actions are needed

The recording and music piracy situation is so pervasive that thousands of pirated audiocassettes and illegal music CDs are sold in the neighborhood of Mesa Redonda, located one block away from the police and Public Ministry's headquarters. A special police unit was created in

May 1997 to fight piracy and other economic crimes, and this unit was trained in IPR enforcement issues. Disturbingly, leaks regarding ongoing investigations and demands for bribes are common. The Peruvian police continue to protect the pirates of Mesa Redonda (an area similar in its level of lawlessness to the Mexican district of Tepito and the Paraguayan city of Ciudad del Este).

The recording industry has been able to conduct some raids in 2000, with successful results, like the one conducted in Lima in the zone known as El Hueco. In El Hueco, 500,000 pirate units were seized in *one* single action. To gauge the size of this action, this seizure compares to approximately 50% of the total legitimate annual sales of music in Peru. It is important to note that Mr. Ramon Pinto, a magistrate of the Public Ministry, has been a key player in investigations of all these cases which the recording industry has filed recently.

During 2000, MPA focused on criminal actions, due to INDECOPI's inability to effectively address video piracy (the change in leadership at INDECOPI toward the end of 2000 may enable MPA to take administrative actions in 2001). MPA conducted 54 raids on retail video outlets, resulting in the seizures of 21,200 pirate videos. In addition, the Peruvian home-video distributor for MPA member company product coordinated 75 police raids. In addition, MPA coordinated six raids on MPA-investigated small-scale video reproduction centers and also coordinated five police raids on street markets. Note that these numbers are down from 1999, primarily because MPA member companies are much less confident about the possibility effective government action than they were two or three years ago. MPA was unable to convince criminal authorities to take any effective action against Polvos Azules. The inaction at Polvos Azules is directly attributable to police and prosecutorial reluctance to attack piracy in that street market.

In 2000, the BSA commenced 28 criminal actions through the Public Prosecutor (Fiscal de Prevención del Delito) against resellers suspected of software piracy. In addition, the police occasionally self-initiated raids to reduce piracy in pirate bazaars such as Galerías Garcilazo and Wilson, Lima. No sentence was handled down in any of the BSA's cases initiated in 2000. Regarding the 1999 cases, only two sentences, out of 31 cases initiated, were handled down in 2000.

IDSA reports that entertainment software companies have taken some actions in Peru, including some police raids against counterfeit product in Lima and with customs seizures of counterfeit product this spring. IDSA members have also supported anti-piracy trainings with INDECOPI.

Problems at the prosecutorial level

In January 2001, a new special intellectual property rights prosecutor was appointed to replace the previous prosecutor. Although the new prosecutor's jurisdiction is still limited to the city of Lima, she handles matters of intellectual property rights exclusively, while her predecessor had concurrent jurisdiction to handle other matters as well. Since she was appointed just last month, it is too early to assess her performance, but she seems willing to pursue copyright infringement cases in an efficient manner.

The long-advocated solution would be to seek the appointment of a second special prosecutor in Lima, and other specialized regional prosecutors for IPR matters. It is important that these prosecutors be empowered to act throughout Peru, not just in Lima, and have the support and cooperation of the police and customs officials. There are now petitions to create IPR *ad hoc* bodies in the judicial system, special IPR prosecutors and special enforcement units. All of these

proposals were introduced by the software industry and are awaiting consideration by INDECOPI, the Ad Hoc Prosecutor and the Commission Against Piracy.

Few criminal verdicts are reached

Few criminal cases reach the judiciary. Of those that do, judges do not impose deterrent sentences. Most cases result in suspended sentences (Peruvian law permits judges to suspend sentences of less than four years). No copyright pirate has received deterrent sentences for criminal copyright infringements in Peru, despite the fact that the law contains high levels of penalties.⁴ Under Article 57 of the Peruvian Criminal Procedures Code, sentences of four years or less are suspendable. The results in these cases have been that the courts suspend the defendant's sentence. The only deterrent factor is that the defendant is prohibited from leaving the country and from committing the same crime again (and even this deterrent is suspected if the defendant files an appeal).

In 2000, MPA filed 65 criminal cases (54 retail, six illegal reproduction and five street market actions). Although eight cases resulted in favorable verdicts, they did not involve jail time or damages. As a result, through 2000, no audiovisual pirate has done any time in jail and no deterrent sentence has been handed down.

BSA commenced 28 criminal actions but obtained no verdicts or decisions in any of its criminal cases in 2000

During 2000, the recording industry worked with Peruvian police and Customs officials to conduct 26 raids, which resulting in the seizure of some 1.7 infringing copies of sound recordings. When arrests are made, the defendants are bailed out. Sixty cases have been commenced. Nineteen cases are pending. So far, there have been no convictions or guilty pleas.

The Administrative Enforcement System in Peru Does Not Yet Provide Effective Copyright Protection and Enforcement

The INDECOPI Copyright Office has been relatively effective in investigating business software cases, but in 2000 did fail to issue fines in cases where entry was denied.

The business software industry (led by BSA), unlike the audiovisual and the recording industries, has relied significantly on administrative actions taken by INDECOPI, and the level of success achieved over the years has been improving. The business software industry prefers INDECOPI enforcement, because their proceedings through the INDECOPI Copyright Office (the administrative court of first instance) continue to be faster than criminal proceedings, which seldom reach indictment and trial. Requests for administrative inspections have generally been approved

⁴ Article 217 of the 1996 copyright law provides for a penalty of not less than two years or more than six years in jail, and a fine of 30 to 90 times the average daily income for most infringements. Other articles provide even higher penalties. For acts involving commercial purposes, Article 218(d) specifies that the sanction is not fewer than two years or more than eight years in jail and fines of 60 to 100 average daily income wages. While these on-the-books provisions are strict, they are not actually imposed as a matter of practice by Peruvian judges.

in a timely manner by the Copyright Office, and BSA has successfully coordinated the timetable of these inspections with INDECOPI officials. BSA has maintained consistently that INDECOPI's Copyright Office has done a reasonably good job in bringing software cases. It acts upon complaints filed quickly (one to two weeks), and resolves the cases in three to six months.

In 2000, BSA commenced 30 end-user administrative actions through INDECOPI and was able to settle most of the cases. Presently, INDECOPI has nine cases pending decision.

INDECOPI did not resolve any of the pending MPA cases in 2000, and MPA chose not to pursue any new cases at the agency based on the decision that the action would be ineffective. Recent changes at INDECOPI raise the possibility that MPA work with INDECOPI in 2001, but it remains only a possibility.

As for entertainment software actions, Nintendo has commenced several criminal and civil actions over the years, and has met with moderate success working with INDECOPI. In December 1999, a large container arrived through Customs containing a large number of 8-bit video game hardware as well as videogame software; the case is currently pending with INDECOPI. Despite the seizure of thousands of counterfeit and pirate products, there have not been sufficient deterrent penalties imposed on any of the defendants to cause them to stop their illegal activities.

The INDECOPI Tribunal is reevaluating its methodology regarding the level of fines and damages to be paid to rightholders of business software

Under the 1996 copyright law, 100% of the administrative fines go to INDECOPI. Additional compensation (known as *derechos devengados* or "rightholder's share") can be awarded to the copyright owners. And in those cases involving the calculation of fines paid to the rightholders, the penalties issued must exceed the value of legitimate copyrighted products infringed upon. This has not been the result in years of administrative cases brought by BSA member companies. The INDECOPI Appellate Tribunal (*La Sala de Propiedad Intelectual*) in most cases slashed the amounts of fines that would go to the rightholders, the affected BSA member companies (while sometimes raising the fines that go to the State).

However, during 2000, INDECOPI's institutional attitude towards the business software industries has improved dramatically. The ODA (Oficina de Derechos de Autor, the administrative court of first instance), recently began adding a paragraph to most copyright decisions expressly awarding a fine in favor of the rightholder equal to 100% of the full value of the license.

Traditionally, the INDECOPI Tribunal has reduced the level of additional compensation awarded by the INDECOPI Copyright Office to be paid to the rightholders. The overall levels of fines issues plus the *derechos devengados* have not deterred the unlawful use of software. Even though there are no minimum or maximum amounts established by the applicable law (Decreto 822), the Tribunal's application of Decreto 822 has been very restrictive. It has consistently maintained that the copyright owner should only be entitled to 20% of the value of an infringed software package instead of the full value of the license because this amount represents the net profit for the author, based absurdly on book publishing precedents. Despite this consistently wrong application of Decreto 822, INDECOPI has been working on a report that will reconsider its methodology for calculation of damages. It is also encouraging that in January 2001, the intellectual property judges at the INDECOPI Tribunal were replaced.

One possible solution to clarify the interpretation of the Decreto 822 regarding this damages problem is to consider implementing and imposing statutory damages which would streamline enforcement and save INDECOPI from the tortuous process of trying to determine the value of the fines and *derechos devengados*. For example, statutory damages incorporated in Brazilian copyright legislation -- and recently increased -- have resulted in penalties at deterrent levels. Statutory damages, which prescribe that a court may use a fixed sum or multiple to determine damages in lieu of determining actual damages, are a feature of copyright legislation in a growing number of countries. CONTRACOPA is currently preparing a bill to reform Decreto 822 which include a provision that grants statutory damages to the rightholder.

Peruvian Border Measures Must be Improved

Border measures in Peru are inadequate to stop the flow of pirated material into the country. Interventions by customs authorities (SUNAD, the Superintendencia Nacional de Aduanas) to seize suspect shipments are few. SUNAD has an online customs clearance system called Aduanet. The key, however, remains that authorities must take action on the ground to stop and hold suspect merchandise. Peruvian Customs, by an internal directive or some regulatory means, should impose strict controls to check the legitimacy of IP goods entering and leaving Peru (e.g., music CDs, videos, business software, videogame software on all platforms, including CD-ROMs, personal computer CD-ROMs and multimedia entertainment products). Customs can consult with industry associations and local representatives about suspect shipments. Many of the copyright industries have participated in training aimed at Peruvian customs officials.

Customs should also pay special attention to the value of the goods that are used as raw materials for the production of copyrighted products, such as recordable CDs, blank tapes, blank videos, etc., that enter Peru with what appear to be underdeclared values.

COPYRIGHT LAW AND RELATED ISSUES

1996 Copyright Law

Peru passed a copyright law (Legislative Decree No. 822) which entered into force on May 24, 1996. This comprehensive legislation raised the level of protection toward the standards of both TRIPS and the Andean Community Decision 351.⁵ The law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. Some preliminary discussion has taken place regarding the modification of Decision 351 to make it TRIPS and WIPO treaties-compatible. At last report, no specific action on this matter has been taken by the Andean Community Copyright Office directors.

⁵ On December 17, 1993, the Andean Community countries (Bolivia, Colombia, Ecuador, Peru and Venezuela) adopted Decision 351, which established a common regime on copyright and neighboring rights. This decision set up rudimentary enforcement mechanisms, including injunctive relief, seizure and confiscation of unlawful copies and devices, and damages, many of which need to be implemented into national legislation. There are several drawbacks to Decision 351, including its failure to provide protection against parallel imports, and to meet the specific civil and criminal enforcement standards found in NAFTA and TRIPS.

WIPO Treaties

Further evidence of Peru's commitment to the effective protection in the digital age would be for Peru to ratify the new "digital" WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty. Last year, INDECOPI prepared an internal report favoring Peru's ratification of these treaties. All that is needed is a presidential signature. INDECOPI has approved ratification and is committed to press the government for early ratification. The importance of ratification and deposit of these treaties for a country's economy and culture, especially in the digital age of electronic commerce, cannot be overstated. For instance, electronic commerce can provide an enormous boost to a country's cultural and creative industries.

Software Legalization in Government Agencies

During 2000, the BSA and INEDCOPI participated in a jointly branded legalization campaign in Peru, including joint publicity bearing the INDECOPI and BSA logos. After the Legalization Campaign ended on June 30, 2000, BSA and INDECOPI continued carrying out joint activities, such as joint educational programs and enforcement actions through the end of the year. Additionally, INDECOPI has committed to support the BSA activities during the second Truce Campaign which will take place in April 2001

1998 Guidelines for the Legal Use of Computer Software

As part of the fallout from BSA's successful truce campaign, INDECOPI issued Resolution No. 0121-1998/ODA-INDECOPI, entitled "Guidelines for the Legal Use of Computer Programs (Software)." This resolution, however, reaches fundamentally erroneous conclusions, out of line with freedom of contract principles and international copyright interpretations (as well as arguably violating Peruvian copyright law), on the rights of copyright owners. Despite strong implications to the contrary in Peru's copyright law, INDECOPI concluded that the rightholder cannot put territorial limits on the right to use a computer program. Therefore, any user can purchase any program outside of Peru and bring it to Peru, despite license language to the contrary. This ignores a fundamental rationale for territorial limitations, such as a possible inability to provide technical and product support across international borders. In support of this conclusion, the resolution states that fundamental use by a user cannot be interfered with, i.e., that a copyright holder really has limited rights regarding license terms. The resolution further states that the rightholder cannot fundamentally interfere with the user's rights to use a software program. For example, an evaluation copy may be free or purchased for a reduced price, and it may only permit a certain number of uses, or use of certain features of the program.

The resolution fails to comprehend the rightholder's freedom to impose the contract terms found in the license; if the purchaser does not like the limitations, the purchaser need not purchase the program. The resolution attempts to sidestep this issue by claiming that software shrink-wrap licenses are contracts of adhesion, unsigned by the user and therefore abusive. However, their validity should be left to the courts, not undercut in an administrative resolution. Finally, the resolution fails to understand that the copyright distribution right gives the rightholder the right to limit territorial distribution; there may be good reasons for doing so, such as preventing violations of U.S. export control laws, or the inability to provide support locally in certain countries.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

Poland is an important market for all the copyright industries. In June 2000, Poland accomplished a long-sought goal of the copyright industries: adopting amendments to make the Polish copyright law comply with the WTO TRIPS Agreement. This four-year effort represented a major achievement, and the TRIPS-plus law was passed only after the Sejm split the larger comprehensive copyright legislative package into two pieces in order to increase the chances that the non-controversial TRIPS bill would pass. The new amendments corrected several, but not all, of the TRIPS deficiencies, including providing a point of attachment for sound recordings and protecting pre-1974 foreign sound recordings. Sadly they did not include provision for civil *ex parte* civil searches or clarify the scope of the existing law on this point. In fact, more objectionable provisions were inserted into this June 2000 legislation which will require additional resolution. The second copyright bill containing numerous controversial provisions to which the copyright industries object remains pending in the Sejm.

Given the passage of the June 2000 copyright legislation, IIPA supported USTR's decision in its out-of-cycle review to move Poland from the Priority Watch List to the Watch List in November 2000.¹ However, much remains to be done to improve enforcement if piracy levels are to remain low and if legitimate businesses are to thrive. In order to ensure that progress continues in Poland, on both enforcement and legislative reform, IIPA recommends that Poland remain on the Watch List and that another out-of-cycle review be conducted. In particular, this out-of-cycle review should focus on distinct and tangible improvements made in halting the activities involved in the sale and distribution of piratical materials at the Warsaw Stadium. IIPA suggests that this review be conducted not later than early September 2001. If the activities in the Stadium should happen to move to other location(s), we expect that situation also will be evaluated in this review.

The lack of effective criminal and civil copyright enforcement in Poland continues to be a major problem for all industries. The most visible example of the pervasive piracy is the numerous open stalls at the Warsaw Stadium. Organized crime elements are involved in the distribution of pirated materials, thus making it impossible for some of the industries to take any anti-piracy action because the danger is too high. Cooperation between police and the industries in anti-piracy raids and seizures of infringing goods continue to be positive, and results are encouraging despite the high levels of piracy and the infiltration of organized crime

¹ Press Release 00-77, Office of the U.S. Trade Representative, "USTR Announces Results of Special 301 Out-of-Cycle Reviews," November 8, 2000. Ambassador Barshefsky stated, "While we believe this [passage of the new copyright legislation] is an important step, it is critical that Poland also address remaining intellectual property problems, including weak enforcement against piracy and counterfeiting." For a full history of Poland's placement on the Special 301 lists, see Appendices D and E of this submission. Poland is also a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program which includes a criterion requiring beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners. In 1999, \$293 million of Poland's imports to the United States benefited from the GSP program, accounting for nearly 36.4% of its total imports. For the first 11 months of 2000, \$289.5 million of Polish goods entered the U.S. under the duty-free GSP code.

elements in piracy. However, few criminal cases reached the sentencing stage and most cases languished at the investigative or prosecutorial stage and then were dropped. Poland must correct the failures of its judicial enforcement system if it is to stem the growth of piracy. The overall trade losses due to piracy in Poland are estimated at almost \$249 million in 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	25%	25.0	25%	25.0	25%	25.0	25%	30.0	20%	39.0	25%
Sound Recordings / Musical Compositions	21.0	30%	22.0	40%	16.0	40%	9.0	35%	9.0	15%	10.0	22%
Business Software Applications ²	92.6	55%	130.0	60%	113.3	61%	86.1	61%	152.7	73%	113.1	75%
Entertainment Software ³	103.1	85%	70.9	60%	72.1	62%	68.2	59%	76.4	65%	72.9	63%
Books	7.0	NA	7.5	NA	7.0	NA	13.0	NA	13.0	NA	13.5	NA
TOTALS	248.7		255.4		233.4		201.3		281.1		248.5	

COPYRIGHT PIRACY IN POLAND

The market for legitimate products in Poland, which only a few years ago seemed promising, has been seriously damaged, for the music, motion picture, business and entertainment software industries. Some of the obstacles to effective enforcement were found in legal deficiencies in the 1994 Polish copyright law. The June 2000 copyright law amendments (discussed in further detail, below) did correct two major problems which affect enforcement — the lack of protection for pre-1974 foreign sound recordings and the low level of criminal penalties — and added new tools. IIPA and its members expect that the effective implementation of the new copyright law will deter piracy in Poland.

Optical Media Piracy in Poland Remains a Serious Problem

Imports of piratical optical media are on the rise

The huge amount of pirate CD imports coming into Poland mainly, from Ukraine, Lithuania and the Czech Republic, first reported in 1999, did not decrease during 2000. These pirated optical media products (CDs, DVDs, CD-ROMs) include illegal audio, audiovisual, and software (of business applications and entertainment) material. The CD and other media are being produced and distributed via a network of plants and distribution chains that illegally cross borders, and that are run by regional organized criminal elements. The police and Customs regularly seize pirate CD shipments from Ukraine on trains, buses and private cars (suitcase

² BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$109.2 at 58% were reported as preliminary. Those BSA numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

smuggling), which strongly indicates that thousands of pirated optical discs are finding their way onto the Polish markets daily.

The entertainment software industry reports that almost all PC product was imported, from Ukraine, Russia, Belarus (and still Bulgaria). There are also reports that pirate cartridge-based videogames manufactured in China and shipped through Hong Kong continue to be found in Poland. The manufacturing and distribution of entertainment software is being undertaken by organized criminal enterprises operating throughout the region. Illegal material is produced in some countries (often in Russian) including Hungary, Ukraine and Poland, and distributed in a major cross-border exchange, to a number of countries.

The Business Software Alliance (BSA), in conjunction with the IFPI, currently is investigating one Polish replicator believed to have exported disks into western Europe for distribution in Denmark. In that case, Polish police, acting upon the request of the BSA and IFPI, raided the replicator near Katowice and seized equipment, 43,000 CDs, and documentation. The BSA and IFPI had reason to believe that the plant was cooperating with firms in the Czech Republic to produce the CDs. The case is currently before Polish prosecutors, however, and has been since early 2000.

The Motion Picture Association (MPA) reports that most of the pirate video production in Poland is diffuse and small scale, and therefore hard to stop. Nevertheless, in 2000, many successful raids against pirate duplication sources were run by the MPA, mostly through joint cooperation efforts with other industry counterparts, consisting of the representatives of the BSA and the IFPI.

The Warsaw Stadium and its link to organized crime

Widespread piracy at the Dziesięciolecie Stadium in Warsaw continues at completely unacceptable levels. The dire and dangerous situation at the Stadium, which is full of pirate optical media product, has not improved. Only recently have the police undertaken some raiding activity at the Stadium. In November 2000, the motion picture industry conducted a major raid which resulted in the arrest of three persons who were suspected suppliers to the stadium market. Because of the danger involved, it is very difficult for industry alone to conduct investigations. The Polish authorities must direct their attention to halting the rampant activities involving in the sale and distribution of piratical materials at the Warsaw Stadium. Attention must also be paid to monitor whether this kind of large, organized activity is being established at other locations.

According to press reports, Armenians (along with other foreign nationals) have been selling mainly pirated CDs as well as smuggled alcohol and cigarettes at the Stadium for years. In July 2000, a Ukrainian died from multiple stab wounds, while his would-be victim, a 38-year-old Armenian who was shot in the head, went to the hospital in critical condition. One press report indicated that the Polish police believe that gangsters at the Stadium extort approximately U.S.\$50,000 from Armenians alone "for protection" every week.

Poland should consider regulating optical media production, distribution and export

According to our most recent reports, there are 12 CD plants are operational in Poland, with 26 operational lines. Nine of these plants have introduced the SID Code; seven have an agreement of cooperation signed with IFPI Warsaw and ZPAV. However, the size of local

production is, for the moment, small compared to the massive pirate imports, especially from Ukraine and Lithuania.

In order to avoid a possible growth of illegal CD production within Poland, steps must be taken to regulate optical disk plants. Poland should regulate the production, distribution and export of optical media. Such regulations would include provisions to close plants that are caught illegally producing copyrighted material, to seize infringing product and machinery, and to monitor the importation of raw materials (optical-grade polycarbonate) used in the production of CDs, DVDs and CD-ROMS and other optical disc media. Also, all of the plants must be required to adopt source identification (SID) codes, so that the source of illegally produced CDs can be traced and any necessary actions taken against infringing manufacturers. To the best of our knowledge, there are no developments to report regarding the implementation of any optical media regulations.

Copyright Piracy Levels in Poland Remain High Across All Industries

In October 1998, a special Anti-Piracy Coalition was founded by three organizations — ZPAV (the local association of the International Federation of the Phonographic Industry, IFPI); FOTA (a Polish MPA-associated organization); and the Polish branch office of Business Software Alliance (BSA). This effort is supported by the EU PHARE program. Many successful raids and seizures have been undertaken by cooperation of these organizations and the police. Unfortunately, copyright piracy levels remain high in Poland for all industries.

The level of recording and music piracy in Poland dropped over the past year to 30% for 2000. The total trade losses in the recording industry were \$21 million in 2000. In 2000, nearly 670,000 pirate CDs and nearly 35,000 pirate audiocassettes with a total estimated value of over \$5.8 million were seized by Polish enforcement authorities (police, customs, border guard). Approximately 97% of all pirate CDs available on the market have been smuggled to Poland through the eastern border; nearly 90% comes from the Ukraine. Therefore, cooperation with customs is the recording industry's highest priority. The year 2000 was announced by the President of Customs, Mr. Zbigniew Bujak, as the Year of Intellectual Property. ZPAV, the recording industry anti-piracy organization, did not expect overnight changes and immediate success when it comes to anti-piracy activities. Reportedly, top-level customs officials as well as officers at the borders have actually started to perceive intellectual property rights infringements as a serious problem which causes damages not only to private business, but to the State Treasury. It is hoped that this attitudinal change will result in more effective customs activity in the field of detecting and seizing pirate sound recordings in 2001.

The Warsaw Stadium remains the biggest point of pirate CD distribution (wholesale and retail). Other main centers of pirate distribution include: open markets along the Poland-Germany border; electronic markets in Krakow and Wroclaw; large used car markets (e.g., in Lublin); open markets in western Poland cities: Poznań, Łódź, Katowice, Szczecin. CD-R piracy and MP3 (recordings in MP3 format fixed on carriers) are still an insignificant phenomenon. Twelve CD plants are operational in Poland (26 lines); nine of them have introduced the SID Code, seven have an agreement of cooperation signed with IFPI Warsaw and ZPAV.

The new copyright law (discussed below) provides for a one-year sell-off period for recordings containing pre-1974 repertoire which had already been manufactured when the new law came into force (July 22, 2000) and were stored in warehouses of companies dealing with their production and distribution. All such recordings needed to be registered at the Ministry of Culture and National Heritage within a period stated in the law. The Ministry has recently forwarded to the Polish recording industry group full information on the register and they are

currently verifying this information and corresponding with companies who have registered their stock.

BSA reports, for example, that even though there has been sustained police cooperation in recent years, the level of piracy remains unacceptably high. Estimated 2000 trade losses due to business software piracy in Poland was \$92.6 million, at a 55% piracy level.

The entertainment software industry in particular, reported an unabated high volume of sales of illegal product at flea markets such as the Warsaw Stadium. Several hundred stalls there sell illegal entertainment and business software, as well as illegal sound recordings (cassettes and CDs). The entertainment software industry reported good cooperation with Customs authorities in the seizure of counterfeit and parallel import product. The Interactive Digital Software Association (IDSA) indicates that the estimated level of entertainment software piracy on all platforms exploded in Poland from 60% in 1999 to 85% in 2000. This increase is reflected in the significant increase in the estimated trade losses due to this form of piracy, which amounted to \$103.1 million last year.

In 2000, video piracy continues to be the most significant form of piracy for MPA member company operations in Poland. Such piracy, primarily involving pre-theatrical-release and pre-video-release titles, is widespread in rental outlets and street markets throughout Poland. These pirate videocassettes are commonly copied from videos recorded in local cinemas (still in English with subtitles), with voiceovers in Polish. Phantom companies often are identified on pirate videocassette labels as the "authorized distributor" of the film. In addition, approximately 50% of rental shops, mostly the smaller outfits, make back-to-back copies of legitimate videos for copy depth, reducing legitimate sales. The overall video piracy rate has stabilized at 20-25%. Cross-border piracy continues to be a serious problem with Germany. Polish pirates manufacture high-quality counterfeit cassettes specifically for German consumers, who purchase them at open markets alongside the Polish-German border. Cable television piracy is not a major problem because the National Broadcasting Council (NBC) requires all operators to be licensed. Cable licenses may be and have been revoked for violation of the law. With the passage of adequate anti circumvention legislation, FOTA, the local anti-piracy organization, is now able to take action against the theft of pay-television signals. The first such case commenced in October 2000.

Internet piracy is beginning to appear in Poland. MPA reports that Polish Websites that advertise the sale of pirate videocassettes and VCDs (video compact discs) have been uncovered. The police and FOTA both find it difficult to identify the owners of such sites because of national data protection legislation. Pirate VCDs are also starting to appear on the market, but are mainly limited to pornographic material. Estimated annual losses to the U.S. motion picture industry due to audiovisual piracy in Poland were constant at \$25 million in 2000.

AAP reports that there is photocopying, mostly of journals in universities. There is no detectible full book commercial piracy. Local publishers and licensees of trade books do enforce their licenses. Book piracy losses dropped slightly, to \$7 million in 2000.

COPYRIGHT ENFORCEMENT IN POLAND

Over the last several years, the copyright industries have continuously faced several major enforcement obstacles in Poland despite concerted efforts by industry anti-piracy actions. Many elements of Poland's enforcement regime are incompatible with its TRIPS enforcement obligations including: the failure to impose deterrent criminal penalties in commercial piracy cases; lengthy delays in bringing and completing both criminal and civil infringement cases; and the lack of deterrent civil damages imposed in practice (three times the retail value is generally considered such a deterrent). The failure of the judicial system coupled with the rise in the production and distribution throughout the region of illegal material has been a serious setback for the copyright industries in Poland over the past few years.

The Polish police and customs officials have been active, but piracy is getting worse. The problem of getting criminal cases through the courts remains an obstacle overall. We are still looking for the Polish courts to impose deterrent criminal penalties in piracy cases. The 2000 amendments to the 1994 copyright law permitted *ex officio* actions and included provisions against the circumvention of technical copy protection measures. These changes will add important options for rights holders beyond the previous, largely ineffective system that was based on private complaints by the injured parties. The penalties in the amended copyright law are generally strong in relation to local market conditions, providing fines of up to U.S.\$125,000 and jail sentences of up to five years. The key is whether they will be imposed in practice by the Polish judiciary.

Border Measures Must be Strengthened to Reduce Piratical Imports.

The top priority for the Polish Government must be to clamp down on the massive number of illegal imports of musical recordings and business and entertainment software. In 1998, Polish Customs authorities started to enforce the copyright law by utilizing a new Customs code which was intended to simplify Customs procedures and make it easier for authorities to seize infringing goods. In 1999, the Polish Central Board of Customs issued a Decree giving Customs officials clear *ex officio* authority to seize suspected pirate goods without a complaint or request from the right holders. Polish Customs also has a special IP department.

On January 24, 2000, the recording, motion picture and business software industries signed a Memorandum of Understanding with the National Board of Customs with the aim to improve co-operation between the private sector and Customs in the fight against piracy. The National Board of Customs declared 2000 the Year of Customs Fight Against Piracy. These are positive developments. It remains to be seen whether they will translate into a clear drop in pirate imports.

Disappointingly, the BSA did not detect any large improvement in the trans border traffic of unlicensed works. BSA reports that Customs officials appear willing to work with right holders, and are in the process of implementing a software asset management policy within the Main Customs Office.

Police Have Been Active in Raids, but Prosecutors and Courts Still Fail to Impose Deterrent Criminal Penalties.

Although the Polish police continued to carry out raids and seizures (mostly of audio, business software, and video material), the Polish judicial authorities lagged behind in imposing deterrent penalties against copyright pirates. The combination of prosecutorial follow-up, and a

failure to pursue most criminal proceedings to completion in the first part of 1999, continued the pattern of the past several years. Few cases successfully got past the significant prosecutorial delay. Even when they did, the level of criminal penalties that were applied were clearly not sufficient to deter piracy. Recently, an increased interest by prosecutors in counteracting piracy has been noticed. However, it remains to be seen whether this will translate into expeditious prosecution of all cases of piracy and, eventually, the imposition of deterrent penalties. The recording industry notes continuously increasing involvement of enforcement authorities in fighting and preventing IPR infringements.

Police conduct raids ...

FOTA reports excellent cooperation with local authorities, having worked closely with both the national police in Warsaw and with regional and local police throughout the country. MPA and FOTA report that 718 raids were conducted in 2000, resulting in 527 indictments. Seventeen judgments were issued, all resulting in suspended jail sentences. 51 cases resulted in criminal fines of less than \$1,000. A July 2000 copyright act included anti-circumvention provisions, *ex officio* actions, and increased penalties. Before the crack of dawn on November 9, 2000, the Warsaw police and FOTA, the Polish Anti-Piracy Organization, raided the X-Year's Stadium, an infamous hive of pirate activity in Poland. Over 300 pirate videocassettes were seized from vendors in the stadium. On November 10, a warehouse located near the Stadium was also raided, resulting in the seizure of over 500 pirate cassettes. In the warehouse, evidence was uncovered that led to a further raid on a pirate lab in a nearby apartment. In the apartment, 15 VCRs, 1,000 cassettes and other equipment were discovered. The owner of the apartment, a major supplier to the X-Years Stadium, was arrested along with two accomplices. They are expected to be detained for at least two months while they await trial. These successful raids add to the 700 actions already launched against copyright infringers by FOTA in Poland this year.

The Broadcast Act has been in force since June 1993. The NBC has granted broadcast and cable licenses, which are revocable for failure to comply with the license provisions. The Broadcast Law does not contain an explicit copyright compliance requirement, but Article 45 does provide that a cable operator's registration may be rejected for distributing programs in violation of the law, and that a registered cable operator can be banned from distributing a program if it violates the law. According to FOTA, it is unclear whether these provisions include violations of the copyright law. The NBC should immediately revoke cable operators' registrations if they violate such a ban.

During 2000, ZPAV and IFPI Warsaw initiated criminal proceedings have been instituted against two CD plants in Poland (according to information gathered during the investigation, the plants were involved in unauthorized production and distribution of CDs containing music and computer software on an international scale). Criminal proceedings are pending.⁴ The industry holds training sessions for enforcement authorities; prosecution and judiciary are conducted on a regular basis.

BSA reports that, as in years past, they received exceptional support from Polish police, particularly with its end-user cases. Polish police raided, either upon BSA request or *ex officio*, 96 end users. Although a number of the targets were individual end users, there were raids involving schools, public relations agencies, music firms, and a furniture shop. Police also

⁴ Polish record producers also are being represented in a case against a CD plant in Russia. During a 1999 raid on a Russian CD plant, several thousand pirate CDs were seized, including Polish repertoire recordings as well as stampers for their production. Preliminary proceedings have now been concluded and the case is going to court. The damages for Polish record producers are expected to reach \$80,000.

conducted 30 reseller raids. Although this trend shows a decline over past years, police did manage to stage raids of flea markets in Warsaw, Wroclaw and Katowice, and a number of hard-disk loaders. Overall, the BSA were pleased with the support they received from police

... but few cases are prosecuted and decided in Poland

MPA and FOTA report that 718 raids were conducted in 2000, resulting in 527 indictments. Only seventeen judgments were issued, all resulting in suspended jail sentences. 51 cases resulted in criminal fines of less than \$1,000. Distributors do, however, manage to collect criminal damages amounting to U.S.\$500-600 per case for all parties involved. Fines are imposed on top of these penalties, ranging from U.S.\$50 to U.S.\$150 (in an unusual case over two years ago, a duplication plant in Krakow was fined \$13,000). FOTA believes the solution to the existing judicial impasse is to increase the number of judges (rather than prosecutors) and the quality of information technology (e.g., increased penetration of computers and trained support staff) so as to improve overall productivity in the court process.

The recording industry reports that penalties imposed for distribution of pirate sound recordings include: fines, damages paid to ZPAV as the injured party (usually from U.S.\$300 to \$1,000) and imprisonment (often one-year) suspended for two to three years (often all three elements combined). Penalties are more severe in cases of repeated criminal activity. For example, a woman was sentenced to eight months imprisonment for offering for sale 22 CDs and 26 audiocassettes; this was her third case in court.

In 1999, the BSA decided to settle many of its pending cases as a result of the lengthy criminal court delays it had experienced in 1998. In 2000, the BSA elected to pursue greater cases to judgment. There were some encouraging events, but concerns about prosecutors dropping prosecutions (although the Criminal Code should now permit right holders to continue such cases) and some weak judgments remain. From over 125 police raids, prosecutors have filed approximately 45 court indictments to date, and the BSA is aware of only 10 criminal convictions from those cases (only a 10% ratio of convictions to the number of raids). A number of these 125 cases remain pending at the investigative stage, or await court proceedings. The average length of time from raid to judgment is one to two years. With respect to the judgments, the BSA learned that they all resulted in fines of between U.S.\$0 and \$1,000, and seven of the ten resulted in suspended jail sentences. Four cases produced a suspended sentence of a year or less. Three cases produced a suspended sentence of between one and two years. One of these cases, however, resulted from the first conviction for the purchase of illegal software at a flea market. Prosecutors declined to bring such cases in past years. Finally, on a positive note, a Polish court in Gdansk issued the first unsuspended prison sentence, for one year, in August to a reseller who had twice before been convicted for piracy. This was a significant achievement.

Poland Must Clarify its Civil *Ex Parte* Measures and Issue Such Orders

The 2000 copyright amendments did not change any existing provisions regarding *ex parte* measures. There have been reports that such measures "theoretically" exist in the copyright law, but that there had been no actual implementation. IIPA had argued that the copyright law should provide clarity for such searches so that judges can begin to implement these procedures. Clarification remains a priority, and BSA is working to support this. BSA is testing these provisions, and filed an application in mid-January 2001. At the time of this filing (mid-February), there still had been no court determination in the matter. This delay itself has been disappointing. BSA is also waiting to see what proposals the Polish government will make for clarifying Article 80 of the current copyright law.

Civil Enforcement Must be Improved, Especially at the Judicial Level

The Polish courts fail to impose deterrent damages in civil cases, which historically involve business software end-user piracy cases. However, as IIPA reported in our 2000 301 filing, BSA's experience on the civil front has been limited, not in large part because of the companies' inability to perform *ex parte* searches, and its campaign therefore has focused on criminal actions.

Delays in Criminal and Civil Cases Continue

FOTA continues to press for more pools of experienced prosecutors to handle the growing intellectual property case backlog. A continuing problem is the notoriously slow Polish judicial system. The Polish courts have only recently begun to hear significant numbers of criminal copyright infringement cases and have issued comparatively few decisions.

COPYRIGHT LAW AND RELATED ISSUES IN POLAND

A summary of the copyright legislative developments over the last few years is important, because not only does it identify the remaining issues on the legislative agenda, it also points out omissions on selected enforcement mechanisms which in turn impact anti-piracy efforts and commercial market development.

The Copyright Act of 1994

In February 1994, Poland adopted a comprehensive copyright law, the Law on Copyright and Neighboring Rights (Law of February 4, 1994, which entered into effect on May 24, 1994). Poland then joined the substantive provisions of the 1971 Berne text, effective October 22, 1994. Although Poland also acceded to the World Trade Organization, Poland announced at that time its intention to take a four-year TRIPS transition period. In 1999, Poland adopted new customs provisions and its related enforcement practice in order to comply with TRIPS, but Poland failed to introduce the other legal reforms required by TRIPS during this four-year period.

Thus, before the 2000 amendments, several features of the Polish IPR regime were not compatible with the TRIPS obligations:

- the point of attachment for the protection of foreign sound recordings (TRIPS articles 3 and 14) had to be clarified. In short, Poland need to change its Law on Copyright and Neighboring Rights to grant a clear provision on full national treatment and a broad point of attachment consistent with international practice to avoid legal uncertainty and any risk of unfair denial of protection and enforcement for foreign sound recordings. In addition, Poland should join the Geneva Phonograms Convention. In sum, Poland had to provide protection for sound recordings based on publication or fixation (in Poland, a WTO, Rome or Geneva Phonograms Convention country), or based on a producer's residency or operations in Poland. That failure to act was seen not only as a violation of TRIPS, but also of Article IV of the 1990 Business and Economic Relations Agreement with the United States.

- express protection for pre-1974 (foreign) sound recordings, in line with TRIPS Article 14.6, needed to be afforded. With respect to domestic sound recordings, the Polish copyright law only provided protection back 20 years from the date of the last copyright reform legislation (i.e., to post-May 1974 recordings). Poland had to extend protection to pre-existing Polish and foreign sound recordings released within the past 50 years. Such full restoration is a critical component of adequate and effective protection for all sound recordings (U.S. companies in Poland own Polish repertoire and therefore have a direct interest in Polish back-catalog being protected as well). Although the Berne Convention (Article 18) requires it, Poland never clearly provided full retroactivity for all copyrighted works.
- the law did not appear to permit software right holders to conduct civil *ex parte* searches that would aid in combating end-user piracy, as required by TRIPS Article 50.

Copyright Reform Efforts Resulted in Two Separate Copyright Bills

The struggle to achieve copyright reform in Poland has been arduous. A summary of the efforts made, along with some of the legal issues, is important here because while the June 2000 law solved the TRIPS-problems, it created other problems and a second piece of copyright legislation remains pending.

Overview of the comprehensive copyright bill, circa 1999, before bifurcation

In October 1999, the Polish government submitted a copyright reform bill to the Parliament which should have brought the Polish copyright law and related legislation into substantive compliance with TRIPS.⁵ On the plus side, these amendments included a proposal to fix the sound recording problems. This package also addressed a variety of provisions intended to comply with European Union Directives and even some of the provisions of the new WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

IIPA identified several problems with the proposed legislation. Very controversial and very onerous provisions relating to collective administration and the treatment of audiovisual works (Articles 69-70) were added into the draft amendments package. The formulation for the scope of national treatment in the point of attachment provision was too limited and need to apply clearly and broadly to foreign works consistent with international practice. The draft also did not contain provisions that might clarify the existence of civil *ex parte* search authority.⁶ In

⁵ This 1999 draft included provisions relating to: (1) rental rights (computer programs, sound recordings, audiovisual works); (2) provisions for the establishment of a reprographic rights organization; (3) provisions to strengthen the rights of collecting rights societies; (4) additional fair use limitations and exceptions; (5) the addition of a right of making available; (6) anti circumvention rights and copyright management information rights; (7) protection of encrypted satellite signals; (8) changes in the presumption of ownership of economic rights in audiovisual works; (9) changes in the rights relating to transfer of economic rights (all works); (10) parallel importation amendments (consistent with membership in the EU); (11) performers, rights; (12) treble damages for intentional infringements; and (13) a new Chapter XIV regarding criminal penalties, as well as procedural amendments to commence public complaints (*ex officio*).

⁶ According to some copyright experts, theoretically civil *ex parte* search procedures could be construed under Chapter 12 of the Copyright Act. IIPA recommended that the law should provide clarity for such searches so that judges can begin to implement the procedures necessary to stop end-user piracy.

lieu of the proposal in Article 50 of a right of making available, Poland needed to adopt a broad right of communication to the public that includes a separate right of making available, to fully comply with the WIPO digital treaties. The technological protection measures and copyright management information provisions in Article 79 give only partial protection and include a “culpable” threshold that further weakens the effect of the provision.⁷ The same is true as regards the so-called “copyright management information” that is attached to or accompanies a work or sound recording, including protection against the alteration, removal or falsification of this information because the protection provided in Article 79, Paragraph 4, falls short of the WIPO treaties’ requirements.

There were at least four other problems in the existing copyright law of 1994 that were not addressed or corrected in 1999 copyright package, including: (1) overly broad exemptions for the interception and retransmission of satellite signals; (2) a compulsory license permitting radio and television stations to broadcast certain published works; (3) very broad exceptions affecting library uses and the production of certain anthologies; and (4) any private copying exception not extending to digital copying of works or sound recordings. Nor should any private copying exception interfere with the ability of right holders to protect their works and sound recordings using technological protection measures.

Poland missed its TRIPS implementation deadline of January 1, 2000, as no legislation was adopted. A number of Polish experts suggested that the TRIPS Agreement is self-executing as from January 1, 2000. Nevertheless, the copyright industries were deeply concerned about the current legal uncertainties. Moreover, the presumed self-executing character of TRIPS, even if respected by the Polish law enforcement authorities and judiciary, would only solve the substantive enforcement problems, such as protection of pre-1974 repertoire. It would, however, not resolve the need for the introduction of increased criminal penalties for copyright infringement; special competence for criminal courts in piracy cases; and the introduction of *ex officio* prosecution (as opposed to the current system of prosecution upon private complaint).

Amendments to the copyright law necessary to make Polish law TRIPS-compliant were delayed, in part, because the proposed law contained some highly controversial provisions relating to collecting societies and rights of performers. Passage of the draft law with these provisions would have caused serious damage to Polish broadcasters, distributors and producers, as well as the U.S. film industry. The Polish collecting rights societies, who successfully secured these provisions in the original draft without input from all affected sectors, used the U.S. government pressure to pass TRIPS-compliant legislation by the end of 1999 to try to railroad the entire copyright bill through the Parliament. This would have precluded meaningful review or comment.

In November-December 1999, the copyright bill had its first reading in the Sejm, and was referred to the Culture Committee for review. The Sejm then decided to split the copyright bill into two segments: one containing the non-controversial (TRIPS-related) provisions and the other containing controversial provisions. Splitting the bill was accomplished in order to ensure more rapid consideration of the non-controversial elements of this legislation. By the end of February 2000, the Culture Committee agreed to bifurcate the bill, and the non-controversial bill passed its second reading shortly thereafter.

⁷ Technical protection measures must not be limited to the act of circumvention; they are the tools that right holders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention.

Copyright law amendments of June 9, 2000

Once the copyright legislation was bifurcated, the Sejm soon passed the non-controversial elements in its third reading on April 18, 2000. The Act of 9 June 2000 on the Amendment to the Act on Copyright and Neighboring Rights was signed by the President and has an "effective date" of July 22, 2000. This passage represented partial success to the bifurcation strategy in that it split out the TRIPS-needed amendments into the non-controversial bill. Unfortunately, the Polish collecting rights society added some provisions strongly opposed by the audiovisual industry to this bill (provisions which clearly were considered controversial) at the last minute. Here is a summary of the key accomplishments of the June 2000 legislation:

- corrected the longstanding TRIPS retroactivity problem. With respect to the point of attachment problem for sound recordings, the recording industry is satisfied that the Polish government's membership in the World Trade Organization provides a sufficient point of attachment for foreign sound recordings, even though the copyright law's unclear point of attachment provisions were not amended;
- created a 12-month sell-off period for inventory of pre-existing sound recordings (as well as "videograms" and radio and television programs) which will now be protected as a result in the change in the retroactivity provision (above);
- raised the levels of criminal penalties. For example: a penalty of up to two years in jail or a fine has been expanded to up to a three-year jail term or a fine. The penalty for infringement done for "material profit" has been changed from up to two years in jail or a fine to imprisonment from three months to five years. If the perpetrator has made the infringement a permanent source of income or manages a criminal activity, the penalty has been revised from a jail term of up to two years or a fine to imprisonment from one to five years;
- extended the term of protection for authors' works such as books, computer software and audiovisual material beyond the TRIPS minima to life of the author plus 70 years. (Note that the term for objects of neighboring rights' protection like producers of phonograms and performances was not extended and remains at TRIPS' level);
- included provisions on anti circumvention of technological protection measures (TPMs) and rights management information (RMI). This article still includes a "culpable" threshold that will likely weaken the provision and provides only partial protection, as IIPA indicated in our 2000 Special 301 report. IIPA had argued (to no avail) that TPMs must not be limited to the act of circumvention, and should have included a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing TPMs as well as outlawing acts of circumvention. This provision, which is far from adequate from our industries' perspective, will no doubt have to be revised once the EU implements the treaties;
- A similar situation has emerged as regards the protection of rights management information against manipulation. The provision is limited to the activity of manipulation itself and does not include – as required in the WIPO treaties – a prohibition of the further dissemination of the manipulated content. Furthermore, the protection against manipulation is limited to

author's rights thereby excluding the phonogram producers and performing artists who enjoy in Poland neighboring rights only.

- permits *ex officio* actions by Polish authorities;
- permits collecting societies, as injured parties, the standing to file a criminal complaint for copyright infringement; and
- added a neighboring right (25-year term) for publishers who for the first time publish or disseminate an unpublished public domain work. Also adds a right (with a 30-year term) for a person who prepares a "critical or scientific publication" (which is not a "work") of a public domain work.

There were three important problems and/or omissions in the June 2000 legislation, as adopted:

- it added the controversial articles 69-70 to which the MPA, the Polish film sector and the U.S. government had objected and had pressed for placement in the separate legislative package to be considered later. Article 70 provided that all economic rights in a film shall be held by the producer and several other entities for theatrical and video rental uses, and that the producers have to pay these other authors some remuneration. The new amendments give more performers the right to obtain residuals, extend the scope of uses to television, and require that the monies must be paid exclusively through collection societies (thereby removing the right holders' choices of how to receive payment and ensuring that residuals are the only way to get paid). This amendment was not required by Poland's international obligations and is very likely to affect the audiovisual market adversely.
- the availability of civil *ex parte* measures was not clarified.
- no amendments were made to narrow the overbroad exceptions regarding library use and anthologies in the Polish copyright law.

"Controversial" copyright legislation is pending

As a result of the bifurcation process of early 2000, the other half of the copyright law amendments – the more controversial half -- is still under legislative consideration in the Polish Parliament. These proposals included those controversial measures related to collective management. With respect to legislative status, the Sejm's Commission on Culture and Media began its first reading of this set of amendments on July 11, 2000. The bill is still pending in the special sub committee, and it is not likely that its consideration of this bill will be concluded before the end of this term of Parliament (Fall 2001).

Based on the controversial elements reported in last year's legislative package, this new legislation would appear to contain articles that would enhance the current practice of giving collecting societies the power to unilaterally set remuneration tables, and limit a producer's ability to assign economic rights to third parties. IIPA does not have the text of this bill and cannot provide additional comments at this time. Suffice it to say, the controversial articles 69-70 which passed in the June 2000 amendments continue to be very detrimental to the audiovisual industry and this issue must be revisited. Vigilance on this bill's legislative developments and progress is necessary.

Poland should withdraw its reservation to Article 12 of the Rome convention

Poland currently has taken an exception to Article 12 of the Rome Convention, permitting it to discriminate against U.S. nationals with respect to rights connected to broadcasting, communication to the public and public performance. Discriminatory regimes connected to reservations under Article 12 of the Rome Convention are objectionable in principle. The dismantling of discriminatory regimes connected to the communication of signals is one of RIAA's primary objectives, and these unfair, and now economically fundamental, discriminatory regimes need to be addressed. Poland should be urged to revoke their reservation to Article 12. Also, Poland should be encouraged to give performing artists and phonogram producers an exclusive right instead of merely a claim for remuneration. Today many of the primary forms of exploitation of sound recordings take place via the communication of signals rather than the delivery of physical product, and yesterday's secondary right is today's primary one.

Ratification of the Two WIPO Treaties

Poland was not a signatory to either of the two new WIPO treaties. The Polish government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Ratification of these treaties may not be immediately forthcoming, given that Poland is one of the last remaining Central European countries looking to track the timetable of the European Union's efforts.

Criminal Code Amendments Relating to Software Piracy

Criminal code amendments applicable only to software piracy were adopted in 1998 and entered into effect in 1999. The principal improvement arising from the legislation, which was applicable only to computer programs, was that it allowed Polish prosecutors to conduct proceedings on their own behalf, and without involving right holders. Subsequent amendments to the code in 2000 now permit the injured right holder to act as a party to the criminal proceedings along with or instead of a public prosecutor. Now, the BSA may file its own indictment with the court and continue proceedings after prosecutors have abandoned cases. The BSA reports that prosecutors now typically rely on the Criminal Code for stronger infringement cases, and rely on the Copyright Act provisions for weaker cases. Prosecutors have employed the code in roughly 40% of the software infringement cases tracked by the BSA.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

QATAR

EXECUTIVE SUMMARY¹

IIPA recommends that Qatar remain on the Watch List.

Qatar must take steps to address piracy of business software and some other copyrighted goods that are causing economic losses to the copyright industries. Otherwise, Qatar may become (and already has become, in the case of business software) an attractive haven for copyright pirates from other parts of the Gulf (where piracy is made more difficult due to enforcement efforts by the governments there).

Qatar's law violates TRIPS. The Qatari government must take urgent steps to amend the 1995 copyright law, including amendments to the enforcement provisions. Estimated total losses to the copyright industries in Qatar were over \$4.0 million in 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	0.5	25%	0.5	30%	1.0	50%	2.0	95%	2.0	99%	6.0	100%
Sound Recordings / Musical Compositions	0.2	25% ²	NA	NA	0.3	27%	0.5	55%	0.5	65%	NA	NA
Business Software Applications ³	3.3	79%	3.5	80%	1.8	84%	2.1	87%	3.0	91%	2.0	91%
Entertainment Software ⁴	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	0.0 ⁵	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	4.0		4.0		3.1		4.6		5.5		8.0	

¹ For more details on Qatar's Special 301 history, see IIPA's "History" Appendix to filing.

² This percentage represents the overall piracy level for sound recording and music piracy in Qatar.

³ BSA loss numbers for 2000 are preliminary. In the 2000 report, BSA reported losses of \$3.2 million as preliminary. The preliminary loss numbers were revised in mid-2000, and are reflected in the chart above.

⁴ IDSA estimates for 2000 are preliminary.

⁵ U.S. publishers report negligible losses due to piracy in Qatar for 2000.

PIRACY AND ENFORCEMENT IN QATAR

Business software piracy is common in Qatar. End-user piracy by both private enterprises and Qatari government entities continues (reportedly, one large Qatari company uses illegal software on over 2,000 personal computers). Circumstances indicate that the government is well aware of the need of its agencies as well as the companies in question to purchase licenses for the software that they use; despite this knowledge, the Qatari government has yet to legalize its software, nor has it taken actions against the known end-user pirates.

Retail piracy exists in Qatar, and the Copyright Division of the Ministry of Finance & Commerce has done precious little to address the problem. Since 1998, only three raids (only one in 2000) have been conducted against business software piracy, including one by the Copyright Bureau against a computer store that was illegally loading software on the hard disks of computers sold by the store, one by the police against a reseller shop in Doha, and another against a reseller. None of these raids has resulted in any penalties being meted out. In the motion picture area, while the Copyright Division has successfully reduced piracy levels from almost 100% in 1996 to a mere 25% in 2000, back-to-back copying of pirate videocassettes and under-the-counter sales of those pirate videocassettes nonetheless continued in 2000, and pirate versions of new releases are available almost as soon as they are released anywhere in the world. The U.S. publishers report that while a small market, some editions intended for the India market only appear in Qatar. Photocopying of textbooks and teaching materials also occurs in Qatari universities.

Qatari officials (including those in the Ministry of Commerce) need to begin coordinating and conducting raids against retail shops selling pirated software, videocassettes, laser discs, VCDs and DVDs. In addition, the authorities need to confront the problem of end users engaged in the illegal use of business software. It is critical to establish ongoing cooperation with representatives of companies that are selling their IP-related products in Qatar. These representatives can provide both the copyright industries and the Qatari government with valuable intelligence on piracy operations and can provide considerable expertise gained in conducting similar operations in other parts of the world.

More specifically, the following is a partial list of the kinds of enforcement activities Qatari officials should commence immediately:

- systematic surprise (day or night) inspections at least every six months of all shops that sell pirated copies, including shops, resellers, hard-disk loaders and end-users;
- imposition of deterrent fines and penalties; and
- publication of actions taken in the Qatari-based and international media.

Most troubling in the situation in Qatar is the resistance the software industry gets from enforcement officials, who appear to work hard to avoid taking any kind of enforcement action against blatant piracy, and have made statements in public during 2000 indicating a lack of willingness to enforce copyright when it comes to business software (there have been some recent indications from the higher ranks within the Ministry of Finance & Commerce that it is interested in providing greater assistance to enforce copyright and in bringing its laws and enforcement system into compliance with TRIPS). The overall piracy situation in Qatar is not

severe (except for business software piracy), is well known to the authorities, and should not be particularly difficult to completely eradicate. With government commitment, Qatar could clean up its act in a very short time and alleviate the copyright industries' main frustration. One substantial step in this regard would be the issuance of a decree by the Qatari government stating that only legal software will be used within the government, and implementing a software management policy to ensure that all current and future use of software is properly licensed. Such a decree would serve as an admirable example to the highly pirate business community and send a clear signal that the Qatari government is committed to the protection of intellectual property.

The copyright industries remain unaware of any cases decided in favor of copyright owners against infringers of copyright. The Qatari government must ensure that the Copyright Division continues to have adequate resources and the authority to initiate enforcement, and that the judicial system then reinforces these actions with serious and consistent sentencing.

COPYRIGHT LAW AND RELATED ISSUES

Qatar's 1995 law (in force October 1996) remains TRIPS-incompatible in several respects. Qatar must pass and implement legislation to meet its TRIPS obligations urgently. IIPA understands that drafting has begun in Qatar, and that certain international consultants are reviewing the draft for TRIPS deficiencies. Problems with Qatar's copyright law include (but are not limited to) the following:

Substantive Deficiencies

- The Qatari law contains inadequate "point of attachment" provisions (that provide for protection of foreign works [including "audio works"] only on the basis of reciprocity). Qatar's TRIPS obligations under Articles 3 and 4 of TRIPS require that Qatar protect works (and "audio works") on the basis of national treatment. Qatar should revise or interpret its law to clarify that works of countries that are members of international treaties to which Qatar is a party are protected in Qatar.
- The copyright law does not clearly protect works (including "audio works") retroactively, as required by Article 9.1 of TRIPS (which incorporates Article 18 of the Berne Convention). Qatar must protect pre-existing works (including "audio works") so that they enjoy full TRIPS-compatible terms of protection.
- The Qatari copyright law does not expressly allow a right holder to control the commercial rental of its computer programs and sound recordings, as required by Articles 11 and 14 of TRIPS, although the general right to "utilize" a work may be interpreted to include an exclusive rental right in line with TRIPS. Qatari authorities should clarify that the law is TRIPS-consistent in this regard, and preferably, amend the law to expressly include a TRIPS-compatible right of rental.
- Performers are not protected in the Qatari law, in violation of TRIPS Article 14.

- Several of the exceptions to protection, particularly the “personal use” exception in Article 17, are overly broad and must be narrowed to comply with TRIPS standards.
- The Qatari copyright law includes burdensome certification and licensing requirements (Article 7). If such requirements are carried out in such a way as to interfere with the copyright owner’s exercise of rights under the copyright law, they would violate Article 9.1 of TRIPS (which incorporates Article 5(2) of the Berne Convention), which requires that works be protected without formalities. The copyright law should be amended to clarify at least that certification and licensing requirements do not apply to foreign works.
- A definition of audiovisual works should be added to cover all cinematographic works, regardless of the medium of fixation.

Enforcement Deficiencies (On Their Face)

- The law does not expressly provide for *ex parte* civil searches, as required by Article 50 of TRIPS.
- The law does not criminalize end-user piracy by a business, in violation of Article 61 of TRIPS.
- The law does not provide for the possibility of judicial order of disposition (TRIPS Article 46) or the seizure as well as destruction of materials and implements used in the infringement, as required by Article 61 of TRIPS.

Qatar Has Joined the Berne Convention

On a positive note, Qatar deposited its instrument of accession to the Berne Convention (Paris [1971] text) on April 5, 2000, making Qatar bound by the provisions of the Berne Convention as of July 5, 2000.

WIPO Treaties

In addition to the changes necessary to bring the Qatari copyright law into compliance with TRIPS, as outlined above, the goal of any amendment effort should be to modernize Qatar’s copyright system, taking into account the latest developments. As such, Qatar should take the present opportunity to amend its law to bring it into line with TRIPS as a call to fully modernize its copyright law, including new technologies taking into account. Therefore, Qatar should not wait to implement the provisions of the WIPO “Internet” Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). At several seminars sponsored by WIPO over the past couple of years, Qatar has resolved to swiftly ratify and implement the WIPO treaties. IIPA stands ready to provide advice to Qatar should it wish to implement the WIPO treaties in the present draft.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY¹

In 2000, as they have for the past several years, the copyright industries continued to confront very high piracy rates and losses in Romania, as the result of little or no improvement in the enforcement regime. This is true even though important reforms were undertaken in the mid-1990s significantly to improve the copyright legal regime in Romania. Improvements with the laws and even cooperation from the police for some industries have not been enough to overcome the large-scale commercial piracy problems. In the software industry, for example, the police are willing to conduct low-level raids. But enforcement cannot improve because the overall Romanian anti-piracy efforts remain woefully under-funded and are a low government priority.

The legal reforms have, however, been significant. In 1998, Romania joined the Paris Act of the Berne Convention (they have been Berne members since 1927), and the Geneva Phonograms Convention. In so doing, Romania fulfilled obligations it made in the U.S.-Romania Trade Agreement of 1992, and among other things, provided a clear point of attachment for foreign sound recordings for the first time. In 1996, Romania became a member of the World Trade Organization. Last year, the Parliament ratified and in February 2001, the government of Romania deposited, its instrument of ratification to the new digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Unfortunately, the Romanian enforcement regime lags significantly behind the legal reforms. In fact in 1996, when Romania joined the WTO, it announced its intention to avail itself of the four-year transition period to give the country additional time to meet its obligations under the TRIPS Agreement. Romania has still not met its TRIPS enforcement obligations even a year after that transition period ended (January 1, 2000). In fact, Romania has undertaken very little enforcement activity since 1996 when the new copyright law was adopted (effective on June 24, 1996). This has been very frustrating for the copyright industries because the Romanian government showed that it could engage in effective enforcement when it provides the necessary resources and willpower. This was demonstrated the first year after the copyright law was adopted, when the Romanian government undertook a series of very effective raids directed at audio and video piracy. But that was a one-year phenomenon, and since then on-the-ground enforcement has been almost nonexistent mostly due to prosecutorial indifference, and the lack of police resources to go after large-scale operations. For several years, the Romanian government has pledged to commit to anti-piracy resources and effective enforcement, but those promises have gone unfulfilled.

The piracy trade losses and rates remain high for most of the copyright industries in spite of relatively good copyright and neighboring right laws in Romania. In sum, Romania must meet

¹ For more details on Romania's Special 301 history see "History" Appendix to filing.

its TRIPS Agreement enforcement obligations and bring these piracy levels and losses down. It must implement its existing criminal, civil, administrative, and border remedies, and it must amend some of these provisions to make them more effective to deter piracy. IIPA recommends that as a result of these enforcement failures, Romania should remain on the Watch List in 2001.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	6.0	60%	6.0	60%	6.0	50%	10.0	50%	20.0	90%	20.0	90%
Sound Recordings / Musical Compositions	11.0	55%	25.0	85%	20.0	90%	15.0	90%	15.0	85%	16.0	85%
Business Software Applications ²	NA	NA	9.8	81%	17.6	86%	12.4	84%	8.3	86%	12.7	93%
Entertainment Software ³	6.9	91%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	NA	NA	NA	NA
TOTALS	25.9		42.8 ⁴		45.6		39.4		45.3		114.0	

COPYRIGHT ENFORCEMENT

Criminal, Civil and Border Enforcement

The three areas of copyright enforcement in need of significant improvement are the criminal enforcement sanctions and operations, civil procedures, and the need to adopt effective border enforcement measures. In sum, the copyright industries (especially the software industry) have begun to receive some cooperation from the police to conduct raids and seizures of infringing product, but they have all had virtually no prosecutorial support even for the few raids and seizures that are conducted. The software industry reports marginal improvements in the levels of prosecutorial action in 2000. So in sum, there are few criminal cases to report.

Neither are there many successes under civil or administrative remedies, even though there are strong remedies available. That is due in large part to the lack of resources and expertise, and the low priority given to these matters, by the government of Romania.

There are some important deficiencies in the law hampering enforcement. There are still no provisions in the Copyright Act to actually provide for civil *ex parte* search orders in the

²BSA loss numbers for 2001 are not yet available. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not available and so were not reported. These numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

⁴IIPA reported overall losses to the copyright industries at \$33+ million in 1999. This number was adjusted upward to reflect the addition of the BSA number in its mid-2000 adjustments.

Romanian law. The only existing measures provide for the securing of evidence to prevent “imminent damage or to secure redress” and the current practice is for Romanian judges to deny a request for an *ex parte* search on the basis of that provision. Provisions in Romania’s Civil Code (Article 239) are similarly ineffective. These provisions permit rightholders to request a court bailiff to “record certain [evidentiary] facts” outside the normal procedures for gathering proof, and clearly fall short of granting *ex parte* searches. There are provisions in the Criminal Code that provide for *ex parte* search orders. However, there are reports that these provisions also are not working effectively. In order to comply with the TRIPS Agreement, the civil and criminal *ex parte* search provisions must be made to work effectively.

Last, the Romanian government must adopt provisions to permit *ex officio* search orders by Customs officials, and it must effectively train and run its border enforcement operations. It is critical that Romania’s border enforcement system improve due to the ease in which pirated product, including optical media, is being imported into and exported from Romania.

The Romanian government has recently stepped up its customs training programs partly due to pressures resulting from its prospective European Union accession; this in turn has improved enforcement at its borders according to some industry reports. Unfortunately, corruption has been a problem, but recent changes in the top ranks of the Customs authority should lead to more effective controls. Equally important however, are the resources made available to Customs to do its job well. In May 2000, the unit specially created for the protection of intellectual property within Customs was dismantled and there are now only six people in the central Customs office with responsibility for fighting against IPR smuggling and piracy. The government of Romania must commit more resources effectively to combat this problem.

Protection and Enforcement Obligations

Romania currently participates in the U.S. Generalized System of Preferences (GSP) program, which offers duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights . . .” At the same time that Romania is causing millions of dollars of losses to the U.S. due to piracy, it imported \$63.1 million worth of products without duty, or over 14.6% of its total imports into the U.S. in 1999 (the last full year of available GSP statistics), and over \$70.3 million worth in the first 10 months of 2000. Romania should not continue to expect such favorable treatment at this level if it is not providing adequate and effective protection and enforcement of copyright material.

COPYRIGHT PIRACY

As noted above, the levels of copyright piracy in Romania are very high -- 81% for the business application computer software industry (in 1999, the last year of available figures); 60% for the motion picture industry; and 55% for the sound recording industry. Except in the music industry, where a large number of seizures were undertaken in 2000, there has been little fluctuation the past few years in the piracy rates due to the lack of enforcement activity on the ground in Romania. Because much of the piracy is a result of organized criminal enterprises, the copyright industries cannot rely on civil and administrative remedies to stop this piracy. The

government of Romania must devote the resources and will power to take action; the best way to do this is to utilize the criminal code to stop this organized criminal activity.

Over the past few years, Romania has faced the importation of large quantities of pirate audiocassettes and CDs, videos, and CD-ROMs containing entertainment and business software; most of this material has been produced in and imported from Ukraine and other neighboring countries. Poor border enforcement, and little or no effective police and prosecutorial activity, have allowed piracy to continue unabated in this manner.

In 2000, for the first time, the recording industry reported production of CDs in Romania (mostly of Romanian repertoire). The Kanami CD plant has unfortunately also refused to date to use the Source Identification (SID) codes; the SID codes, along with other optical media regulations, can be used effectively to stop this form of piracy. The motion picture industry also reports that there is a legitimate optical media plant in Bucharest operating without any reports of the production of pirate product there. Most of the pirate CD material (an estimated 60%) is coming from Ukraine; perhaps 15-20% of the pirate market is the result of small CD-R operators. The two main entry points for pirate material is Siret (by truck and train) and Galat-Reni (by boat) along the Danube. It is estimated that 20% of the illegal material once entered Romania from the former Yugoslavia; during the war in Kosovo, this trade was moved to other locations.

Many of the copyright owners have relied on enforcement assistance from the Romanian Copyright Office (ORDA). However, even with responsibility for copyright enforcement, the office's resources for effective enforcement, like that elsewhere in the government, are in short supply. The Business Software Alliance (BSA) reports, for example, that in the past, they relied on both the Romanian police and ORDA officials to conduct raids. Unfortunately, at the end of 1999, BSA reported that ORDA had stopped conducting such raids; but then, in 2000, they recommenced. As in years past, Romanian enforcement agencies still lack critical resources. This is true in all of the law enforcement organizations such as the National Economic Crimes Unit (the economic police), the financial police, the ONC (National Film Office, formerly the CNC), as well as the local police, prosecutors and the judiciary. Still there are reports that some agencies, such as the Ministry of Finance and the Competition Office (enforcing the 1996 competition law) have conducted isolated anti-piracy actions.

The only way enforcement will be effective is if the Romanian government commits the needed resources to the police, the National Economic Crimes Unit, and to ORDA to undertake the proper criminal enforcement activity. Besides a lack of resources, a lack of clear lines of authority within the government has hampered effective enforcement. IIPA has called on the government in the past to clearly define the organizational responsibilities for copyright enforcement, and we continue to do so. Amendments to the 1996 copyright law have been pending consideration for a number of years that would extend copyright enforcement to organizations other than ORDA to officially act in IPR enforcement activities. These amendments, submitted by local copyright industry representatives have been repeatedly ignored; they were excluded from the two "emergency ordinances" (administrative decrees) that were recently passed.

In 1999, a local anti-piracy organization known as ARA was organized by the motion picture industry (Motion Picture Association, MPA). It was hoped that this organization would ensure better cooperation among Romanian officials and the film industry, including action against pirate television and cable stations. In February 2000, a high-profile enforcement conference was organized by ARA and MPA with over 50 officials from the local and financial

police, ORDA, and customs. Interviews with the speakers at the seminar were broadcast on national television. Immediately after this seminar, the ARA and MPA reported several successful raids and seizures.

In fact, 2000 marked a turning point in the level of cooperation between the various private copyright industries and government institutions. As one example noted by many of the copyright industries, the ARA and the local U.S. Embassy officials have worked closely together to create a monthly roundtable where copyright issues (raised by the music, software, and audiovisual industries) are brought to the attention of the proper officials in the Romanian government.

The Motion Picture Association notes that there have been some notable successes undertaken against TV piracy in Romania. This is due, in large part, to the active role of HBO Romania in the anti-piracy organization, ARA. In 2000, two cable stations had their operations suspended and hundreds of illegal decoders were confiscated. The seizures of videocassettes and VCDs almost doubled in 2000, to a figure as high as 20,000 units. The penetration of VCDs and DVDs is beginning to grow higher as computers and DVD multisystem-player prices drop; these machines are now being imported into Romania in larger quantities.

For the MPA, the major problems are still video, broadcast and cable television piracy. The video piracy rate, once 100%, has decreased markedly, to approximately 60% in 2000 in the wake of limited legitimate market entry and a series of police actions under the new copyright law. Street vendors and video shops in Bucharest removed their displays of pirate product, and overt video piracy has not returned. However, the lack of consistent enforcement has allowed under-the-counter sales in video shops to continue in Bucharest, and in small towns outside of the capital, pirate tapes are still sold at weekend markets.

Cable television is widely available in Romania and inexpensive, at only U.S.\$2.50 per month. Approximately 350 small cable companies are scattered across the country. Market development and increased self-regulation by the 57 members of the Cable Television Association have helped reduce the rate of cable piracy. However, cable piracy outside of Bucharest continues to be a major problem. Most cable systems retransmit satellite television programs intended for Germany, Italy, and other Western European countries while dubbing them into Romanian. Some stations also broadcast pirate videos.

Internet piracy could become a major problem, especially because the Romanian law is silent or unclear on Internet issues. VCDs are starting to make inroads in the Romanian market, but because of low computer penetration throughout the country, pirate copies are mainly found in Bucharest. To "service" the capital city, small CD burning operations are scattered through the countryside. A limited amount of videocassettes and a large number of VCDs destined for more westerly markets are transshipped from Ukraine. Romanian law does not forbid parallel imports, so a significant number of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) are also beginning to enter the upper end of the local market.

The MPA reports that annual losses to the U.S. motion picture industry due to audiovisual piracy in Romania remained at an estimated U.S. \$6 million in 2000.

For the recording industry, the most serious legal deficiency of the last several years was corrected when Romania acceded to the Geneva Phonograms Convention (effective October

1, 1998). Actually, Romania should have been providing such protection beginning in 1996 under their WTO/TRIPS national treatment obligations, but membership in Geneva Phonograms ended any doubt; it did, however, leave a large amount of back-catalog material. The WTO Agreement clearly requires that Romania provide protection for pre-existing sound recordings that are less than 50 years old. So, as a WTO member, Romania must make it clear in its legal system that it is providing this protection, if necessary through an appropriate court ruling, as required by Article 14.6 of the TRIPS Agreement. To date, the government has taken no action on this important matter.

Even after five years, the recording industry (International Federation of the Phonographic Industry, IFPI) reports that there have been no reported cases of criminal prosecutions under the 1996 law even though the penalty levels (up to U.S.\$1800 and five years' imprisonment) might, if imposed, deter piracy. As in past years, the problem has been Article 18(1) of the Criminal Code – cases are dismissed due to a lack of public interest (no social harm) under the provisions of that article. The primary problem confronting the recording industry continues to be the flood of illegal material (CDs and cassettes, now in equal amounts), most of it from Ukraine, that comes into Romania due to poor border enforcement.

The state body responsible for copyright enforcement, ORDA, has direct reporting lines to the Council of Ministers and the Economic Police Unit. However, the National Police never created a specialized unit for IPR protection, and there are only a handful of police officers assigned to IPR protection. Further, for years provisions have languished that would amend the Copyright Act to add enforcement responsibilities to other agencies in addition to ORDA. ORDA personnel have police powers. However, the seemingly constant staff changes within ORDA (also a problem in other agencies with IPR responsibilities in the National Police offices and Customs) have contributed toward an overall lack of efficiency. ORDA continues to face severe internal and budgetary problems, which is doing grave harm to its ability to work effectively. Its working relationship with the police is frustrated by poor communication, and a lack of clear authority. The local recording industry group (UPFR) reports that this lack of authority and lack of resources has significantly hindered effective enforcement.

In January 2000, a governmental decree was issued to establish a registration and hologram program for the production and distribution of phonograms. It is administered by UPFR under the supervision of ORDA. The failure to comply with these provisions results in fines and confiscation of illegal material; the provisions went into effect on March 2, 2000.

On August 31, 2000, a new decree (a so-called “emergency ordinance”) was enacted regarding software and audiovisual works. The software industries were able to get amendments to make the decree acceptable to help police against illegal distributors and permit quick access to information on piracy cases initiated by ORDA.

However, the motion picture industry was and remains very much opposed to this decree (which actually was initiated by local motion picture representatives in an entirely different form). The motion picture industry is opposed to the decree because it imposes a state-mandated (ORDA- approved) hologram stickering system. It requires the application of “distinctive marks” on each copy of an audiovisual work. This type of state-mandated stickering system, attempted in other countries (Moscow, Russia) is counterproductive to anti-piracy efforts because it results in “legalizing” pirate material once the stickers are themselves forged. Alternatively, it prevents the legal distributor from getting product into the marketplace because

the bureaucracy that issues legal stickers works very slowly and inefficiently, so pirate material is more readily available than legal material.

The provisions pertaining to audiovisual works and software reportedly went into force on February 1, 2001. The ARA (the local anti-piracy organization organized by the motion picture industry) fought to prevent the introduction of any stickering system by ORDA or the Ministry of Culture. ORDA will now apparently be responsible for monitoring the distribution of the stickers. Rather than accept a state-organized system, ARA is currently working to amend the Emergency Ordinance so that it or another nongovernmental organization can manage it. It is unclear why the stickering system was forced upon the audiovisual industry; it will oblige all audiovisual distributors (who must be registered at the National Film Office and receive certificates for every title) to purchase stickers from a state-appointed private company. Each sticker will cost 500 Lei or approximately 2 cents. Until the two houses of Parliament (Senate and Chamber of Deputies) both agree to reject the ordinance, it will remain applicable under the Romanian Law of Ordinances.

The ordinance, as amended, also introduced new penalties for IPR infringements and it permits right holders to have control over certain criminal proceedings. Under the provisions, right holders have to provide ORDA with a model license agreement and must satisfy certain other procedural requirements.

Even though the decree was revised so that it could be supported for the most part by the software industry, because of the strong opposition from the motion picture industry, the Ordinance should either be rejected by the Parliament or it should be further revised consistent with the concerns of the motion picture and software (business and entertainment) industries.

The recording industry has had success in 2000 with raids and seizures, including one seizure of Ukraine material (CDs) in a sophisticated smuggling network. In fact, since 1999, according to the National Police, there has been over a 100% increase in the number of cases commenced (actually the number of seizures and raids undertaken). As a result, the overall level of piracy for sound recordings has declined from 85% to 55% in 2000. The U.S. trade losses were estimated at \$11 million in 2000 (down from the \$25 million in 1999). Unfortunately, like the other industries, the recording industry reports that even with success at the seizure level, there are few prosecutions.

As in past years, the business software industry (Business Software Alliance, BSA) continues to report good relations with Romanian police, but despite police assistance, piracy continues to flourish. Police are willing to raid small endusers, but with very few exceptions, appear unwilling to conduct raids of large corporate endusers, perhaps fearing political backlash.

The BSA reports that in 2000, the police undertook 175 end-user raids, although almost all were of businesses consisting of fewer than five personal computers. A modest breakthrough occurred in April, when the police raided the Ploesti branch of one of Romania's largest banks. Nevertheless, the BSA has been informed that it is difficult for such cases to progress because of the political influence wielded by such targets and their owners. Romanian police also conducted approximately 30 reseller raids, including raids involving hard-disk loaders (something they had been averse to), and some Internet resellers. With respect to the latter, the police set up sting operations that led to the arrest of a number of individuals.

Unlike past years, the BSA did manage to secure a number of judgments in end-user cases, and even obtained its first criminal conviction for end-user piracy. However, the sentences imposed were, in all instances, remarkably inadequate. A Cluj court convicted a computer-system administrator employed by an infringing enduser and imposed a U.S.\$60 fine in November 2000. This was followed by a similar conviction in December 2000 resulting in an U.S.\$80 fine. In another case, a reseller was convicted in early 2000, and received a U.S.\$54 fine.

The software industry's experience shows that these judgments, even of minor fines, require a considerable exertion of effort and time to obtain, and they represent a small fraction of the total cases initiated by police. The BSA reports that the average time required to obtain a criminal court decision in Romania is between one and two years. A ruling on appeal requires another eighteen to thirty-six months. This naturally remains a cause for concern.

In order to ensure that the software industry can rely on civil, as opposed to criminal, laws to enforce its rights, civil *ex parte* provisions need to be clearly included Romania's Copyright Act. Finally, ORDA officials must begin to conduct more raids against larger scale software pirates.

The Interactive Digital Software Association (IDSA) estimates losses due to piracy of entertainment software in Romania at \$6.9 million, with a piracy rate estimated at 91% in 2000. IDSA reports that prerecorded CDs of entertainment software continue to be produced in or shipped from Ukraine, Bulgaria, Russia, Belarus and other countries in the C.I.S., and even from Southeast Asia, and are transported for sale in Romania due to lax border enforcement there. Most of the material is produced and shipped by Russian organized crime groups. In addition, there are disk-burning syndicates that produce and distribute material (with the use of advertisements) via the mail in Romania. Unlike some of the other industries, IDSA reports that it has had difficulty even getting police raids and the seizure of material, but like all industries, they have had no prosecutorial successes to report. In sum, the entertainment industry is confronted with a moderately good law that is rarely enforced.

Piracy of U.S. books, especially textbooks and popular fiction, continues at a moderate level in Romania. Book publishing losses in 2000 were estimated to be \$2.0 million, the same level since 1997.

LEGAL REFORM AND RELATED ISSUES

Copyright Act of 1996, Including Criminal Penalties

The Copyright Act of 1996 strengthened penalties for copyright infringement. The law provides criminal fines ranging from 200,000 Romanian lei to 10 million Rlei (U.S.\$8 to U.S.\$400) and imprisonment of one month to five years (articles 140-142). Romanian judges reportedly interpret these provisions as requiring fines for first offenses and imprisonment for subsequent offenses. Unfortunately, the fine levels in the criminal provisions have been ravaged by inflation, even cut by more than two-thirds in the last year. They are now too low to effectively deter piracy, particularly by criminal organizations in Romania. There have still been no reports of any jail terms imposed to date in Romania, three years after the new laws were put in place.

Due to hyperinflation, fines should be tied to more stable figures. Also, ORDA's exclusive authority to investigate and identify pirate product (Art. 142) needs to be interpreted more expansively. ORDA currently only has four investigators in the whole country; they are not capable of properly handling all investigations. Last, the act of "offering" pirate product for commercial sale should be sanctioned with criminal penalties (currently, a sale has to be completed). The criminal code needs to be amended. It should make clear that possession of illegal material, including the possession of the equipment used to make illegal material, can result in criminal sanctions.

The Copyright Act of 1996 also made other significant improvements in enforcement. It provides for: *ex officio* criminal copyright enforcement by the police; civil damages awards and/or seizure of illegal profits; preliminary and permanent injunctive relief; and seizure, forfeiture and destruction of infringing profits (Article 139). The copyright law now defines unauthorized satellite and cable retransmissions as copyright infringements. The criminal code provides that *ex parte* criminal searches are allowed against suspected pirates, but they have not been shown to work. (Civil code provisions in Article 239 have been referred to by the government of Romania as pertaining to such searches, but these are neither *ex parte* provisions *per se*, nor do they work effectively in any case, at securing evidence.)

There are several substantive changes in the law that still need to be addressed as well, especially those concerning the ownership by and rights of audiovisual producers. One currently requires cinemas to get prior authorization from and to compensate authors of music performed in publicly exhibited films; this is an unusual provision that hinders film distribution in Romania. A second provision unfairly divides performance royalties and will further hurt the film distribution business.

Finally, the good news is that Romania, a signatory to both of the new digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), did ratify the treaties in February 2001. Efforts are now underway to make all of the necessary amendments to the laws of Romania to comply with them. Such ratification and eventual implementation of the appropriate laws will protect against Internet and other forms of digital piracy, and encourage ecommerce, so these efforts are strongly encouraged by IIPA and its members.

The copyright law already does correctly ensure that the right of reproduction covers temporary copies; however, it is limited to computer programs, so it must be amended to include all works in order to provide the necessary protections against digital piracy. In fact, to comply with the treaties, Romania must adopt numerous amendments. These include: adoption of a more complete right of communication to the public, including a right of making available; and provisions to allow right holders to enforce their rights against the circumvention of technological protection measures. Technological protection measures are the tools that rightholders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. A current provision in the law provides some anti-circumvention protection, but it is not as broad as the right noted above, and it is limited to computer programs.

In addition, rightholders need to be able to protect so-called “copyright management information” that is attached to or accompanies a work or sound recording, including protection against the alteration, removal or falsification of this information.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

SLOVAKIA

EXECUTIVE SUMMARY¹

IIPA recommends that Slovakia be placed on the Watch List.

Wide scale piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) exists in Slovakia. Business software piracy is also a problem, although there were some signs of cooperation by the Slovak authorities in early 2000. In 2000, the leading piracy concerns in Slovakia for the motion picture industry continue to be video and cable television piracy. The music industry reports imported CDs from Ukraine as the major problem, and CD-R piracy is on the increase.

IIPA applauds the Slovak government's action in becoming a charter member of the WIPO treaties, and its partial implementation efforts in the amended Copyright Act (2000). At the same time, the government's decision not to include express *ex parte* civil search provisions in the Copyright Act was disappointing. IIPA hopes the government will provide this important enforcement tool in amendments to the Civil Code this year (and will then implement such provisions in practice).

Estimated losses to the copyright industries in Slovakia topped \$14.7 million in 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1999 - 2000

INDUSTRY	2000		1999	
	Loss	Level	Loss	Level
Motion Pictures	2.0	20%	2.0	20%
Sound Recordings / Musical Compositions	0.5	10%	NA	NA
Business Software Applications ²	5.2	45%	7.9	46%
Entertainment Software ³	7.0	85%	NA	NA
Books	NA	NA	NA	NA
TOTALS	14.7		9.9	

¹ This is IIPA's first-ever report on the copyright situation in Slovakia.

² BSA loss numbers for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

PIRACY AND ENFORCEMENT IN SLOVAKIA

Wide scale piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) exists in Slovakia. The copyright industries are in the process of gathering investigative information on pirates in Slovakia and forwarding this information to the Slovak authorities, mainly the police. As copyright piracy is a relatively new area for the police, trainings of the kind provided by the business software industry in 2000 will be important. Business software piracy is also a problem in Slovakia. There were a number of successful raids in 2000 to combat this form of piracy, with improved cooperation between the police and the industries, but more regular reporting is needed to monitor its progress. The first raid of a computer reseller engaged in hard-disk loading (the loading of unlicensed computer software onto a computer prior to sale) occurred in December 2000.

In 2000, the leading piracy concerns in Slovakia for the motion picture industry continue to be video and cable television piracy. Flea markets appear to be almost free of pirate material, but the rental of back-to-back pirate videocassettes remains pervasive. Though regular inspections have reduced piracy levels in the flea markets (and newly-imposed visa requirements hinder Ukrainian pirate traders), many pirates have shifted to mail order and private home operations, making enforcement more difficult. Mail order piracy requires extensive investigation and notarized test purchases before a complaint can be filed. Mail order videos are usually copied from “masters” rented from video rental outlets, and the copies are of poor to medium quality. These videos appeal to mainly less affluent members of society, and often do not bear any protective labels or holograms; if they do, the labels are usually stripped from old discarded legitimate cassettes.

Though recorded home-made movie CDs do turn up in small quantities, pressed pirate VCDs are not a piracy problem. Given the lack of videocassettes dubbed into Hungarian, Hungarian-language piracy is often found in the south of the country where most of the 10% Slovak-Hungarian minority reside. Web-based marketing of pirate hard goods is also beginning to appear.

Cable retransmission piracy is still a problem in Slovakia. The piracy levels for cable piracy were 60% in 2000, up from 50% in both 1998 and 1999, but the market is currently in flux given some change in ownership of small stations within the territory. Ninety-nine cable companies were licensed to retransmit satellite and terrestrial signals, and many of them regularly retransmitted foreign programming without authorization. Because of differences in programming release times between Western Europe and Slovakia, these pirate retransmissions damage home video releases in the country. While some of the pay channels now offer subscriptions through existing cable companies (e.g. HBO), no pay television is being offered yet for individual owners of satellite dishes; hence, there has been some temptation on the part of the satellite dish owners to purchase pirate smart cards or decoders so they can watch pay channels coming over satellite without authorization, which are advertised in technical journals. There is very little broadcast piracy in Slovakia (2% in 2000, down from 10% in both 1998 and 1999).

COPYRIGHT LAW AND RELATED ISSUES

Amendments to the Copyright Act and Two New Laws (on Collecting Societies, and on Broadcasting and Retransmission) Enacted in 2000

On June 20, 2000, the National Council of Slovakia (the legislature) reportedly approved amendments to the 1997 Copyright Act (Act No.383/1997); IIPA understands that these amendments went into effect on August 1, 2000. In addition, a new Collecting Society Law (234/2000 Coll.) and a new Broadcasting and Retransmission Act were passed in the same session.

The amendments to the Copyright Law were intended to bring Slovakia's law into compliance with TRIPS (ambiguities in the law prior to amendment included, e.g., lack of express protection for pre-existing works and sound recordings, etc.), and attempted to implement certain requirements of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). For example, the legislation reportedly includes: a right of "making available" works to the public; a rental right; provisions prohibiting the circumvention of technological measures, including the prohibition of those that use devices "designed partially" to circumvent technological measures, as well as the prohibition of the business of dealing in such devices; and provisions prohibiting the alteration of rights management information. The amended law reportedly strengthens enforcement procedures, particularly providing for the possibility of seizure and destruction of infringing copies, but significantly, reportedly fails to provide for such remedies with respect to materials and implements used in the infringement, a major TRIPS-deficiency. The Slovak Criminal Code, Section 152, remains unchanged, providing for up to two years imprisonment or a fine, the seizure of infringing materials, and imprisonment for a period of six months to five years if "considerable profit" (100 times the minimum salary) is shown. The law also imposes new reprographic reproduction levies.

The amendments failed to provide express protection for pre-existing works and sound recordings, a major shortcoming. The amendments reportedly failed to remedy a presumption against permitting monetary compensation for infringements, which has resulted in difficulties in getting adequate damages in copyright infringement cases. The amendment also reportedly rejected requests that civil *ex parte* provisions, required by Article 50 of the TRIPS Agreement, be included. The Slovak government expressed the opinion that it would be more appropriate to amend the general Civil Code. The government's decision to exclude civil *ex parte* provisions from the amended Copyright Act, contrary to the recommendation of the software industry, was a disappointment. This omission makes it vital that police understand the issue of software piracy and take appropriate action to enforce the laws proscribing it.

The Broadcasting Act of 1991 requires, as a condition of cable and broadcast television licenses, that the cable system or broadcaster declare how they plan to secure transmission rights from right holders. It provides for the withdrawal of licenses if operators fail to comply with its provisions. However, the Act does not apply to cable systems with fewer than 100 subscribers, unfortunately encouraging the growth of small pirate "community video" cable systems in apartment complexes (hence, cable piracy rates remain unacceptably high).

Slovakia Joined the WIPO “Internet” Treaties

On January 14, 2000, Slovakia deposited its instruments of ratification of both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Slovakia has been a member of both the Berne and Geneva Phonograms Conventions since January 1, 1993, and has been a member of the WTO effective January 1, 1995. IIPA applauds the Slovak government’s action in becoming a charter member of the WIPO treaties, and also its partial implementation efforts in the amended Copyright Act (2000). The WCT and WPPT raise the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Generalized System of Preferences

Slovakia currently participates in the U.S. GSP Program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Slovakia meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” At the same time that Slovakia caused losses to the U.S. due to piracy, Slovakia imported (during the first eleven months of 2000) \$60.3 million of products into the United States without duty (26.8% of its total imports into the U.S.). Slovakia should not expect such favorable treatment at this level if it fails to meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

SOUTH AFRICA

EXECUTIVE SUMMARY¹

IIPA recommends that South Africa be placed on the Watch List, to express its concerns over the failure of South African authorities to take actions under the Counterfeit Goods Act and to register unhappiness with the government's failure to pass amendments to fix TRIPS deficiencies in the Copyright Act and make other much-needed improvements to the law.

In the nearly one-and-a-half years since South Africa and the United States came to a written "Understanding" regarding the importance of intellectual property rights protection (including South Africa's reaffirmation of its commitment to comply with the TRIPS Agreement), the South African government has done precious little to demonstrate its commitment to protect copyright in a TRIPS-compatible way. Disturbingly, it has been more than three years since the effective date of the Counterfeit Goods Act (January 1, 1998), and to this day, no pirate has ever been charged with trading in counterfeit goods or counterfeiting a trademark and no pirate has ever been penalized under the Act (with penalties of up to R5,000, or U.S.\$833), per infringing item or a prison term to be set by the court). IIPA understands that finally, the Minister of Trade and Industry has designated "depots" for secured storage of pirated goods seized. IIPA urges the South African government immediately to take actions under the Act to prosecute known copyright pirates. In the absence of effective enforcement, piracy levels in South Africa remain disturbingly high for some industries, and South Africa continues to be a destination point for pirated optical media products from Asia, including, for example, high-quality counterfeit software produced in the United States and the Far East, and pirate masters of movies not yet released in South Africa.

IIPA is also disheartened by South Africa's failure to pass amendments to bring its law into compliance with TRIPS. A set of amendments had been put forward for consideration in 2000, but those amendments were removed from consideration and subsequent developments have been non-transparent, leading to concern that a future draft may not make changes necessary for South Africa to comply with its international obligations. The 2000 amendments included some positive changes, including the criminalization of end-user piracy, the possibility of statutory damages, and a fix to the current TRIPS-deficient provision on presumption of subsistence and ownership of copyright. If any action in the past year-and-a-half demonstrated South Africa's non-committal attitude to compliance with the TRIPS Agreement, it was the government's withdrawal of these proposed amendments. The amendments are back and are with the Cabinet.

Total estimated U.S. trade losses due to piracy in South Africa \$129.0 million in 2000.

¹For more details on South Africa's Special 301 history, see IIPA's "History" Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	12.0	10%	12.0	10%	12.0	16%	12.0	10%	12.0	12%	11.0	12%
Sound Recordings / Musical Compositions	11.0	13%	NA	NA	12.0	40%	3.0	20%	3.0	20%	NA	NA
Business Software Applications ²	62.6	47%	68.4	47%	74.9	49%	54.8	48%	40.2	49%	65.5	58%
Entertainment Software ³	22.4	70%	NA	NA	22.2	NA	15.3	NA	NA	NA	NA	NA
Books	21.0	NA	20.0	NA	21.0	NA	20.0	NA	22.0	NA	20.0	NA
TOTALS	129.0		100.4		142.1		105.1		77.2		96.5	

COPYRIGHT PIRACY AND ENFORCEMENT IN SOUTH AFRICA

Piracy Phenomena in South Africa

All of the copyright industries suffer varying levels of piracy in South Africa of their staple products. Among the serious problems that exist in South Africa today are the following piracy phenomena:

- While there is no evidence in the increase of commercial piracy of hardbound books, there is wholesale copying of whole books by students in copy shops. Most textbooks are available in lower priced student editions, but students still copy those they need. Pirate photocopying and commercial piracy in the Eastern Cape area remain major problems for the publishing industry. Import of cheap reprints intended only for the market in India as well as India-pirated copies fill the retail markets in South Africa. While the book market has expanded in the past 10 years since the end of apartheid, funding for educational materials has not. In recognition of limited financial funds of students, international publishers heavily discount books. Nonetheless, it is estimated that at least 30-50% of texts used countrywide are pirate photocopies. There are reports that some universities that used to buy reference books for its faculty members now buy only one copy, and photocopy the book for other faculty members internally.
- The retail markets for entertainment software (including all formats, like console-based videogames on CD, personal computer games, and cartridge-based videogames), sound recordings, business software and publishing CD-ROMs, are largely pirate. For example, it

² BSA loss numbers for 2000 are preliminary. In IIPA's 2000 Special 301 report, reported piracy levels for business software were 50% for 1998 and 50% for 1996. These piracy levels have been adjusted downward (to 49% for each year) in this year's chart to reflect the final reported piracy levels.

³ IDSA estimates for 2000 are preliminary.

is estimated that 60% of the console-based videogame market is pirate, while 75% of the personal computer CD-ROM videogame market is pirate, with much of the pirate product being imported from countries in Asia including Thailand, Hong Kong and Malaysia.

- The recording and music industries are hampered by pirate imported audiocassettes from nearby countries such as Mozambique, Tanzania and Malawi, at least some of which are transshipped through the Gulf region from points in Southeast Asia.
- Video piracy exists in South Africa, albeit in low levels (roughly 10%), particularly in the greater Johannesburg region. Most pirate videos are sourced from pirate VCDs and parallel imported Zone 1 DVDs (DVDs programmed for playback and distribution in North America only), with much of the duplication taking place in private homes. Natal Province is the entry point for large quantities of pre-video and pre-theatrical release VCDs that are imported from Malaysia and Singapore. There has also been an increase in the number of pirate optical discs coming in through Johannesburg, with smaller quantities slipping through Customs in Cape Town. These materials - of fairly good quality - are used as "masters" for local illegal duplication labs, which in turn supply networks of distributors. Pirate videocassette labs are generally small in size (no more than a half a dozen machines), but are well organized and active (part of the "syndicate") throughout the Western Cape and Durban. "Home dealers" in the Cape Flats and Kwa-Zulu Natal border also prey on major revenue centers, disrupting legitimate business and inhibiting market expansion. Flea market pirates (many of them foreign nationals) sell VCD, DVD and video titles, mainly in Johannesburg. Counterfeit VCDs can be readily found in hardware stores together with VCD players that have been dumped in South Africa.
- There has been a marked increase in Internet piracy over the past couple of years, with an estimated 20% of the videogame market now being lost to pirate downloading of "warez" (pirate) copies of games.

Some Hope of Implementation of the Counterfeit Goods Act

As noted above, it has been more than three years since the effective date of the Counterfeit Goods Act (CGA) (January 1, 1998), and still, no pirate has been charged with violating the Act or penalized under the Act (with penalties of up to R5,000 (approximately US \$833) per infringing item or a prison term of up to three years). Meanwhile, much pirate product flows through South Africa Customs points undetected, and in many instances when pirate product is detected, it is simply handed back to the pirate importer (in some instances, Customs officials are intimidated by threats of legal action by the importers). Corruption may play a part at the points of entry, in particular at the Johannesburg International Airport. IIPA has reports that indicate that in early February 2000, police arrested numerous Customs officials on charges of corruption and have seized products from some of the officials' houses.

IIPA understands that finally, the Minister of Trade and Industry has gazetted the "depots" (warehouses) that will store goods to be seized by Customs and other authorities under the CGA, and in addition, the Minister has appointed the inspectors who will operate under the CGA. These inspectors, under the auspices of the Legal Services unit of the South African Police force, have enlisted industry to conduct several trainings. One of these occurred in October 2000, and more will occur in six major cities during April and May 2001. Nonetheless, the copyright industries

have waited for more than three years for enforcement under the CGA and are still waiting. IIPA urges the South African government immediately to take actions under the Act to prosecute known copyright pirates. It is particularly disheartening that Customs posts in South Africa have now been reduced to 19. The government must adequately resource enforcement efforts against piracy.

Another related hurdle in South Africa is right owners' inability to make use of the defunct trademark registration system to enforce their rights against pirates and counterfeiters. Right holders could use the CGA based on counterfeits of their trademarks, were the system operating as it should. During the course of the year 2000, the state of the Trade Marks Registry in South Africa approached an all-time low, with delays of in excess of three years in the examination of trademark applications, and trademark searching facilities for the public being largely suspended by the Registrar. Some interested parties have made strong representations to the government, even threatening litigation to compel the Minister of Trade to comply with his obligations in regard to intellectual property. These overtures led to assurances by the Minister that the state of affairs would be dramatically improved.

Judicial System that Fails to Deter and Fosters Recidivism

South African prosecutors, magistrates and criminal courts continue to give low priority to copyright infringement cases. Public prosecutors accept admissions of guilt and impose police fines in some cases, but other cases brought under the Copyright Act languish in the courts, sometimes for upwards of two years or more. This inability to prosecute and finalize criminal cases has the effect of fostering recidivism, because as the criminal cases move along at a glacial pace, offenders keep getting caught (sometimes three or four times) for the same offence before the first case gets anywhere near a court. If and when the first case is prosecuted, the justice system appears totally ineffective at deterring piracy, resulting in paltry fines that don't even amount to a cost of doing business for the pirate. The system needs to be streamlined in order to prevent the repeat offenders, or at least have a first conviction in place before the culprit is caught again, enabling the courts to impose heavier fines or imprisonment for second or third offenses. One proposal over the past couple of years has been the establishment of specialized intellectual property courts to deal only with commercial crimes; such a court might be helpful in ensuring swifter judicial enforcement and harsher remedies being meted out to commercial pirates.

Burdensome Procedures Hinder Enforcement in South Africa

Procedural problems, including the lack of evidentiary presumptions of subsistence and ownership in copyright infringement cases continue to subject copyright owners to overly costly and burdensome procedural hurdles.⁴ These problems force plaintiffs to spend inordinate amounts of time and resources simply proving subsistence of copyright and ownership, and place South Africa squarely in violation of its TRIPS obligations. Whereas in certain other former Commonwealth countries, ownership by the plaintiff is presumed unless proof to the contrary is introduced, in South Africa mere denial by the defendant shifts the burden to prove ownership to the plaintiff. As a result, the defendant in a copyright infringement case can and often does, without any supporting evidence, call into question the subsistence of copyright in a work, as well as the plaintiff's ownership of that copyright. In numerous cases, plaintiffs have been forced to

⁴ South Africa provides these presumptions for motion pictures and videogames through a title registration system, but that system is impractical, unnecessarily complex and expensive.

defend such unfounded challenges at great expense. South Africa must amend the Copyright Act to provide TRIPS-compatible presumptions.

The business software industry continues to report how difficult it is to obtain and enforce an *ex parte* civil search order (an Anton Piller order). Without a criminal remedy against end-user piracy (see discussion below), right holders must rely solely on civil infringement actions, and *ex parte* civil searches are essential to preserve evidence of illegal copying of software and therefore to the successful pursuit of civil infringement cases in South Africa. To obtain an Anton Piller order in South Africa, the right holder must provide a detailed affidavit signed by a current or recent employee of the target with direct information about infringement. Naturally, "whistle-blowers" are reluctant to provide signed statements, making it difficult for the right holder to satisfy the evidentiary threshold for a civil order. Also, the cost is unreasonably high, arguably placing South Africa in violation of its TRIPS obligations. Obtaining these orders in South Africa typically costs about \$20,000, while the equivalent procedure in most European countries that charge much higher legal fees costs far less. Until Anton Piller orders are more reasonably granted in South Africa (consistent with Article 50 and Article 41 of TRIPS), right holders have few prospects for effective civil prosecution against end-user piracy (unauthorized copying or use of software by a business). Section 11 of the CGA (discussed above) created a statutory Anton Piller order. With the depots in place to receive seized items under the CGA, IIPA is hopeful that the courts will grant Anton Pillers under Section 11 of that Act. Similar problems in obtaining search warrants in the criminal arena have been reported by some industries, particularly with respect to the narrow scope of such warrants, and the judiciary's penchant to return seized items to an infringer.

Failure of the Police to Combat Piracy Effectively

The copyright industries have little hope of combating piracy effectively unless the South African Police Services (SAPS) become engaged in aggressively fighting it. Some of the industries report improving relations with officers (in part due to regular training sessions given to individual police units throughout the country), and as a result, better enforcement in 2000. Overall, however, some serious problems remain. First, the police are faced with severe personnel shortages; more resources must be devoted to the Police. Second, many newly assigned officers lack the experience and training needed to carry out copyright enforcement. Difficulties also arise when SAPS officers refuse to act against known pirates, even with extensive evidence of piracy and all the necessary affidavits.

One bright spot on the horizon is increased cooperation and action from the Commercial Crime Unit (CCU) of SAPS. In particular, the CCU have begun acting against counterfeit and illegal software; the Pretoria CCU has been particularly cooperative, conducting several raids in early 2001. These units need more training and resources, but early signs in 2001 are at least encouraging.

Some Enforcement Gains in the Fight Against Video and Software Piracy

Both the motion picture industry and the videogame software industry have had to resort to privately-funded bodies to assist them in fighting piracy, with some success. The South African Federation Against Copyright Theft (SAFACT) has actually been given special powers to pursue video piracy cases and must perform most of the preparatory work for official investigations and

police actions. The entertainment software industry works with the South Africa Film, Video Security Office (SAVSO) to bring some criminal prosecutions against entertainment software pirates.

In addition, the motion picture industry makes use of some other statutes to try to obtain good enforcement. For example, the Proceeds of Crimes Act started being enforced this year by a special unit attached to the Department of Justice, specifically targeting organized piracy syndicates. The Act empowers the unit to attach all assets owned by syndicate members, unless they can prove that the property was accumulated through legal means. In order to raise more funds for government efforts, Inland Revenue Service (IRS) inspectors are also now being informed of all raids on private pirate homes. In the first half of 2000, 846 Zone 1 DVDs, 3209 VCDs, and 23 VCRs were seized, all of which would, but for the seizure, have been used by syndicate labs to produce pirate videocassettes. A further 4,836 videocassettes and 16,566 pirated interactive games discs were seized during this period by the special unit.

Government Software Management

The BSA has been working with the South African government to establish a program to support and educate government officials in software management. Recently, the government has agreed to begin to investigate and manage its licensing in certain government agencies. However, given the delays that have dogged this process, we would urge the South African government to implement a systematic software asset management plan for monitoring use and acquisition of software government-wide to ensure that the current and future use of software is adequately licensed. IIPA hopes that the State Information Technology Agency (SITA) will implement policies to ensure that there is proper allocation for legal software in all information technology infrastructure deals.

COPYRIGHT LAW AND RELATED ISSUES

Failure to Enact Amendments to Comply with TRIPS, WIPO “Internet” Treaties in 2000

IIPA is disappointed that the South African government failed in 2000 to enact amendments to cure remaining TRIPS-deficiencies in the South African Copyright Act (No. 98 of 1978). As noted above, a set of amendments had been put forward for consideration and went through a public comment period, but those amendments were removed from consideration in September 2000. The amendments included, among other things, criminal sanctions for end-user piracy, statutory damages, and a fix for the current TRIPS-deficient provision on presumptions relating to copyright subsistence and ownership. The amendments also included clarifying language to the concept of fair dealing (parts of which IIPA has some misgivings about). IIPA hopes that the government will consider amending the Copyright Act to bring it into compliance with TRIPS, and that the government will at least address the following:

- **Berne-Compatible Presumption of Subsistence and Ownership.** The draft amendment introduced a presumption of subsistence and ownership of copyright, such that subsistence is presumed and ownership by the claimant is presumed unless “the person seeking to challenge” the presumptions “asserts facts which serve to place doubt on the correctness of the relevant averments made by the Plaintiff or the State.” IIPA applauds the drafters and

supports this amendment, which would fix a Berne/TRIPS deficiency in the South African law.

- **Statutory Damages.** The draft amendment included the possibility of the court assessing additional statutory damages of R10,000 (US\$1285) “for each article to which the infringement relates.” IIPA is pleased that the draft contemplates per copy, pre-established damages. However, it is increasingly important, given new technologies and methods of distribution, that a statutory damages provision also encompass separate infringing acts. The term “article” appears to encompass copies, whether permanent or temporary, so would apply to a case in which multiple copies were made on a computer, but might not apply to separate multiple infringing acts of distribution. Therefore, to resolve any doubts, IIPA recommends that the provision be amended by adding “or infringing act” after the word “article.” Also, IIPA would like to see the statutory damages provision made electable by the plaintiff (as opposed to court-assessed).
- **Criminalizing End-User Piracy.** The draft amendment made it a crime to possess or have under one’s control in the course of business “with a view to committing any act infringing the copyright . . . articles which [one] knows or has reason to suspect are to be infringing copies of the work.” IIPA supports this addition, which would provide criminal sanctions for end-user piracy in a business
- **End-User Infringement.** The draft amendment made it an infringement of copyright to possess or control an article “in the course of business” if “to [one’s] knowledge the making of that article constituted an infringement of that copyright or would have constituted an infringement if the article had been made in” South Africa. IIPA supports this addition, which was intended to deem acts of end-user piracy in a business as infringements. It would be particularly helpful in this regard if the government confirms that included in the current term “reproduction” under the South African Copyright Act are temporary copies, including copies stored in RAM on a computer. If this point is unclear, then an amendment so clarifying would be highly preferable. Further, the law should be amended, if necessary, to ensure that this provision will apply to one who “reasonably should have known” that the making of the article constituted an infringement, etc.
- **Narrowing of Exceptions.** Exceptions to protection in the Copyright Act are overly broad (and must be amended to comply with the standards of TRIPS). An attempt was made to clarify the meaning of the concept of “fair dealing” in the draft amendment. For the most part, the drafters simply adopted the “fair use” factors from the U.S. Copyright Law. Without commenting further on any specific proposal at this time (since the proposal was withdrawn), IIPA simply notes its approval of the purpose of the amendment, namely, to clarify and tighten up the definition of “fair practice.” IIPA also reserves at this time any discussion of specific exceptions, but notes that in past submissions, overly broad exceptions to protection have been raised.
- The principle of national treatment is not currently the basis for the distribution of levies for private copying.

In addition to these “on their face” deficiencies in the Copyright Act of South Africa, IIPA would also like to emphasize that, in practice, South Africa must make civil *ex parte* searches

("Anton Piller" orders) easier to obtain. The measure of civil damages available under the Copyright Act, actual damages or an amount equal to a "reasonable royalty", does not constitute a deterrent to further infringement. It is unclear that the "reasonable royalty" measure of damages could be interpreted to provide an effective deterrent to further infringements, as required by TRIPS. Given recovery prospects like this, it is hardly surprising that plaintiffs often choose to settle rather than await judgment through trial of needlessly complex issues. Statutory damages (as discussed above) would be a welcomed addition to the panoply of remedies available. Finally, many IIPA members report that criminal penalties imposed in copyright infringement cases have been inadequate to deter piracy.

South Africa additionally needs to include protection against unauthorized parallel imports. South Africa does have some legislation in place to protect the local market against parallel imports, but this is related to publication certification rather than copyright. The unauthorized parallel importation of Zone 1 DVD (DVDs programmed for playback and distribution in North America only) hardware and software from the U.S. is harming the motion picture industry in South Africa. This material arrives in South Africa well in advance of video release and, at times, the South African theatrical release. Pirate product sourced from these materials is also beginning to appear in the street markets. Local distributors do not have direct protection against such product under the Copyright Act. The product, however, is being placed on the market without the required certification of the South African Publications Board under the Film and Publications Act. Products violating the Film and Publications Act are subject to seizure and administrative fines. Local industry has managed to secure amendments to this legislation making it compulsory to prove distribution rights to the Publications Board. While this sounds effective in theory, the Board cannot always verify the legitimacy of contracts provided by importers. SAFACT, the local anti-piracy organization, assists the Board where major studio product is concerned. Nonetheless, an amendment to address this problem in the Copyright Act would be desirable.

WIPO Treaties

IIPA also looked to the South African government to implement the WIPO "Internet" Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), in the latest round of amendments, and was disappointed that the government did not include provisions necessary to implement the WCT and WPPT in the 2000 draft amendments. The WIPO Treaties require, among other things, effective legal remedies against the circumvention of technical measures used by content owners to protect their property from theft and mutilation. This legal framework that permits content owners to provide for the security of their property online is essential for successful electronic commerce. South Africa is a signatory to the WIPO Treaties, and IIPA encourages the government of South Africa to take swift action to implement the obligations of the WCT and the WPPT, paving the way for ratification of the Treaties.

Other Treaties

South Africa currently adheres to the Brussels (1948) text of the Berne Convention (Articles 1-21), and thus should be strongly encouraged to adopt Articles 1-21 of the Paris (1971) text of the Berne Convention. In addition, South Africa should be encouraged to join the Geneva (Phonograms) Convention.

Generalized System of Preferences

South Africa currently participates in the U.S. GSP program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that South Africa meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” At the same time that South Africa caused losses to the U.S. due to piracy and kept its law in violation of international treaty obligations, South Africa imported (during the first eleven months of 2000) \$534.0 million of products into the United States without duty (13.7% of its total imports into the U.S.). South Africa should not continue to expect such favorable treatment at this level if it continues to fail to meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

THAILAND

EXECUTIVE SUMMARY¹

The business of optical media piracy is growing and thriving in Thailand. Pirate production capacity has roughly doubled in the past year; pirate product occupies an increasing share of the domestic market, except in sectors for which it has wiped out the legitimate market almost entirely; and Thailand remains one of the largest sources of pirate CDs and videogames exported to markets worldwide. All this has occurred despite active government anti-piracy enforcement efforts, including a series of raids on optical disc factories, and a specialized intellectual property court that has nearly eliminated the backlogs and delays that used to make the Thai judicial system an enforcement bottleneck. Clearly more enforcement resources, better coordination, and new legal tools are all needed if Thailand is to respond more effectively to its mushrooming optical media piracy problem. In particular, the strong optical media regulatory legislation which has reportedly been drafted must be enacted as promptly as possible, and then aggressively implemented, or Thailand will remain a safe haven for the international criminal syndicates that dominate optical media piracy. While the slowly growing willingness of the Intellectual Property and International Trade Court to sentence major commercial pirates to jail is encouraging, the fate of these sentences now rests with a Supreme Court whose record on piracy issues is quite uneven. Thailand also needs to tackle its persistent cable piracy problem, crack down on unacceptably high levels of institutional piracy of business software applications, and step up to the new challenge of Internet piracy. To facilitate the monitoring of these critical enforcement, judicial, and legislative developments, USTR should maintain Thailand on the Special 301 Watch List for 2001.

¹ For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 – 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	24.0	60%	21.0	55%	19.0	50%	19.0	50%	19.0	65%	29.0	65%
Sound Recordings / Musical Compositions	16.0	45%	6.0	40%	9.1	35%	15.0	40%	10.0	40%	5.0	13%
Business Software Applications ²	47.0	78%	66.5	81%	39.4	82%	75.5	84%	153.8	82%	80.2	82%
Entertainment Software ³	130.5	98%	116.3	95%	93.5	92%	86.4	85%	75.0	82%	73.3	80%
Books	33.0	NA	33.0	NA	28.0	NA	32.0	NA	32.0	NA	32.0	NA
TOTALS	250.5		242.8		189.0		227.9		289.8		219.5	

OPTICAL MEDIA PIRACY

The Problem Continues to Grow...

The most serious piracy problem in Thailand, and the one that afflicts all sectors of the U.S. copyright industry, is optical media piracy: the unauthorized production, distribution and export of copies of copyrighted materials in formats such as audio compact disc, video compact disc (VCD), Digital Versatile Disc (DVD), and CD-ROMs, which are used to carry business software applications, entertainment and videogame products, audiovisual works, recorded music and literary material.

Pirate optical media production within Thailand, a rarity just a couple of years ago, is now firmly entrenched, and growing rapidly. Industry estimates that there are some 43-50 optical media plants in the country (up from 23 reported last year). Some are in or near Bangkok, while others are in more remote areas, particularly near the frontiers with Indochina and Burma. One pirate plant is located directly opposite a major Defense Ministry office in Muangthong Thani, Nonthaburi province. Many factories have more than one production line, and estimates of their total annual production capacity run as high as 200-300 million units (more than a doubling from last year's estimates). In a country whose market can absorb an estimated 15 to 20 million units per year of legitimate copies in these formats, it is obvious that Thai pirate production, besides completely dominating the domestic market, also fuels a thriving export trade.

The impact of pirate optical media syndicates in Thailand transcends the boundaries between different market segments. The motion picture industry estimates that 70 percent of the video CDs on the market are pirate, while unauthorized DVDs are also beginning to turn up in Thailand. Pirate market share for recorded music also continues to rise, to an estimated 45% for 2000. There can be virtually no legitimate market for videogames in optical media formats in Thailand, since a glut of pirate product on the market – nearly all of it locally produced – has

² BSA loss numbers for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

driven street prices down to the level of US\$0.75 per piece for CD-ROMs for use in Sony PlayStation® consoles, for instance.

Pirate optical media products are readily available at retail throughout Thailand. Pirate music CDs, for example, can be found in markets in Bangkok, in other cities, and in tourist areas. While pirate audiocassettes are widely sold as well, this format occupies a shrinking share of the market; while the number of pirate cassettes seized in 1998 outnumbered CD seizures by more than six to one, for 2000 the local recording industry reports that more CDs than cassettes were seized. The glut of pirate CDs of international repertoire on the market has driven the street price down to about Bt 150 (US\$3.50). Overall, RIAA estimates that 45% of international recorded music product in the Thai market is pirate, up from 40% in 1999 and 35% in 1998.

Thailand was slower than some of its neighbors to migrate from the videocassette format to VCD for home video products, but by now the VCD format predominates in the pirate market. In the major cities, pirate DVDs are starting to appear in increasing numbers. In all, nearly 850,000 pirate optical discs of audiovisual product were seized in 2000. MPA estimates that about 60% of all audiovisual product in Thailand is pirate, up from 50% in 1998; estimated losses due to piracy have also increased, from \$19 million in 1998 to \$21 million in 1999 to \$24 million in 2000. These losses include damage to the theatrical box office caused by the widespread availability of pirate video versions of films that have not yet been released in Thai cinemas. The damage is increased by the fact that 90% of pirate VCDs now have a soundtrack in the Thai language. Pirate product in both VCD and videocassette formats can readily be found in major shopping areas in Bangkok such as Panthip Plaza, Tawanna, Seri Center, Secon Square, Future Park Rangsit, and others. Street vendors do a brisk business in both VHS and optical disc formats in night markets, selling from catalogs and photo spreads and keeping their inventory in a separate location to frustrate enforcement efforts. Conditions are similar in other major cities and tourist centers. The going price for pirate VCDs is about US\$2-3.

Pirate versions of business software applications may be found at a number of stores in Bangkok. Similar conditions obtain for entertainment software, which also suffers a persistent problem of sales of illegally copied games on CD through Internet Websites based in Thailand. Over 213,000 pirate CD-ROMs of videogames in the PlayStation format were seized in Thailand in 2000.

Thai optical media piracy is an international, not just a domestic, concern. Both the volume and the scope of export of pirated optical media products from Thailand are nearly unmatched. During 2000, some three million pirate music CDs originating from Thailand were seized in Paraguay alone; another million were intercepted in Germany during the year. A single shipment of Thai-produced pirated PlayStation videogames seized in Frankfurt amounted to 116,000 units in 11 crates, weighing two and one-half tons and valued at over US\$5 million; it was en route to Mexico.⁴ Countries as far flung as Sweden and South Africa report that Thailand is the major source of pirated interactive entertainment software seized by their customs officials.

The source of the optical media piracy that is distorting markets both within Thailand and around the world is a well organized, well financed group of syndicates with strong international connections. Nationals from Taiwan, Macau, Malaysia and China have been detained in connection with the operation of factories that have been raided in Thailand. Initially financed

⁴ "PS Software Seizure," Game Week, April 3, 2000.

from abroad, the syndicates develop strong political ties with local and national figures in Thailand, and their plants are often well protected, both politically and (increasingly) in terms of armaments. The syndicates have developed extensive distribution networks, both for the Thai retail market and for export. Their retail operations, especially for pirate CDs, rely increasingly upon children under the age of 15 to staff stalls and other outlets, since they know that restrictions on the prosecution of juveniles make enforcement more complicated.

...Despite an Enforcement Response

The continued astronomical growth rates of optical media piracy in Thailand are due in part to the efforts of authorities in neighboring countries to crack down on this illegal trade. The growth in Thailand is especially remarkable because it has occurred despite one of the more aggressive enforcement efforts seen in any country in the region. Thai officials, who began to conduct raids on pirate optical media plants in July 1999, carried out at least 16 such raids during 2000. One of the most productive series of raids took place in the Bangkok area on May 2-3, and turned up a full pirate stamper replication service. Records seized at the Mercury Bay facility during this campaign indicated that the plant was turning out some 900 stampers per month – master copies of titles such as “Star Wars Episode I” and “The Matrix,” from each of which some 100,000 pirate VCDs could be produced. Significantly, seven Malaysian nationals and one Thai were arrested at the scene.

Perhaps most remarkably for the region, many of these raids have been followed up with prosecutions and with swift action by Thailand’s specialized Intellectual Property and International Trade Court. To date, some fifteen people arrested in connection with the factory raids have been sentenced to jail terms of up to one year, and the trial court (the Central Intellectual Property and International Trade court) did not suspend any of the sentences. However, all the sentences were appealed, and no jail time has yet been served by any of the pirates. Still, this is an encouraging result in a country in which even suspended jail terms for copyright pirates were virtually unheard of prior to 1998.

That the pirate optical media problem in Thailand has grown so rapidly in the face of such an unprecedented level of enforcement, prosecution and sentencing testifies to the enormous profits to be made in the piracy business, and to the tenacity of the criminal syndicates determined to reap those profits. The positive developments seen in the past year are simply nowhere near enough to turn the tide. Clearly, enforcement efforts will have to be intensified, given more resources, and sustained over a considerable period of time before Thailand can hope to reverse the trend. Tougher and more consistent sentencing of individuals involved in optical media piracy, including major distributors and exporters as well as manufacturers, will also be required.

Needed: A New Legal Tool

Thailand must also emulate some of its neighbors by adopting a comprehensive regulatory regime governing both the importation of the equipment and raw materials needed to make pirate optical media products, and also the operation of optical media production facilities. Long reluctant to embark on such a step, the Thai government’s position changed almost overnight in late 1999 in the wake of a scandal over the involvement of the Prime Minister’s driver in piracy (the so-called “PM scandal”). Since then, Thai officials from a number of agencies have been working with private sector advisors and others to draft comprehensive legislation. IIPA understands that

drafting is now complete. Reportedly, the draft bill builds on the recently enacted legislation in Hong Kong and Malaysia, and covers both equipment and raw materials and requires the use of Secure Identification (SID) codes on all optical media products produced in Thailand. However, to date, more than a year after work began on the new legislation, it still has not been formally approved by the Minister of Commerce, much less by the full Cabinet. Presentation to the Thai parliament lies even further in the future.

While we applaud the Thai government's recognition that a comprehensive regulatory regime is needed, the extremely slow progress toward putting that regime in place is cause for concern. This issue must take a top priority on Thailand's legislative agenda. The Thai legislative process is normally quite protracted; strong pressure from the responsible departments will be needed if the new legislation is to come into effect quickly enough to be of maximum usefulness against the growing threat of optical media piracy. Prompt enactment and implementation of this legislation should give enforcement authorities a powerful new tool to wield against the optical media piracy syndicates. It could also lessen the attractiveness of Thailand as a site for locating future pirate facilities.

EFFECTIVE ENFORCEMENT: MORE NEEDS TO BE DONE

Historically, anti-piracy enforcement in Thailand has been plagued by a lack of cooperation among enforcement agencies. This began to change in 1999, and the process accelerated toward the end of that year, when, in the wake of the "PM scandal," the Department of Intellectual Property (DIP), carrying out a directive of a new Deputy Minister of Commerce, set up nine task forces to carry out ongoing investigations and raids in different parts of Thailand. All police units in Bangkok and in tourist areas throughout the country were empowered to enforce the copyright law and ordered to give such enforcement a high priority. All seized pirate product was ordered destroyed on a quarterly basis, a response to the aggravating practice of returning pirate inventory to retailers upon payment of a nominal fine, a policy that clearly violated Thailand's obligations under the WTO TRIPS Agreement.⁵ Under the new setup, the tempo of enforcement activity increased dramatically, as different agencies competed to carry out raids and to distance themselves from any hint of complicity with pirates.

These positive trends continued into 2000. A key coordinating body established by the government in 1998 – the Infringement of Intellectual Property Suppression Center – continued to meet with industry representatives and helped to focus enforcement efforts. In addition, a special task force created in the wake of the PM scandal was empowered to carry out anti-piracy IP enforcement activities around the country, and has been an effective participant in the anti-piracy effort. These bodies should be made permanent. But much more needs to be done before the Thai enforcement and prosecution apparatus can be considered truly effective.

Coordination should be improved still further through the adoption and implementation of a nationwide anti-piracy plan. More enforcement manpower is needed to tackle what is essentially a nationwide problem, and anti-piracy enforcement must be given a higher priority throughout the government, including at the provincial level. The Department of Intellectual Property should be given the authority to carry out enforcement actions, not just to coordinate them; this would assist

⁵ This remains a problem with respect to seized product not specifically identified by right holders as infringing. Thai authorities should be encouraged to destroy seized product more consistently and on a more frequent schedule.

the existing enforcement agencies, like the Economic Crimes Investigation Division (ECID) of the National Police, which need more resources. Customs, foreign trade, domestic trade, revenue and consumer protection agencies need to be more fully integrated into the overall enforcement effort. Thai enforcement authorities should also be strongly encouraged to improve on their performance on several issues identified in the Thai-U.S. IPR Action Plan of 1998, including improved border controls; more effective use of tax, fraud and other laws against pirate organizations; and devoting sufficient resources to enforcement across the board.

Thailand's success in converting raids into successful prosecutions remains uneven. On the plus side, besides the aggressive prosecution of optical media factory operatives summarized above, a total of 89 prosecutions against distributors and retailers of pirate VCDs were initiated in 2000. By contrast, only seven prosecutions were launched against retail business software pirates during 2000, although seven times that many retail raids were carried out. Thailand must devote the resources needed to ensure that all serious cases of copyright infringement are brought to court promptly.

COURTS

Continued Progress Toward Deterrent Sentencing by the IP &IT Court...

For years, interminable delays, convoluted procedures, and purely nominal sentencing practices rendered the Thai court system dysfunctional in the fight against copyright piracy. The inauguration of the Central Intellectual Property and International Trade Court (IP&IT Court) in December 1997 fulfilled a longstanding commitment of the Thai government, and offered the potential to make a real difference. The new court's personnel have received specialized training; streamlined procedures have been adopted; and the court's jurisdiction is broad. Almost since its inception, it has processed cases expeditiously, thus addressing one of the main shortcomings of the old system. In 2000, the court disposed of 4059 IPR criminal cases, while a total of 4719 such cases were received; this indicates that backlogs were quite minimal. MPA reports that criminal convictions were obtained in 87 of the 89 criminal cases which it initiated during 2000, and that the other two were resolved in January 2001.

A major challenge facing the new court was whether it could break with the traditional inability or unwillingness of judges to impose deterrent penalties, including jail terms, upon convicted pirates in serious cases. In this regard, 2000 was a breakthrough year for the court, as exemplified by the fifteen unsuspended jail sentences it imposed on operatives of pirate optical media factories during the year. It also sentenced a total of six defendants to jail in two cases involving pirate warehouses and distribution centers, and imposed prison terms in three retail piracy cases as well, all without suspending the custodial sentences. All defendants appealed to the Supreme Court, however, and none has yet served any jail time; the three retail pirates received suspended sentences for the Supreme Court, while all the distribution and factory cases remain pending. The U.S. government should closely monitor the appeals in these cases, to ensure that this important step toward deterrent criminal sentencing in piracy cases has a real impact. The court should continue these firm sentencing practices as more operatives from pirate optical media plants are brought to justice. It should also continue its practice of ordering the forfeiture of optical media production equipment used to make pirate product, and should extend that forfeiture policy to other cases as well.

Another appeal that should be closely monitored involves a defendant named Yothin Krutpong, a shop owner who sold pirate optical media products — business software, VCDs and music — from his store in Panthip Plaza. In May 1999, the IPR court imposed on him the toughest sentence ever handed down for copyright piracy in Thailand: 28 months in jail, and fines totaling Bt 840,000 (US\$22,400). If the sentence is upheld on appeal to the Thai Supreme Court, where it is still pending, this defendant could be the first Thai copyright pirate ever to go to prison as a result of a criminal conviction for copyright infringement.

So far, the willingness of the IP&IT Court to impose jail terms on commercial pirates is restricted to those involved in optical media production. However, the court does appear to be imposing somewhat heavier fines on pirates than in the past. Individuals convicted of distribution roles with respect to pirate VCDs are fined about Bt 100,000 (US\$2400) on average, while VCD retailers generally face a fine of about Bt 48,000 (US\$1100). BSA reports similar results in 55 retail cases adjudicated through the first quarter of 2000, with average fines of US\$3200. By contrast, fines imposed in 129 music piracy cases resolved in 2000 averaged less than US\$1200. In 2001, the court should bring sentences on major pirate distributors up to deterrent levels, including jail terms.

In the year ahead, the court should be encouraged to continue this trend toward tougher sentencing, since a consistent pattern of such sentencing must be established in order to achieve a deterrent effect. It is worth reiterating that it falls largely upon the Central Intellectual Property and International Trade Court to fulfill Thailand's international obligation under Articles 41 and 61 of the TRIPS Agreement to impose deterrent criminal penalties on commercial copyright pirates. This internationally recognized minimum standard became fully applicable to Thailand on January 1, 2000. It is imperative that Thailand provide for, and actually impose, criminal remedies which are "sufficient to provide a deterrent" (TRIPS Articles 41 and 61), and that it provide the full panoply of criminal, civil and administrative procedures and remedies. The IP & IT Court is well positioned to advance many of these goals in the year ahead.

...but Mixed Results at the Supreme Court Level

The most significant Thai court decisions of 2000 on substantive copyright law and enforcement issues were rendered, not by the IP&IT Court, but by the country's Supreme Court, hearing appeals from the specialized tribunal. The results sent decidedly mixed signals regarding Thailand's commitment to fulfill its international obligations regarding the fight against copyright piracy.

Two of the cases involved book piracy, a chronic problem in Thailand that cost U.S. publishers an estimated \$33 million in 2000. The problem is centered around commercial photocopying operations that set up shop near college or university campuses and do a booming business in unauthorized copies of textbooks. Police raids against photocopying establishments in the fall of 1998 marked the first enforcement actions taken against this growing form of commercial copyright piracy. Unfortunately, in the first two of the resulting cases to be decided by the IPR Court in September 1999, the results were unsatisfactory. The IPR Court concluded that wholesale unauthorized photocopying carried out by commercial photocopying shops at the direction of students fell entirely within the exception to copyright protection for nonprofit "research and study" purposes under section 32(2)(1) of the Thai copyright law. Consequently, one case was dismissed while the other, in which the defendant had apparently stockpiled photocopies in anticipation of

future requests from students, was concluded with a nominal fine. The court also refused to allow the forfeiture of the photocopying machines used to make the unauthorized copies.

Thailand's Supreme Court rendered more satisfactory judgments in both these cases. In the case against Somsak Thanasarnsenee, the Supreme Court upheld the fine imposed by the lower court and also ordered the forfeiture of the photocopying machines used to commit the offense.⁶ In the second case, handed down in September, the Supreme Court reversed the acquittal of the defendant (Konakchai Petchdawongse) ordered by the IP & IT Court, imposed a fine of BT 100,500 (US\$2400)⁷, and ordered the forfeiture of the equipment. However, reportedly the Supreme Court decision was based on a narrow finding that the defendant had failed to demonstrate that the unauthorized copies seized had been made at the specific request of students. The decision appears to leave open the possibility that if such prior requests were documented, a for-profit commercial photocopying operation, engaged in high-volume unauthorized copying, would be able to claim the benefit of the statutory exception for copying for nonprofit "research and study" purposes.⁸ If this reading is correct, it is regrettable that the Supreme Court missed this opportunity to specifically disapprove the lower court's reading of the law, which appears not only to tolerate but even to encourage commercial copyright piracy of textbooks. Such an interpretation would raise serious questions about the ability of Thailand to fulfill its obligations under the TRIPS Agreement.

An even more disturbing Supreme Court decision involved Atec Computer and its director, who in 1999 had been fined a total of Bt 1,050,000 (US\$28,000 at then-prevailing exchange rates) for loading unauthorized copies of Microsoft® business software programs on the hard disks of computers they were selling.⁹ This was a welcome change from the light sentences imposed by the IPR court in its earlier software piracy cases, and sent a strong signal that this common form of software piracy was not acceptable in Thailand. Unfortunately, on October 16, 2000, the Supreme Court released a decision overturning the conviction, on the grounds that, because a Microsoft investigator had ordered the computer, Microsoft therefore could not have been the injured party, and indeed had "facilitated" the offense.¹⁰ To the extent that this decision casts doubt on the legal validity of "trap purchases," one of the most commonly employed techniques in investigating all kinds of piracy cases, it threatens to undermine much of the progress Thailand has made in its fight against piracy.

⁶ "Appellant fails to overturn copyright conviction," *IP Asia*, July/August 2000, at 7.

⁷ Reportedly this fine was subsequently reduced to Bt 67,000 (US\$1600).

⁸ Periera, "Supreme Court sets out what's allowed in reproduction of copyrighted text," *IP Asia* December 2000/January 2001, at 41.

"IPR Court Continues Hard Line on Pirates," *Bangkok Post*, July 7, 1999

¹⁰ "Thai Supreme Court Rules against Microsoft," *The Nation* (via Newsbytes News Network), Nov. 6, 2000.

VIDEOCASSETTE, CABLE AND PUBLIC PERFORMANCE PIRACY

Cable piracy — the unauthorized transmission of U.S. programming over cable television systems — is widespread in Thailand, especially in rural areas. Illegal decoder boxes and smart cards are widely available. Cable piracy undermines the markets for theatrical exhibition, home video, and licensing for broadcast of U.S. motion pictures. Most of the offending cable operators have strong connections with local politicians, and it is difficult to obtain enforcement. The cable piracy rate is estimated at 35%.

Also rampant is unauthorized public performance of U.S. audiovisual works, in many small hotels outside Bangkok that use in-house movie systems. Most bars in tourist areas also exhibit videos without authorization, often in “private rooms.” MPA estimates that 35% of all public performances of their member company titles in Thailand are unauthorized.

Finally, despite the advent of the VCD, VHS videocassette piracy remains a serious problem, particularly in the provinces and small towns. Pirates use VCDs, laser discs, promotional cassettes, and cassettes recorded from the screen in U.S. theaters as masters for pirate VHS versions, which are often available before the title in question has been released for theatrical exhibition in Thailand. While ongoing enforcement against retailers of pirate videocassettes is essential, the main enforcement thrust should be directed against duplication facilities for these products and against the major distributors who supply retailers. Competing pirate organizations supply videocassettes to their respective outlets, with separate distribution systems for the rental and sales markets. Masters are duplicated in facilities that often produce legitimate product part of the time, sometimes employing high-speed duplicating equipment. More sustained enforcement efforts and duplicators and distributors are needed to move videocassette piracy levels downward.

INSTITUTIONAL BUSINESS SOFTWARE PIRACY

Institutional end-user piracy, in which companies or other institutions make multiple unauthorized copies of business software for their internal operations, also occurs at unacceptably high levels in Thailand. This piracy contributes heavily to the estimated 78% piracy rate for business software applications, and the estimated \$47 million in losses this piracy inflicted on this sector during 2000. The enforcement response to this problem historically has been minimal. During 2000, the Business Software Alliance worked closely with the Department of Intellectual Property to educate the Thai business community about the need to comply with software licensing practices. A series of joint industry-government site visits to corporate end-users was part of this campaign. Clearly, without strong backing from government agencies for such educational efforts to promote respect for intellectual property rights, end-user piracy in Thailand, like retail piracy, will remain at unacceptably high levels, so this effort should be stepped up in 2001. In addition, BSA initiated ten actions against corporate end-user pirates in Thailand in 2000.

In 1998, the Thai government reissued an Executive Order requiring all government agencies to use legitimate and licensed software. This was a significant step forward in Thailand's efforts against piracy of business software. Some follow-up took place in 1999. The Business Software Alliance (BSA) conducted a series of seminars for government CIOs in Bangkok, cohosted by the Ministry of Science and Technology, and NECTEC (the National Electronics and Computer Technology Center, which is spearheading implementation of the Executive Order). The seminars

were well received, and NECTEC announced its intention to be the first agency to implement software asset management procedures and adopt good licensing practices. However, there was little follow through in 2000. the Thai government needs to revitalize its efforts to implement the Executive Order.

USE OF INTERNET AND NEW TECHNOLOGIES

In recent years, the Internet has been used more often for the marketing of pirate product in Thailand. It appears that an increasing number of international pirate organizations are establishing a presence in Thailand through which orders taken over the Internet for pirate CDs, CD-ROMs and VCDs can be fulfilled. As Internet use grows in Thailand (there are now an estimated one million Internet users in the country), Internet piracy can also be expected to increase. Thai law and enforcement practices need to be adapted to this new environment.

Accordingly, it is past time for Thailand, which participated actively in the negotiations that led to the adoption of the World Intellectual Property Organization treaties (the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty), to move promptly to ratify and implement those treaties. By updating its copyright and neighboring rights laws for the digital age, Thailand would maintain its hard-earned position of leadership within the ASEAN community on modernization of intellectual property regimes.

On the enforcement level, Thai enforcement officials need better training to understand and to be able to deal with Internet-based piracy. Designating a specialized cybercrime and Internet piracy unit could facilitate the training process. Enforcement agencies should also intensify their efforts to combat the growing problem of pirate CD-Recordable compilations of unauthorized copies of musical recordings. The Thai government also should move, in cooperation with industry, to promote public awareness of the need to respect intellectual property rights in cyberspace. In particular, the Department of Intellectual Property should work with Internet Service Providers to develop best practices and regulations that will encourage ISPs to cooperate with copyright owners to detect and deal with infringements taking place online.

LEGAL REFORM

As discussed above, the Thai government now supports the implementation of a regulatory system for optical media production equipment, raw materials, and operations. Prompt enactment of any necessary legislation, issuance of regulations, and aggressive implementation could make a major contribution to the fight against optical media piracy. Such a system should be comprehensive, including a combination of legal or regulatory measures to provide strict border controls on the importation or exportation of equipment or raw materials; licensing requirements for optical media production facilities; and vigorous enforcement, including surprise inspections and the revocation of licenses of plants used for infringing purposes.

Enactment of cable regulatory controls in Thailand is long overdue. Although the copyright law can be used against cable pirates, a regulatory system would make it easier to control cable piracy by conditioning the issuance and retention of cable licenses on compliance with copyright as in other countries. Legislation passed in January 2000 — the Frequencies Management Act — creates a National Broadcasting Commission, but selection of its members has been delayed to

March 2001 at the earliest. This commission should be appointed promptly and given the power to fight cable piracy.

Thailand is also considering broadcast legislation that includes provisions on signal theft and on the production or distribution of signal theft-related devices. The penalties proposed for these offences in the draft legislation are too weak, topping out at one year's imprisonment and a fine of Bt 2 million (US\$47,000). Stronger penalties are needed if this law is to be effective.

While Thailand has come a long way toward meeting its substantive obligations under the copyright portions of the World Trade Organization (WTO) TRIPS Agreement, it is not yet fully in compliance, especially with the critical enforcement obligations found in Part III of TRIPS. As discussed above, the IPR court is the Thai government institution most clearly responsible for fulfillment of these international obligations, but legislative changes could be needed as well, to clarify some ambiguities in the copyright act.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

VENEZUELA

EXECUTIVE SUMMARY

Over the years, legislative and administrative changes taken by Venezuelan governments to address piracy issues have presented a mix of advances and obstacles. Unfortunately, Venezuela's efforts to fight copyright piracy have declined in the last two years. Budget reductions and changes in staff responsibility adversely affecting Venezuela's anti-piracy brigade COMANPI, once the model for the region, have undermined its ability to take action. The National Guard (Guardia Nacional) has attempted to fill this gap by conducting anti-piracy actions in conjunction with industry. An overburdened special intellectual property rights prosecutor and consistent and pervasive problems with the judiciary, particularly in criminal cases, continue to result in lengthy delays and the failure to impose penalties and civil remedies at levels sufficient to deter piracy. Border measures need to be improved to intercept infringing product. Longtime problems with customs duties on computer software remain unresolved. Piracy losses remain high. Sadly, economic instability in Venezuela also appears to be adding incentives to steal copyrighted materials. IIPA recommends that Venezuela remain on the Special 301 Watch List.¹

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	65%	30.0	65%	35.0	65%	40.0	70%	40.0	85%	30.0	65%
Sound Recordings / Musical Compositions	30.0	62%	30.0	62%	15.0	35%	15.0	35%	5.0	22%	5.0	25%
Business Software Applications ²	45.5	58%	46.4	60%	55.6	62%	44.2	64%	42.4	68%	42.9	72%
Entertainment Software ³	47.0	78%	50.9	70%	53.8	73%	54.3	74%	54.0	70%	50.9	68%
Books	22.0	NA	21.0	NA	20.0	NA	20.0	NA	23.0	NA	23.0	NA
TOTALS	169.5		178.3		179.4		174.5		164.4		151.8	

¹ For more information on the history of Venezuela under Special 301 review, see appendices D and E of this submission. Venezuela is also a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program, which includes a criterion requiring beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners. In 1999, \$533.5 million of Venezuelan imports to the United States benefited from the GSP program, accounting for 5.1% of its total imports to the U.S. For the first 11 months of 2000, \$684.8 million of Venezuelan goods entered the U.S. under the duty-free GSP code, representing a 43.8% increase over the same time period last year.

² BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$45.7 million and 57%, respectively, were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

COPYRIGHT PIRACY IN VENEZUELA

Piracy in Venezuela has remained at high levels for all the copyright industries. Estimated losses have been over \$150 million per year, for each of the last five years. Continuing economic instability in this country may be adding incentives to pirate copyrighted materials.

For the motion picture industry, the most significant audiovisual piracy problem in Venezuela during 1999 continued to be cable and television piracy because Venezuela is within the footprint of U.S. satellite signals. Pirate cable systems with large numbers of subscribers continue to operate in cities where no legal cable company yet exists. These pirate enterprises provide programming to otherwise legitimate subscribers. Private resorts, condominiums, hotels and other commercial and domestic establishments consistently retransmit unauthorized programming, with seasonal increases during special events or holidays. Subscription television piracy in Venezuela has decreased (now estimated at under 40%) due to raids and investigations carried out by the MPA Venezuela program in 2000.

Home video piracy is pervasive in Venezuela, supplied by large – scale laboratories with national distribution systems. Many of the estimated 400 “legal” retail video stores in Venezuela perform small-scale back-to-back copying of legal videos purchased. The overall level of video piracy (including video and other products) remains at 65%. Broadcast television piracy continues to affect the legitimate market. Regional television stations often broadcast unauthorized U.S. motion picture product before their video release, seriously impacting the viability of the theatrical and home video markets in Venezuela. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Venezuela are estimated to be \$25 million in 2000. This is a slight drop, due in part to reductions in signal theft piracy as well as to some diminished expectations in the home video market due to Venezuela’s economic situation.

With respect to business software, pirate resellers continue to advertise openly in the major daily newspapers, and CD-ROM piracy has appeared in the market. Advertisements for pirate product through the Internet have been reported. Business software piracy can take many forms. Pirates advertise in the press, and sell compilation CDs for prices between \$7 and \$20. Pirates also act as assemblers, building computers and selling them pre-installed illegal software. Corporations use software programs without corresponding licenses. Universities and other educational institutions have high piracy levels, even among those which may have software licensing agreements with software companies. Government ministries also use unauthorized copies of business software. During 2000, the BSA conducted an aggressive enforcement campaign and was successful in deterring street vendors (*buhoneros*) from selling counterfeit and pirate compilation of business software CDs on principal streets and pedestrian ways. The estimated 2000 trade losses due to piracy of business applications software in Venezuela are \$45.5 million, with a piracy level of 58%.

The piracy situation for the book publishing industry in Venezuela remains as dismal as in prior years. There has been no improvement in reducing book piracy in Venezuela. Commercial piracy of college texts and English as a Second Language (ESL) materials and illegal photocopying are the major problems. Some professional books are now being pirated. No limits are placed on photocopying in and around universities. Estimated trade losses due to book piracy in Venezuela rose to \$22 million in 2000.

Like other Latin countries, the Venezuelan pirate sound recording market is shifting formats from cassette to CD piracy. Pirate CDs from neighboring countries easily enter Venezuela, with little to no action by the customs authorities to stop them. Basically, the problem of piracy has increased as a result of the populist approach that the Venezuelan government has taken: no government institution wants to go against street vendors. Last year, piracy in the CD-R format (recordable CDs) rose. The level of audio piracy in Venezuela remains at high levels, with an estimated 62% piracy level and losses of \$30 million in 2000.

Most of the pirate entertainment software in Venezuela is imported, notably from Taiwan, Hong Kong and China, usually transshipped through Paraguay. Clearly, improved border controls in Venezuela are needed to block the import of pirated entertainment software. There have been some seizures of counterfeit videogames at the border. Retailers openly sell piratical videogames in the main shopping arcades with little fear of reprisal. Estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) declined slightly to \$47.0 million in 2000. This decline is not due to declining piracy because piracy level estimates increased to 78% in 2000.

ENFORCEMENT IN VENEZUELA

Although Venezuela has taken structural actions to improve its enforcement mechanisms in recent years, the effectiveness of these organizations has declined dramatically. Furthermore, the possibility of effective deterrence has been diminished by the ineffectiveness of the Venezuelan judicial system. Deterrent penalties are rarely issued. It takes years for courts to issue a decision. As a WTO member, Venezuela is required under its TRIPS obligations to provide for effective action against copyright infringement across the board — in criminal, civil, administrative and customs measures. As discussed above, Venezuela also must meet its bilateral IPR obligations under U.S. trade law.

Venezuela Fails to Apply Deterrent Criminal Penalties.

COMANPI has lost its effectiveness as a copyright anti-piracy force

For several years, the enforcement arrangement Venezuela created with its police authorities in cooperation with the private sector was a relatively effective one, despite its chronic shortage of personnel and funding. However, cutbacks and reassignments of trained personnel are undermining what was once seen as a model for criminal intellectual property rights enforcement. In June 1996, an agreement was reached among the Ministry of Justice, directors of the Judicial Technical Police, the National Directorate of Authors' Rights, and representatives of the copyright industries which created an anti-piracy command known as COMANPI. COMANPI is a specialized brigade of the Judicial Technical Police, charged with making investigations and bringing criminal prosecutions of copyright infringers.

While COMANPI made great strides in its first years of operation, its pace has slowed considerably in recent years. COMANPI was reorganized in the Spring of 1998, with the goal of creating a kind of exchange program between COMANPI and the other functionaries in the police technical unit. Unfortunately, this activity ended up siphoning off COMANPI personnel to functions

other than copyright enforcement, such as conducting cases on industrial property (trademark and patent) matters. This reduces the staff available for copyright actions, which was why COMANPI was established in the first place. There are only seven agents, three of which specialize in copyright issues. There has been no increase in the human resources made available, despite the dramatically increased caseload. MPA continues to use COMANPI for selected signal theft actions. For limited actions where immediate action is not necessary (e.g. the violation is recorded) and there is no need for storage, COMANPI, at least for the raid, is still a viable option.

Additional funding, personnel and resources from the Venezuelan government would bolster COMANPI's ability to take additional action. Copyright owners have begun to rely heavily on the Guardia Nacional to initiate investigations and actions. BSA has also relied on the judiciary as well to initiate search actions.

The Guardia Nacional is becoming the enforcement agency of choice

BSA's campaign in Venezuela includes actions against channel pirates for suspected tax evasion. The Guardia Nacional, one of the administrative tax agencies, supports the BSA campaign and conducts actions. In 2000, a total of 42 resellers inspections were initiated with this entity. However, these actions are initiated for tax evasion instead of copyright infringement. This administrative procedure is not optimal for carrying out raids against resellers.

Because of the recent reduced effectiveness of COMANPI, MPA has been conducting video anti-piracy actions with the Guardia Nacional, using tax evasion (not copyright infringement) by the pirates as the basis for these actions. The MPA has worked successfully with the Guardia Nacional and the Judicial Technical Police on anti-piracy efforts. The Guardia Nacional has become the more effective antipiracy agency, and private investment has started to flow more towards the Guardia Nacional than to COMANPI. In 1999, 55,000 pirate videos were seized, and 31,000 cases and stickers; 17 satellite antennae were confiscated.

The recording industry reports little progress on the enforcement front in 2000. Very few actions took place early in 2000, due in part to political uncertainties, no Congress, the downsizing of the Judiciary, and the like. Meanwhile, the recording industry worked to train staff and incorporate APDIF Venezuela, which opened its doors in September/October 2000. The Special Prosecutor has done her best to take actions related to IPR issues. In addition, the recording industry was able to work some few cases with the Guardia Nacional. The industry was able to conduct some raids thanks to the efforts of the Guardia Nacional and municipal enforcement personnel or inspectors. COMANPI is no longer a viable enforcement agency for these actions. The Venezuela judiciary is not close to taking infringement cases seriously. The music industry aired a radio campaign during December of 2000 against piracy but with no major centralized support from the government.

SAPI has limited enforcement powers

The Venezuelan government created a new intellectual property office, SAPI (Servicio Autonomo de Propiedad Intelectual) in 1997 which merged the copyright office (formerly DNDA, the National Copyright Directorate) and the industrial property office. This new office was supposed to become operational in June 1998 and focus on enforcement efforts. But because of the February 1999 change in government, it looked like SAPI would be naming new personnel which

may have slowed down its operations. SAPI has very limited powers: no ability to order seizures or close businesses, and its fines are very low.

The single specialized IPR prosecutor is overburdened

In 1999, the Public Ministry created a special IPR prosecutor unit under the new Organic Code of Criminal Process to work with COMANPI after criminal raids are conducted and to oversee the ongoing investigations. In fact, the IPR Prosecutor has delayed investigations, and prevented product retention and detention of infringers. This prosecutorial unit has delayed the time periods to take action on criminal complaints, exceeding established deadlines. Parties now wait at least 30-60 days for action on any complaint. It was hoped that a second prosecutor would be named before the new criminal procedures code went into effect in July 1999, but this failed to occur. In 2000, the situation remained unchanged; there is still only one prosecutor.

Unwarranted Delays Occur in Criminal and Civil Cases.

The judicial system in Venezuela continues to serve as a major hurdle in the fight against copyright piracy. Courts take years to complete infringement cases. Furthermore, strikes have resulted in the closure of courts, at times for over six months.

In July 2000, one copyright company finally obtained resolution to a civil copyright infringement case which was originally filed in July 1995.⁴ The Superior Civil and Mercantile Court of Caracas issued a 46-page decision in favor of Nintendo of America (NOA) against Atari Mundial, a retail outlet store, and a number of its retailers, for distributing counterfeit hardware and software. While the initial court decisions was in Nintendo's favor, numerous appeals were filed by Atari Mundial. As a result of this decision, the court upheld Nintendo's copyrights in a long list of game titles, ordered the seizure and destruction of infringing games, and issued an injunction against all the defendants on the manufacture or sale of the identified games.

Regarding business software civil actions, the inspections are carried out before filing the legal suit, and the BSA is usually able to inspect the defendant and conclude a fast settlement. However, when the case is not settled, BSA has to follow the slow civil process, which can take

⁴ Here is the detailed procedural history of this case. Nintendo® requested the Court to inspect the retail store's premises to inventory the counterfeit products. The Court held its judicial inspection on June 20, 1995; 556 video games were seized, and many hardware systems. Nintendo filed for a preliminary injunction, whereby Atari Mundial and its retail outlets and other associates would be ordered to cease distributing infringing products. The Court issued the preliminary injunction on June 30, 1995. On September 28, 1995, the Court issued a judicial form requesting payment for the action, which was paid on behalf of NOA on October 2, 1995. On December 18, 1995, Atari Mundial filed a brief requesting dismissal of the case for failure to pay the appropriate fees. NOA requested the Court to issue the accurate payment form and paid the corrected fees on December 21, 1995. On January 17, 1996, the Court granted the dismissal and NOA appealed on January 24, 1996. On July 29, 1996 the Court ruled in favor of Nintendo. Nintendo also prevailed in its effort to have additional judicial inspections held, proving that Atari Mundial continue to distribute counterfeit Nintendo video game products. On February 14, 1997, the Court seized over 2,500 counterfeit Nintendo hardware and software products. As of March 23, 1998, all of the evidence had been presented by both parties to the case. The defendants used all steps possible to delay the decision. On April 5, 1999, Judge Zambrano of the Fifth Court of First Instance Mercantile ruled in favor of Nintendo of America, Inc. Part of the recent decision orders the defendants to immediately cease the manufacture, distribution and any type of commercialization of video game cartridges which are recognized by the law as belonging to Nintendo of America, Inc. In addition, the judge ordered the destruction of each one of the seized goods, as well as any other object that violates the exclusive rights of Nintendo. The case was again appealed by the defendants.

two to five (or more) years until the case is finally resolved. On the end-user piracy front, BSA initiated 39 civil actions in 2000. The majority of these targets, 25 in all, settled with the BSA, four targets were clean, and BSA filed damages actions against five of the targets

In 2000, no sentences were issued in any of MPA's pending cases. No sentence has been imposed for an audiovisual copyright infringement offense. The lengthy period of time it takes to bring and complete these actions only compounds the difficulty in obtaining deterrence. Again, the overloaded special prosecutor has not been able to take action on MPA cases.

The Venezuelan Judiciary Fails to Impose Deterrent Penalties.

Venezuela adopted a new Code of Criminal Procedure (CCP), published in the Official Gazette on January 23, 1998, and which entered into effect on July 1, 1999. This law established specialized courts (*tribunales colegiado*) in Venezuela. These courts are to address special issues of law, including the creation of IPR courts in which cases will be heard by three lawyers trained in intellectual property issues. Unfortunately, these courts cannot rule in software infringement cases, as their decision-making authority is restricted to cases where the maximum penalty exceeds four years of prison, which exceeds applicable penalties in software infringement cases.

Other provisions of the CCP ensured that the criminal process might be initiated by the state prosecutor; provided the possibility of settling criminal cases after they are initiated; and lifted the very restrictive judicial secrecy provisions which had prevented effective publicity of criminal cases, including copyright matters. Nevertheless, cameras are still prohibited in the courtroom, defendants' photographs may not appear in the paper, and their names are to be withheld. The rationale is to protect the individual until he/she is proven guilty.

Border Measures are Ineffective.

With the growing problem of pirated and counterfeited goods crossing its borders, Venezuela is faced with a major challenge to improve its border measures. Customs is a key element in the effort to control the contraband of legal and illegal product.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1993

The 1993 Venezuelan copyright law is relatively modern in most respects. In April 1995, the President approved implementing regulations to the copyright law and Decision 351 of the Andean Pact on copyright and neighboring rights. It is this interplay among the copyright law, its regulations and the Andean Pact decision which affords copyright protection close to the level required by the TRIPS Agreement.⁵

⁵ Some preliminary discussion took place regarding the modification of Decision 351 to make it TRIPS- and WIPO treaties-compatible, but no resolution has been taken at this point by the Andean Community Copyright Office directors.

WIPO Treaties

Venezuela is a signatory to both of the digital treaties of the World Intellectual Property Organization, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Legislation which would permit Venezuela to ratify both treaties was presented to the Congress on August 21, 2000. IIPA encourages Venezuela to approve this legislation and deposit instruments of ratification with WIPO in Geneva. These treaties raise the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Government Legalization of Business Software

There are no negotiations with the government underway to legalize its software use. Only a few agencies, like SENIAT, the Central Bank, and the Ministry of Education have legalized their software. Unfortunately, the government appears to be the main infringer of copyrights.

Customs Law Reform

The Venezuelan Senate passed new customs legislation in 1998 which reportedly included measures to strengthen border measures. Although regulations have been issued and the law is in effect, the copyright industries report at least two problems. First, no container can be opened without judicial approval. This adds another level of difficulty in inspections. Customs officials should have *ex officio* authority to inspect suspicious containers. Second, apparently there is no administrative mechanism for rights holders to take actions through Customs. As a result, everything must go through the courts. One interim reform would be to empower SAPI to have such administrative authority. As a result, these border actions are not being conducted.

IPR in the Organized Crime Bill

A bill on organized crime was presented to Congress during the first half of 1998, and is being studied in the Interior Policy commission of the House of Deputies. This bill reportedly would include certain categories of intellectual property infringement (like commercial-scale piracy) as organized crime. Proposed prison terms for certain categories of copyright infringement could range from three to six years. The copyright-based industries in Venezuela support this bill. For example, BSA member company representatives met with the DNDA Director to recommend modifications to the pending legislation which would ensure, among other things, that the prosecution of copyright under the Organized Crime Law is in addition to other civil, criminal and administrative remedies available to a right holder, and does not displace these pre-existing remedies. This bill is still pending, and is not among the priorities to be considered by Congress.

Customs Duties on Computer Software

In May 1995, the government modified the application of its import duties on computer software to assess the 15% import duty on prepackaged computer software over the entire value of the software package, and not just the value of the physical media. This change in the valuation methodology represented a marked increase in the cost of commercializing software in Venezuela. It also represented a backward step from the overwhelming international trend toward assessing

duties only over the value of physical media. BSA has worked to rectify this situation, and has met with limited success. The Venezuelan government's petition to reduce the import tax of computer software from 15% to 5% was accepted by the governmental body of the Andean Community on a provisional basis in June 1997 (although the tax would still be applied over the entire invoice value of the product). This 5% rate expired on January 1, 1998, and reverted back to 15%, where it has remained to date.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

VIETNAM

EXECUTIVE SUMMARY¹

The signing of a trade agreement between the U.S. and Vietnam in 2000 was a watershed event in bilateral relations, but by itself will have little real impact either copyright on protection or on enforcement for U.S. works. Protection already exists under the Bilateral Copyright Agreement that came into force in 1998, but enforcement remains largely a theoretical proposition. Vietnam's market for every kind of copyrighted material is almost entirely pirate. While there are indications that Vietnam's government is no longer itself as closely linked to pirate activity as in the past, it remains unable to mount any consistent or effective enforcement effort against piracy. Vietnam needs to streamline and strengthen its enforcement capability, and to continue to forestall any expansion of pirate optical media production into its territory. The real significance of the bilateral trade agreement could be the lowering of some of the impenetrable market access barriers that currently keep most legitimate foreign product out of Vietnam. As its markets gradually open to trade in copyrighted materials, Vietnam needs to be prepared to enforce the laws it has already enacted. IIPA recommends that Vietnam remain on the Special 301 Watch List while the U.S. government monitors and seeks to encourage Vietnam to accelerate its progress toward these goals.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	7.0	100%	5.0	100%	5.0	100%	5.0	100%	5.0	100%	5.0	100%
Sound Recordings / Musical Compositions	NA	100%	NA	100%	6.0	99%	6.0	99%	10.0	99%	NA	NA
Business Software Applications ²	13.5	98%	10.5	98%	8.3	97%	8.1	98%	11.4	98%	25.8	99%
Entertainment Software ³	NA	NA	20.1	96%	22.5	98%	21.9	97%	18.0	97%	15.0	99%
Books	8.0	NA	8.0	NA	7.0	NA	7.0	NA	7.0	NA	7.0	NA
TOTALS	28.5		43.6		48.8		48.0		51.4		52.8	

¹ For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to filing.

² BSA loss numbers for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

PIRACY AND ENFORCEMENT

Optical Media

IIPA remains very concerned about the threat of optical media piracy throughout Southeast Asia, including in Vietnam. We believe there are now three optical media production lines operating in Vietnam. So far, there is no evidence that these plants have been used for piracy. Even so, the known production capacity clearly exceeds Vietnam's current low consumption levels for CDs, video CDs, and/or CD-ROMs.

Despite the advent of legal protection under copyright for U.S. works, resulting from the Bilateral Copyright Agreement (discussed below), Vietnam is, almost without exception, a pirate market. Finding a legitimate copy of a U.S. copyrighted work is a rare occurrence. This is true for works in both digital and nondigital formats.

Pirate music CDs are readily available throughout the country, at numerous retail outlets and street markets, and especially in areas like the Yen Bai flea market in Hanoi, and District 1 of Ho Chi Minh City. Prevailing prices are about U.S.\$0.85. These CDs are believed to be imported from neighboring countries, although there is an increasing trend of CD-Recordable (CD-R) discs being burned locally using professional-level equipment.

VCDs are also starting to penetrate a market still dominated by videocassettes. This is especially the case in the major cities. Legal video importation remains a monopoly of a government agency, FAFILM Vietnam, which claims to have licensed 62 VCD titles for import.⁴ Still, the market is almost entirely pirate. The pirate VCDs in the Vietnamese market are believed to be produced mostly in China and Cambodia.

Computer programs and many other kinds of copyrighted materials in pirate digital formats may be purchased at a store located right next to the Ministry of Trade building in Hanoi. There, pirated copies of Windows 2000 Professional® cost US\$2.85, barely one percent of the retail price in the U.S.⁵

Vietnam must prevent its excess optical media production capacity from being diverted to pirate purposes, and should forestall the establishment of pirate optical media production facilities that are now starting to penetrate the territory of its Indochinese neighbors. Vietnam should ensure that its regulations on the import, export, and operation of optical media replication and mastering equipment, and on optical grade polycarbonate, are sufficient, and sufficiently well enforced, to prevent this threat from occurring.

High Levels of Piracy Remain, and Enforcement is Almost Nonexistent

Antipiracy enforcement in Vietnam has been slow, uneven, and almost totally lacking in transparency. Agencies charged with enforcement generally have little understanding of the new

⁴ "Vietnam Takes Steps to Implement Copyright Law," *Asia Pulse*, May 4, 2000.

⁵ McDonald, "Landmark U.S.-Viet Pact Calls for Open Markets, Copyright Protection," *San Jose Mercury News*, July 14, 2000.

legal framework they are supposed to implement. Even the Ministry of Culture and Information (MOCI), charged with enforcing Vietnam's copyright law, admits that the audiovisual and music markets are dominated by piracy which is "destroying domestic production" of legitimate product.⁶ State companies producing products for the domestic market share the assessment that piracy has driven them "to the edge of bankruptcy."⁷

MOCI has promulgated regulations on import, export, and distribution of audio and video products, and claims to have carried out thousands of inspections, confiscated more than 2.5 million pirate CDs and videocassettes, and imposed administrative fines totaling 7.4 billion dong (US\$509,000).⁸ But none of this activity has had much impact on actual market conditions, which can be summarized as follows.

For the audiovisual industry, Vietnam is, for almost all intents and purposes, a pirate market. The government has issued a decree giving up its monopoly over film importation, and there have been a few licensed exhibitions of U.S. movies in Vietnamese cinemas. But most theatrical exhibition remains unlicensed, as are the numerous minitheaters that use pirated videos for public performances. The video market for Motion Picture Association (MPA) member company product remains 100% pirate. FAFILM, which maintains its monopoly over video importation, no longer blatantly imports, copies and distributes pirate video product throughout the country, emblazoned with its official censorship stickers, as was the case as recently as 1997. Indeed, FAFILM now maintains that controlling piracy is one of its top priorities. It has issued directives to its distributors (which include provincial and municipal bureaus of the Culture Ministry) to stop selling, renting, or otherwise exploiting all previously distributed U.S. audiovisual materials in all formats, and to recall and return pirate film prints. Nevertheless, pirate videos are readily available throughout the country. Large video rental outlets in Hanoi offer pirate versions of current Hollywood hits for VND2000 (US\$0.15) per day. In 1999, the government estimated that unauthorized public performances of U.S. music and television programming dominated the broadcast spectrum, accounting for 80% of airtime.⁹ It now asserts that U.S. films amount to only 10% of films shown on the central television network and that all are licensed.¹⁰ Annual losses to the U.S. motion picture industry due to audiovisual piracy in Vietnam are estimated at \$7 million for 2000.

While Vietnam has great potential as a market for U.S. publishers, especially for English language training and college textbooks, widespread piracy of these products and of technical and scientific titles has prevented much progress toward realizing this potential. In 1999, the Ministry of Culture and Information estimated that U.S. titles (including novels as well as textbooks and instructional materials) formed 20 percent of all books published in Vietnam; nearly all these were unauthorized translations and/or pirate editions, and many of these are published by houses controlled by the Ministry itself.¹¹ As of May 2000 the Ministry counted only 21 licensed or public

⁶ Hung, "CD pirates face new crackdown," *Vietnam Investment Review*, 31 May 1999, at 3.

⁷ Hung, "Black CD agencies must face the music," *Vietnam Investment Review*, July 19, 1999.

⁸ Asia Pulse fn. 3 *supra*.

⁹ Hung, *supra*.

¹⁰ Asia Pulse fn. 3 *supra*.

¹¹ Hung, *supra*; Birchall, "US tries to close last Asia refuge of CD pirates," *Financial Times*, January 6, 1999.

domain editions of U.S. works from government publishing houses.¹² Illegally photocopied books of all kinds are openly sold in the alleyways of Hanoi; English language training books are particularly popular targets of offset piracy. Major research institutes, such as the National Centre for Science and Technology in Hanoi, use pirated software (including software published by members of AAP, the Association of American Publishers), and circulate research articles electronically without having paid subscriptions to the journals. Local publishers continue to translate and reprint U.S. copyrighted books without seeking permission. Enforcement efforts are tentative at best; officials are consistently reluctant to carry out raids or take other action against piracy. Administrative authorities have issued some warnings or nominal fines (US\$50 to \$100) to commercial pirates, and there have even been some damage awards from the civil courts in some localities, but not at a level sufficient to deter. AAP estimates losses to U.S. publishers for 2000 at \$8 million, unchanged from the previous year.

Piracy of U.S. music and audio products remains pervasive in Vietnam. As noted above, cheap imported pirate CDs dominate the domestic market, and blank recordable CDs are also imported and loaded in Vietnam with unauthorized copies of Western sound recordings.¹³ The Vietnamese authorities have never made any serious, sustained attempt to clear pirate materials from the market, although there have been sporadic police actions against smugglers and against pirates of Vietnamese repertoire. Most major recording companies are not operating in Vietnam, as U.S. repertoire lacked any legal protection until December 1998. Virtually 100% of the Vietnamese market for American recorded music is pirate.

The market for software in Vietnam, both entertainment and business applications, is virtually entirely pirate; a 98% piracy level for business applications is estimated by the Business Software Alliance (BSA). A Vietnamese copyright official has publicly stated that software piracy is "out of control" in Vietnam.¹⁴ Rampant software piracy not only harms U.S. firms, but has been identified as one of the leading factors stunting the growth of Vietnam's fledgling software industry. BSA estimates losses to U.S. business software producers at \$13.5 million for 2000, a \$3 million increase from 1999.

Clearly Vietnam's enforcement efforts have not been effective to date. At least recently, this has not been due to a lack of laws or regulations. Indeed, the government has continued to promulgate edicts to govern the enforcement process, including a March 1999 decree covering administrative enforcement. But as new laws are laid on top of old, confusion about the enforcement system mounts. At least five state authorities have reportedly been assigned enforcement responsibility, but no one agency has been put in charge. The enforcement apparatus also steers copyright owners away from bringing their cases into court; they are foreclosed from doing so if they pursue the matter in the administrative system to the ministerial level. The Vietnamese National Assembly recently increased maximum penalties for copyright violations, both for administrative fines and for criminal punishment¹⁵, but there is no indication that deterrent penalties have actually been imposed on violators.

¹² Asia Pulse, fn. 3 *supra*.

¹³ Watkin, "Pirates send CD industry spinning," *South China Morning Post*, August 17, 1999, at 6.

¹⁴ "Vietnam urged to take action against software pirates," *Asia Pulse*, October 29, 1999.

¹⁵ *Asia Pulse*, fn. 3 *supra*.

While the U.S. should continue to press the government of Vietnam to put in place effective enforcement mechanisms against copyright piracy, two other steps seem indispensable. First, the government must completely cease its sponsorship of video, broadcast, public performance and book piracy, and its agencies must legalize their use of computer software. Second, experience teaches that enforcement is unlikely to be effective so long as there is no legitimate source of supply for copyrighted materials. Vietnam must open up its market to legitimate producers if it is to be successful in stamping out piracy.

COPYRIGHT LAW AND RELATED ISSUES

The 1998 Bilateral Copyright Agreement and the 2000 Bilateral Trade Agreement

Bilateral Copyright Agreement

On December 23, 1998, after many months of uncertainty and mixed signals, the United States - Vietnam Bilateral Copyright Agreement (BCA) went into effect. When it signed the BCA with the U.S. in June 1997, Vietnam undertook to do two things: provide U.S. works the same level of legal protection, on a national treatment basis, as its law accords to domestic works; and raise its levels of legal protection and enforcement, at least as to U.S. works, to fulfill the substantive requirements of the agreement. These substantive obligations are quite extensive, and include:

- coverage for all copyrightable works and sound recordings;
- protection for pre-existing works and sound recordings (retroactivity);
- protection without formalities (registration is not required);
- exclusive rights modeled on U.S. copyright law, including reproduction, distribution, and public performance and display, subject to exceptions that conform to the criteria of Article 9(2) of the Berne Convention;
- civil, criminal and border enforcement obligations modeled on TRIPS, including deterrent penalties;
- specific implementation of all these obligations in national law and regulations.

Vietnam moved fairly quickly to put national treatment in place, although some questions remained.

The Circular

The second commitment — substantive law and enforcement obligations — proved more problematic. It was not until September 1998, when Vietnam's Minister of Culture and Information promulgated a circular for the implementation of the BCA, that it was sufficiently fulfilled to allow the BCA to go into force.

The circular specifies that U.S. works are protected in Vietnam “in accordance with the [BCA].” The protection specifically includes all the minimum rights spelled out in the BCA. Furthermore, Section 4.5 of the circular provides that disputes and claims of infringement of U.S. works in Vietnam are to be handled “*in accordance with the Agreement and the laws of Vietnam*”

(emphasis added), thus incorporating the TRIPS-level enforcement obligations of the BCA into the enforcement regime in Vietnam, at least as to U.S. works.

The circular, and the other directives issued by the Vietnamese government to implement the BCA, thus go far enough to establish that, as of December 23, 1998, U.S. copyright owners enjoy a comprehensive and high level of protection for their works in Vietnam — on paper. The practice, is of course, far different. Vietnam's commitment, not only to accord U.S. works legal protection but also to enforce that protection, remains untested.

Vietnam's Civil Code provides the foundation upon which a modern copyright law and enforcement system — one compliant with the BCA — can be built. So far, though, very little has been built on that foundation, especially with regard to enforcement. USTR should encourage Vietnam to adopt sound and comprehensive enforcement regulations, which resolve ambiguities in the Civil Code provisions, which explicitly designate a lead agency for copyright enforcement matters, and which set out a clear framework by which U.S. copyright owners can enforce their rights. The U.S. should also provide expert advice and assistance in the enforcement of copyright law against piracy, to which certain IIPA members are prepared to contribute time and expertise.

Bilateral Trade Agreement

U.S. and Vietnam signed a landmark Bilateral Trade Agreement in July 2000. The copyright provisions of the BTA are not substantially different from the applicable requirements of the BCA, although to the extent they are inconsistent, the later agreement controls. Of course, the BCA remains in full effect until the BTA is ratified by both countries, which should take place in 2001.

The more significant impact of the BTA for the U.S. copyright industries flows from its market access provisions. While these are quite limited in some aspects — for example, there are no commitments for market access of “video tapes,” and a blanket provision allows Vietnam to deny national treatment with regard to “production, publication and distribution of cultural products” — in others they may allow improved market access for U.S. copyrighted materials. As noted above, this is likely to be a functional prerequisite to any significant improvement in Vietnam's currently astronomical piracy rates. The recent decree allowing entities other than FAFILM to import films for theatrical exhibition is a step in the right direction, but just a first step toward the open and competitive marketplace that the U.S. copyright industries seek in Vietnam.

ADDITIONAL OUT-OF-CYCLE REVIEW

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

PALESTINIAN AUTHORITY

EXECUTIVE SUMMARY¹

IIPA recommends that USTR leave the Palestinian Authority off the Special 301 lists at this time and conduct an out-of-cycle review when conditions permit. This year's report contains information on activities as known to IIPA prior to the outbreak of violence in the region that has lead to the sealing of the borders between Israel and the West Bank, and Israel and the Gaza Strip. This report's recommendations are prospective, to be followed when conditions once again permit.

Through August 2000, the Palestinian territories continued as a hub of pirate production in the Middle East, churning out thousands of optical media products and thousands of pirate videos and audiotapes per day. At the same time, authorities signaled their willingness to address the problem, including by raiding one of the largest pirate optical media producers in May 2000. With the outbreak of violence the borders with Israel were sealed and it is unlikely that much pirate output from plants in the Palestinian territories can make it into Israel, although pirate production for export to other countries is unknown. As soon as conditions warrant, the Palestinian Authority needs to be vigilant in closing down known commercial pirates of optical media (CDs), more traditional media (videocassettes and audiocassettes), and published materials, including textbooks. Losses due to piracy in 2000 are largely unknown.²

When conditions permit, the Palestinian authorities should move forward with plans to pass a modern copyright law that takes into account minimum international standards for protection (e.g., Berne/TRIPS minimum standards of protection, including the provision of express point of attachment for foreign works/sound recordings). Such a law was, according to reports, being considered for passage when the situation in the region destabilized.

PIRACY AND ENFORCEMENT IN THE PALESTINIAN TERRITORIES

Optical Media Piracy Will Require Regulatory and Enforcement Response

Prior to the current unrest, the sharp rise of illegal CD and CD-ROM production for domestic consumption and export to Israel and beyond in the West Bank and Gaza Strip continued in 2000, although the Palestinian authorities engaged in some encouraging

¹ For more details on the Palestinian Authority's Special 301 history, see IIPA's "History" Appendix to filing.

² This year, the book publishing industry reports losses of at least U.S.\$2.0 million due to piracy in 2000. In previous years, IIPA reported losses of at least U.S.\$31.0 million in 1999 due to piracy (including lower losses than in 1998 for the sound recording/musical compositions category due to five months of halted production), and losses of at least U.S.\$55.0 million in 1998 due to piracy (including sound recording/musical compositions losses based on output of the largest known plant in the areas controlled by the Palestinian Authority).

enforcement activity to curtail it. IIPA knows of five CD plants in the Palestinian territories. One known plant, Laizer, located in Wad El Bariya near Hebron (in Zone A), has three CD production lines, and all the ancillary machinery needed to make professional counterfeit or pirate CDs. This plant alone has a daily production capacity of more than 15,000 discs (approaching 6 million discs per year). Two more plants in Ramallah, and one in Nablus (which reportedly has a manufacturing capacity of 5 million discs per annum) continue to operate, producing pirate product. The ease with which these plants have begun operations over the past couple of years directly contrasts with the difficulty the copyright industries have had in closing them down.

On a positive note, the Palestinian Authority demonstrated its willingness to act against overt pirate optical media production, cooperating with industry representatives and raiding one plant, seizing 410 pirate stampers, among other things. IIPA is pleased that the Palestinian Authority has taken seriously the need to raid pirate plants just as it would any other commercial criminal actor, and looks to the authorities, when conditions permit, to continue in its pursuit toward eradicating such illegal behavior in the Palestinian territories.

Prior to the outbreak of the current violence, both the retail markets for audio CDs, as well as the retail markets for business as well as entertainment software on CD-ROMs had been close to 100% pirate. Compilation CD-ROMs containing video games or sometimes up to several dozen software programs from different manufacturers sold on the streets for as little as U.S.\$7-8. Due to porous geographical barriers and lax enforcement at the borders with Israel, the situation in the territories prior to the sealing of the borders affected the situation in Israel, especially the Arab population in Israel (over a million people).

When the situation permits, the Palestinian Authority must adopt a regulatory system for the import, export and operation of optical media production equipment and raw materials (including optical grade polycarbonate), as well as commit adequate resources to enforcement efforts. In addition, plants should be obligated to employ source identification (SID) codes on all mastering and replication equipment, adopt strict accounting for polycarbonate supplies, maintain full transparency of all orders for mastering and replication services, and submit to surprise spot inspections to assure compliance.

Videocassette and Audiocassette Duplication Labs

Through August 2000, the rise of video duplication plants in the West Bank had led to commercial losses, with an estimated 5,000 to 7,000 pirate videocassettes a day being smuggled from the areas controlled by the Palestinian Authority into neighboring Israel.

Piracy of Educational Materials, Books, Textbooks

Pirate manufacturers have long supplied pirated copies of educational textbooks as well as scientific, technical and medical (STM) books to the Palestinian Territories at low prices. The U.S. publishing industry knows of two bookstores in Nablus that have been pirating U.S. textbooks as well as STM books, selling them at prices which make it impossible for U.S. publishers to sell legitimate books into the Palestinian territories. When conditions permit, this blatant piratical activity should be halted by the Palestinian authorities.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law

The Palestinian Legislative Council, elected in January 1996 pursuant to the Interim Agreement, has drafted intellectual property laws (to replace the current regime of laws, under which the West Bank and Gaza [with certain reservations] follows the 1911 Copyright Law of the U.K.) in two parts, including a copyright law section and an industrial property law section. IIPA has not seen the draft copyright law, but reports indicate that the draft includes many good provisions, including some provisions intended to implement certain requirements of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (the WIPO "Internet" treaties). IIPA looks forward to reviewing and commenting on this draft and hope that it contains such important elements as express point of attachment for U.S. works, as well as at least minimum standards of protection (Berne, TRIPS, Geneva [phonograms] Convention) to give U.S. copyright owners the tools necessary to combat growing piracy.

Generalized System of Preferences

Both the West Bank and the Gaza Strip currently participate in the U.S. GSP program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that the country meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." At the same time as West Bank and the Gaza Strip caused losses to the U.S. due to piracy, West Bank imported (in the first 11 months of 2000) \$181,000 of products into the United States without duty (5.5% of its total imports into the U.S.). When conditions permit, the West Bank and the Gaza Strip will need to address copyright deficiencies so as to meet the discretionary criteria in this U.S. law.

APPENDIX D

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990 – 2000) & IIPA's 2001 SPECIAL 301 RECOMMENDATIONS

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990-2000) AND IIPA 2001 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation 2001	OCR Result 2000	USTR Placement										
			2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Argentina	PWL		PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL
Armenia	WL(GSP)		WL										
Australia				WL	WL	WL	WL		WL	PWL	PWL	PWL	
Austria					OO	OO							
Azerbaijan	WL		WL										
Bahamas	WL	NONE	OCR										
Bahrain				OFF	WL	WL	WL	WL					
Belarus	WL		WL	WL	OO								
Bolivia	WL		WL	WL	OO	WL	OO						
Brazil	PWL (GSP)		WL	WL	OFF	WL	WL	PWL	OO	PFC	PWL	PWL	PWL
Bulgaria					PWL	WL	OO	OO					
Canada			WL	WL	WL	WL	WL	WL	OO		WL	WL	WL
Chile	WL		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
CIS	WL												
Colombia	WL		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	PWL		WL	WL	WL	WL	WL	WL					
Cyprus				OFF	OFF	OO	OO	OO	WL	WL	WL	WL	
Czech Republic	WL		WL	WL	WL	OO							
Denmark			WL	WL	WL	WL							
Dominican Republic	PWL (GSP)		PWL	PWL	PWL	WL	OO						
Ecuador			WL	WL	PWL	PWL	WL			WL	WL		
Egypt	PWL + OCR		PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL
El Salvador	WL	NONE	OCR				WL	WL	WL	WL	WL		
Estonia	WL			OFF	OO								
European Union			PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
Georgia	WL												
Germany				OFF	OO	OO	OO	OO	OO		WL	WL	
Greece	PWL		PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Guatemala	WL		PWL	PWL	WL	WL	WL	WL	WL	WL	WL		
Honduras					WL	WL	OO	OO	OO				
Hong Kong				OFF	WL	WL	OO						
Hungary	WL	WL	WL	WL	OO	OO				PWL	PWL	WL	
India	WL		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL
Indonesia	PWL		WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Ireland		OFF	WL	WL	WL	WL	OO						
Israel	PWL		PWL	PWL	PWL	WL	OO	OO	OO				
Italy	WL + OCR	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL
Jamaica			WL	WL	WL								
Japan				WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL
Jordan	OCR			WL	WL	WL	OO	OO					
Kazakhstan	WL (GSP)		WL	OFF	OO								
Kuwait	PWL		WL	PWL	PWL	WL	WL	OO					
Kyrgyz Republic	WL												
Latvia	WL		WL	NONE									
Lebanon	PWL		WL	WL	OO								
Lithuania	PWL		WL	NONE									
Luxembourg						WL							
Macau	WL + OCR	WL	WL	PWL	PWL								
Malaysia	PWL + OCR		PWL	OR									WL
Mexico				WL	OO	OO	OO						
Moldova	WL		WL										
Myanmar				NONE									
Netherlands					OO								
New Zealand				WL							WL	WL	
Nicaragua				OFF	OO	OO	OO						

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990-2000) AND IIPA 2001 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation 2001	OCR Result 2000	USTR Placement										
			2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Oman	WL		WL	WL	WL	WL	WL	OO					
Pakistan	WL		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority	OCR		OCR	NONE									
Panama				OFF	OO	WL	OO		OO				
Paraguay	306		306	306	PFC	PWL	WL	OO	OO		WL		
Peru	WL		PWL	PWL	WL	WL	WL	WL	WL	WL	WL		
Philippines	PWL		WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL
Poland	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL		
Portugal							OO						
PRC	306		306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL
Qatar	WL		WL	WL	WL	OO	OO	OO					
Romania	WL		WL	WL	OO	OO	OO	WL					
Russian Federation	PWL (GSP)		PWL	PWL	PWL	PWL	WL	WL	OO				
San Marino						WL							
Saudi Arabia	PWL		WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL
Slovakia	WL												
Singapore			WL	WL	WL	WL	WL	WL	OO				
South Africa	WL			WL	WL		OO	WL					
South Korea	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL
Spain			WL	WL	OO				WL	WL	WL	WL	WL
Sweden				WL	WL	WL							
Taiwan	PWL		WL	WL			OO	WL	WL	PWL	PFC	WL	WL
Tajikistan	WL		WL										
Thailand	WL		WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL
Tunisia					OO								
Turkmenistan	WL		WL										
Turkey	PWL(GSP)		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL
UAE		NONE	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	
Ukraine	PFC (GSP)		PWL	PWL	WL								
Uruguay	PWL + OCR		WL	WL	OO	OO							
Uzbekistan	WL(GSP)		WL										
Venezuela	WL		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	WL		WL	WL	WL	WL	OO	OO					
Yemen					OO								
Yugoslavia												WL	WL

PFC: Priority Foreign Country
 PWL: Priority Watch List
 WL: Watch List
 OO: Other Observations
 OR: Open Recommendation
 OCR: IIPA recommends that an out-of-cycle review be conducted by USTR.

APPENDIX E

IIPA HISTORICAL SUMMARY
OF
COUNTRIES' SPECIAL 301 PLACEMENT

ARGENTINA

Argentina has been on the Special 301 lists since 1989, fluctuating between the Watch List and the Priority Watch List, primarily for significant problems with patent protection. In April 1996, USTR elevated Argentina to the Priority Watch List because of serious problems involving patent legislation and the lack of criminal penalties for infringement of computer programs. The USTR has kept Argentina on the Priority Watch List every year since 1996. In the May 1, 2000 Special 301 announcement, the USTR noted U.S. concern that despite the 1999 ratification of the WIPO Copyright Treaty and Performance and Phonograms Treaty, "enforcement against copyright piracy and trademark counterfeiting remains significantly below TRIPS standards." On the same day, the USTR also announced the initiation of a TRIPS dispute settlement proceeding against Argentina for violations in their patent protection regime for the second year in a row.

Argentina currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." On January 15, 1997, the Clinton Administration withdrew 50 percent of the trade benefits grants to Argentina under the GSP program, and increased duties were placed on about \$260 million worth of Argentina's imports under the GSP program, resulting in only about a \$13 million penalty. In 1999, \$182.3 million in Argentine imports to the United States benefited from the GSP program, accounting for nearly 7.1% of its total imports to the U.S. For the first 11 months of 2000, \$199.5 million of goods from Argentina entered the U.S. under the GSP duty-free code, a 19% increase over the same time period last year.

ARMENIA

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Armenia, the agreement was signed on April 2, 1992 and entered into force on April 7, 1992.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

In June 1999, IIPA filed a petition with the USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition be on Moldova be withdrawn, as a result of cooperation with that government on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters. In 1999, \$2.7 million in Armenian imports to the United States benefited from the GSP program, accounting for nearly 20% of its total imports to the U.S. For the first 11 months of 2000, \$9.4 million of Armenian goods entered the U.S. under the GSP duty-free code, a 279.3% increase over the same time period last year.

AUSTRALIA

In 1994, Australia was named to the Watch List. Between 1991 through 1994, IIPA filings cited a number of issues which harmed U.S. copyright industry sales and exports in Australia, notably the threat to remove parallel import protections for sound recordings and computer programs; the failure to provide exclusive rental rights to sound recordings, the denial of national treatment to the U.S. recording and music publishing industries in the administration of Australia's audio levy, concerns about the strength of copyright protection for computer programs, and a severe problem of bootleg recordings of U.S. performers. In 1991, Australia was placed on the USTR Priority Watch List, where it remained until 1993.

Australia was briefly dropped from the Watch List after some legal reforms were undertaken but was reinstated to the Watch List because of deficiencies in the protection of pharmaceutical test data in 1996. In 1997, noting the renewed threat to weaken or eliminate the importation right, IIPA recommended placement of Australia on the Watch List. USTR agreed and Australia remained on the Watch List through 1999 in part because of what was described as "serious concern" over 1998 legislation abolishing the importation right for sound recordings and pending legislation abolishing the importation right for other copyrighted works including software, electronic games, and gaming equipment.

Although Australia was removed from any Special 301 List in 2000, the USTR noted in its May 1, 2000 Special 301 announcement the possible initiation of future WTO dispute settlement cases against several countries, including Australia, for apparent noncompliance with TRIPS obligations.

AZERBAIJAN

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Azerbaijan, the agreement was signed on April 12, 1993 and entered into force on April 21, 1995.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

BAHRAIN

IIPA first recommended placing Bahrain on the Watch List in 1993, and renewed its recommendation over the next two years, citing severe video and audio piracy problems, including exports. In April 1995, USTR placed Bahrain on the Watch List. From 1996 through 1998, IIPA recommended that Bahrain remain on the Watch List because its law was out of sync with its international obligations under TRIPS, and because piracy levels continued to be high while enforcement was weak. USTR agreed all three years. In 1998, the USTR urged Bahrain to bring its copyright regime into line with its obligations under the Berne Convention and the WTO, and to increase enforcement actions against the piracy of copyrighted works of all types. Bahrain did not appear on any Special 301 list in 1999 or 2000.

Bahrain currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$57.9 million of Bahrain's imports to the United States benefited from the GSP program, accounting for 84% of its total imports to the U.S. For the first 11 months of 2000, \$56.2 million of goods from Bahrain entered the United States under the GSP duty-free code, a 10.6% increase over the same time period last year.

BELARUS

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Belarus, the negotiations for such a bilateral trade agreement were completed and initialed in June 1992; then on January 6 and February 16, 1993, there were exchanges of letters that put the agreement into force. The agreement entered into force on February 16, 1993.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

In June 1999, IIPA filed a petition with the USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition be on Moldova be withdrawn, as a result of cooperation with that government on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters. In 1999, \$10.6 million of Belarus' imports to the United States benefited from the GSP program, accounting for 11.5% of its total imports to the U.S. For the first 11 months of 2000, \$5.7 million of goods from Belarus entered the United States under the duty-free GSP code.

BOLIVIA

In February 1995, IIPA recommended that Bolivia be added to the Special 301 Watch List because of widespread piracy of all kinds of copyrighted works unchallenged by any meaningful government enforcement efforts. In 1996, IIPA again advocated that Bolivia be placed on the Watch List; USTR placed it on the Special Mention list and added an out-of-cycle review (OCR). In December 1996, upon conclusion of the OCR, the USTR announced that Bolivia was being elevated to the Watch List because it had not yet taken adequate steps to combat copyright piracy, particularly in the area of illegal computer software production; to adequately implement the Andean Pact Decision 351 on copyright requirements; or to revise its copyright law to conform with international standards. Bolivia stayed on the Watch List in 1997.

In April 1998, Bolivia signed a bilateral investment treaty with the U.S. and in so doing, committed to becoming TRIPS-compatible within twelve months. As a result, the USTR placed Bolivia on the Other Observations list for 1998. However, in both 1999 and 2000, noting that "Bolivia's protection of intellectual property has not significantly improved over the last year," and that Bolivia has yet to achieve TRIPS compliance, USTR kept Bolivia on the Special 301 Watch List.

In 1995, IIPA also requested that USTR initiate investigations of Bolivia's copyright practices under the statutory provisions of the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA), both of which include discretionary criteria that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." IIPA never received notice of any formal action on its 1995 GSP and ATPA petitions, and thus concluded that they were not accepted.

In 1999, \$7.96 million of Bolivia's imports to the United States benefited from the GSP program, accounting for 3.6% of its total imports to the U.S. Another \$61.5 million of Bolivia's imports to the United States benefited from the ATPA program in 1999, accounting for 27.4% of its total imports that year. For the first 11 months of 2000, \$4.9 million of goods from Bolivia entered the U.S. under the duty-free GSP code, and \$55.7 million under ATPA.

BRAZIL

During the 1990s, Brazil received a significant degree of attention from the U.S. government under the Special 301 bilateral trade tool. On April 30, 1993, USTR designated Brazil as a Priority Foreign Country. As a result of the ensuing Section 301 investigation, the Brazilian government committed in a February 1994 diplomatic agreement to take certain concrete steps to improve its IPR regime, including the early implementation of TRIPS, improving protection for computer software, addressing certain tax issues affecting computer software, and improving copyright enforcement in general. Over the next few years, Brazil's placement on the Special 301 lists seesawed between the Special Mention list and the Watch List. On May 1, 1998, the USTR removed Brazil from the Special 301 list, in recognition of its legislative accomplishments on copyright legal reform, adding: "However, Brazil must take further significant steps to combat piracy." Copyright piracy issues have been highlighted in several bilateral meetings as well as U.S. congressional trips to Brazil over the years.

In February 1999, IIPA recommended that Brazil be elevated to the Priority Watch List because of the continuing failure of that government to address the rising piracy problems and deteriorating enforcement actions by the government authorities despite very active participation in antipiracy efforts by the affected copyright industries. USTR put Brazil back on the Watch List in April 1999, noting that "the lack of effective enforcement is a serious and growing concern. Some efforts have been made to improve copyright enforcement, but these efforts have fallen short given the scale of the piracy problem in Brazil and the absence of a coordinated strategy on the part of the government. We have particular concerns with proposed legal reforms that could reduce criminal penalties for intellectual property crimes and remove policy authority to engage in *ex officio* searches and seizures on their own initiative ... We also look to the Brazilian government to ensure full implementation of all TRIPS obligations, including enforcement obligations, no later than January 1, 2000."

The 2000 deadline came and went. Despite IIPA's recommendation that Brazil be elevated to the Priority Watch List, the USTR kept Brazil on the Watch List, and noted in the May 1, 2000 Special 301 announcement: "...Progress has not been sufficient on Brazil's commitment to increase effective enforcement actions, from raids through judicial decisions, against intellectual property infringement; the rate of CD piracy in Brazil continues to worsen. Failure to address this problem could lead to the collapse of the market for legitimate CDs in Brazil."

IIPA's dissatisfaction with the lack of progress being made by Brazil to enforce its copyright law led us to file an August 2000 petition with the USTR requesting that the country eligibility of Brazil under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners. The petition was accepted, and a GSP IPR is underway. In 1999, \$1.9 billion of Brazil's imports to the United States benefited from the GSP program, accounting for 16.9% of its total imports to the U.S. For the first eleven months of 2000, \$1.93 billion of goods from Brazil entered the United States under the duty-free GSP code, an 11.5% increase over the same time period last year.

COMMONWEALTH OF INDEPENDENT STATES (CIS)

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

In June 1999, IIPA filed a petition with the USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition be on Moldova be withdrawn, as a result of cooperation with that government on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters.

COLOMBIA

Colombia has been on the Special 301 Watch List since 1989 for problems involving copyright enforcement and inadequate patent and trademark legislation. In 1997, the USTR noted that “[p]iracy continues to be a significant problem and that the Television Broadcast Law discriminated again foreign content.”

Because of the need for the Colombian government to license pay-TV operators and improve enforcement efforts, IIPA recommended that Colombia be elevated to the Priority Watch List in 1998. In 1998, the USTR kept Colombia on the Watch List, and added an out-of-cycle review in December 1998. In October 1998, President Clinton met with President Pastrana and they initiated consultations on a bilateral investment treaty. One of the key elements of the 1998 out-of-cycle review was whether or not the Colombian government would issue licenses to cable TV operators. In February 1999, the CNDeTV reported to the Minister of Communications that its new team of investigators had visited 219 community cable services and clandestine cable operators, documenting violations and initiating administrative actions against 160 of them.

In 1999, the USTR kept Colombia on the Watch List, noting that the although the Colombian Attorney General has initiated legal action against 108 television operators, “Colombia has still to resolve the major issue USTR highlighted in its December [1998] out-of-cycle review – failure to license legitimate pay television operators and pursue pirate operators.” USTR also added a September 1999 out-of-cycle review to measure Colombia’s progress. Progress was made on issuing these licenses and on December 17, 1999, USTR announced its decision to keep Colombia on the Watch List as a result of the September 1999 out-of-cycle review. Colombia remains on the Watch List in 2000 in large part because of insufficient enforcement of copyright laws and high piracy levels.

Colombia currently participates in both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of these program is that the country provide “adequate and effective protection of intellectual property rights.” In 1999, \$46.8 million of Colombia’s imports to the United States came in under the duty-free GSP code, accounting for .8% of its total imports to the U.S. Another \$797.3 million of Colombia’s imports to the United States benefited from the ATPA program in 1999, accounting for over 13.5% of its total imports to the U.S. that year. For the first 11 months of 2000, \$62.4 million of Colombian goods entered the United States under the GSP program, representing a 39.9% increase over the same time period last year. \$767.4 million of Colombian goods entered the U.S. under the ATPA program, accounting for a 4.8% increase over last year.

COSTA RICA

Costa Rica has been on the Special 301 Watch List since 1995, primarily for problems associated with inadequate patent protection, but also for inadequate copyright enforcement. In the May 1, 2000 Special 301 announcement, the USTR noted that despite the enactment of TRIPS compliant legislation in 1999, "a number of problems remain on the enforcement side, particularly with respect to criminal prosecutions, as evidenced by high levels of piracy."

In 2000, Costa Rica passed legislation which significantly undercut Costa Rica's obligations multilateral and bilateral obligations. Because of our industries' dissatisfaction with this legislation and the declining level of enforcement in Costa Rica, IIPA filed an August 2000 petition with the USTR in August 2000, requesting that the eligibility of Costa Rica under both the Generalized System of Preferences (GSP) and the Caribbean Basin Economic Recovery Act (CBERA) trade programs be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners. Unfortunately, the U.S. government rejected our petition, no doubt in part, to be consistent as it extended new trade benefits to Costa Rica under the U.S.-Caribbean Trade Partnership Act (CBTPA), which requires eligible countries to have very high levels of IPR protection.

In 1999, \$24.9 million of Costa Rica's imports to the United States benefited from the GSP program, accounting for 0.6% of its total imports to the U.S. For the first eleven months of 2000, \$50.6 million of Costa Rican goods entered the United States under the duty-free GSP code, representing a 117% increase over the same time period last year. Under CBERA, Costa Rica had \$683 million worth of goods enter the U.S. in 1999, accounting for 17.2% of its total imports into the United States. For the first 11 months of 2000, \$552.7 million of Costa Rican goods entered the U.S. under the CBI.

CYPRUS

Cyprus was on the Special 301 Watch List from 1991 through 1994. IIPA and its members have been monitoring legislative and enforcement events in Cyprus for years. In 1993, because of widespread piracy and an untenable delay in the effective date of amendments to the Cypriot copyright law, IIPA filed a petition with USTR, requesting that Cyprus lose its beneficiary country status under the Generalized System of Preferences (GSP) program. On September 21, 1993, USTR announced that it would conduct an "expedited review" against Cyprus; at that time, Ambassador Kantor warned that "[s]uspending criminal copyright penalties is unprecedented, and we view it with utmost seriousness." Three months later, on December 22, 1993, Ambassador Kantor announced his decision to suspend GSP benefits to Cyprus, but he deferred the suspension because Cyprus intended to implement amendments to its copyright law on January 1, 1994. On June 30, 1994, USTR terminated the GSP review because there was a significant improvement in enforcement efforts which resulted in increases in sales of legitimate product and a decrease in piracy after the criminal penalties entered into effect.

In April 1995, Cyprus was placed on the Special Mention list, primarily due to improvements in copyright enforcement. In the April 1996 Special 301 announcements, the USTR acknowledged that while Cyprus had made progress in its copyright enforcement efforts, the Administration would be monitoring efforts by the Cypriot government to continue to act aggressively against piracy of software and of video and audio recordings. In keeping Cyprus on the Special Mention list in 1997, the USTR notified Cyprus that USTR expects that the Government of Cyprus will act expeditiously to implement fully its TRIPS obligations. In 1998, IIPA recommended the placement of Cyprus on the Other Observations list (formerly known as the "Special Mention list"). Cyprus was not placed on any list by USTR in 1998, 1999 or 2000.

CZECH REPUBLIC

In April 1990, the former state of Czechoslovakia was one of the first Eastern European countries to sign a bilateral trade agreement with the U.S. which incorporated intellectual property rights commitments. Revisions to the 1965 Copyright Act were adopted effective June 1, 1990, adding protection for computer programs and increasing the term of protection for audiovisual works and sound recordings. When the Czech Republic split from the former Czechoslovakia on January 1, 1993, it acknowledged its successor interest to the trade agreement, as well as to the text and effect of the copyright law and its treaty relations.

In early 1996, further amendments to the law were made which improved protection, in particular, for computer programs and sound recordings. The Czech Republic appeared on the Special 301 Special Mention list for the first time in 1997, after IIPA recommended that the Czech Republic be placed on the Watch List because of its poor enforcement record. Since 1998, IIPA has recommended that the Czech Republic be placed on the Watch List. USTR has agreed, and the Czech Republic has been on the Watch List in 1998, 1999 and 2000. The USTR also noted in its May 1, 2000 Special 301 announcement the possible initiation of a future WTO dispute settlement case against the Czech Republic for noncompliance with TRIPS obligations.

The Czech Republic currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$225.4 million of the Czech Republic's imports to the United States benefited from the GSP program, accounting for 29.9% of its total imports to the U.S. For the first 11 months of 2000, \$254.4 million of Czech goods entered the United States under the duty-free GSP code, representing a 24.4% increase over the same time period last year.

DOMINICAN REPUBLIC

Special 301 is not the only trade forum in which the copyright industries have engaged the Dominican Republic. In 1983, problems in the Dominican Republic and other Caribbean nations prompted the copyright industries to unite under the umbrella of the then newly founded IIPA and press for the inclusion of intellectual property rights criteria in the Caribbean Basin Initiative trade legislation, which was the first piece of U.S. legislation linking IPR with trade law. In June 1992, the Motion Picture Association (MPA) filed a petition under the Generalized System of Preferences (GSP) trade program against the Dominican Republic for its failure to afford adequate and effective copyright protection to U.S. copyright owners of motion pictures due to the unauthorized retransmission of U.S. films and television programming by broadcasters and cable system operators. That petition was accepted by USTR, and in 1993, the Dominican Republic took a number of initial steps to address those serious problems. Although piracy remained a serious concern, promises for improvement were made by the Dominican government and MPA withdrew its GSP petition in September 1994.

USTR placed the Dominican Republic on Special 301 Other Observations in 1996 to encourage it to address the shortcomings in its intellectual property regime. In its 1997 Special 301 decisions, USTR elevated the Dominican Republic to the Watch List because of persistent piracy problems, especially involving broadcast and cable piracy. In February 1998, IIPA recommended elevating the Dominican Republic to the Priority Watch List for its continued and persistent failure to improve enforcement to address widespread piracy and engage in legal reform. In April 1998, the U.S. Secretary of State raised the regional problem of the lack of adequate and effective protection and enforcement of intellectual property rights at a CARICOM conference held in Santo Domingo.

In 1998, the USTR followed IIPA's recommendation, and elevated the Dominican Republic to the Priority Watch List. The Dominican Republic remained on the Priority Watch List in 1999 and 2000. In the May 1, 2000 Special 301 Announcement, the USTR noted that "[d]espite some reductions in video piracy, piracy of videos, sound recordings, computer software, books, and satellite and cable piracy remain widespread." USTR also noted the possible initiation of a future WTO dispute settlement case against the Dominican Republic for noncompliance with its TRIPS obligations.

In June 1999, IIPA filed a GSP/CBI petition against the Dominican Republic for its failure to provide adequate and effective copyright protection and enforcement to U.S. copyright owner, a key criteria of both programs. IIPA's petition was accepted by USTR in February 2000 and hearing were held shortly thereafter. In 1999, \$31.2 million of Dominican imports to the United States benefited from the GSP program, accounting for 0.8% of its total imports to the U.S., and \$820.3 million of goods under the CBI program, accounting for 19.2% of its imports to the U.S. For the first 11 months of 1999, \$42.5 million of Dominican goods entered the U.S. under the duty-free GSP code, representing a 40.5% increase over the same time period last year, and \$738.2 million entered under the CBI.

ECUADOR

Ecuador appeared on the Special 301 Watch Lists in 1992 and 1993, before being removed from the list in 1993 when it signed a bilateral intellectual property rights agreement with the U.S., which was negotiated in conjunction with a bilateral investment treaty. Ecuador reappeared on the Watch List in 1996. In February 1997, IIPA recommended that USTR commence a World Trade Organization dispute settlement case against Ecuador for its failure to fully implement the terms of its WTO accession protocol by July 31, 1996. In April 1997, the USTR stated that USTR would initiate a WTO case against Ecuador, and elevated Ecuador to the Priority Watch List with an out-of-cycle review later in 1997. By the time of that out-of-cycle review, Ecuador had reversed its previous position regarding its accession, which was encouraging to the U.S.

In February 1998, IIPA recommended that USTR keep Ecuador on the Priority Watch List to monitor its implementation and enforcement of then-pending copyright legislation in fulfillment of its multilateral and bilateral obligations. USTR agreed, scheduled an out-of-cycle review, and kept Ecuador on the same list in February 1999. Ecuador remained on the Watch List in 1999 and 2000. In the May 1, 2000 Special 301 announcement, the USTR noted that “serious enforcement problems remain, with piracy levels still high, difficulty getting court orders enforced by the national police and the customs service...”

In 1999, \$19.2 million of Ecuador’s imports to the United States benefited from the GSP program, accounting for 1% of its total imports to the U.S. Another \$260.3 million of Ecuador’s imports to the United States benefited from the ATPA program in 1999, accounting for 14.1% of its total imports. For the first 11 months of 2000, \$24.6 million of goods from Ecuador entered the U.S. under the duty-free GSP code, representing a 33.3% increase over the same time last year. Another \$220.5 million of goods entered under ATPA.

EGYPT

As early as 1985, IIPA targeted Egypt as a major copyright offender, and because of its leadership role in the Middle East, pressed it to adopt a model law for the region. Seven years later, after long and frustrating delays, USTR placed Egypt on the Priority Watch List in April 1992 and Egypt finally passed amendments to its law in June 1992. These amendments fell short of internationally accepted standards. In April 1993, Egypt was kept on the Priority Watch List and an out-of-cycle review (OCR) was scheduled for December 1993. In June 1993, because Egypt had not made corrective amendments to its law, IIPA filed a petition, which was accepted by USTR in October 1993, to remove Egypt as a beneficiary of the Generalized System of Preferences (GSP) program. As a result of 1994 amendments, Egypt was moved to the Watch List on April 30, 1994, and another OCR was scheduled for October 1994. On July 1, 1994, the GSP investigation was successfully concluded, but Egypt was retained on the Watch List as a result of the OCR in October 1994. Egypt remained on the Watch List in 1995 and 1996 as a result of inadequacies in its patent regime, and in 1997, largely because of patent concerns, Egypt was elevated to the Priority Watch List. In 1998, IIPA recommended that Egypt be placed on the Watch List because of wavering copyright enforcement and the imposition of low, nondeterrent penalties for infringement.

From 1998 through 2000, USTR kept Egypt on the Priority Watch List, noting inadequate protection for pharmaceutical patents, lax enforcement on unchecked copyright piracy, and unclear protection for pre-existing sound recordings. USTR also noted in its May 1, 2000 Special 301 announcement the possible initiation of a future WTO dispute settlement case against Egypt for noncompliance with TRIPS obligations.

Egypt currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$25.5 million of Egyptian imports to the United States benefited from the GSP program, accounting for 3.7% of its total imports to the U.S. For the first 11 months of 2000, \$24.2 million of Egyptian goods entered the U.S. under the duty-free GSP code.

EL SALVADOR

El Salvador was first placed on the Special 301 Watch List in 1992. It remained on that list for several years. While legal reform of the copyright law and various criminal codes was achieved, effective copyright enforcement was not achieved (in contrast, there was some progress on trademark matters). In 1996, IIPA recommended to USTR that El Salvador be elevated to the Priority Watch List; USTR chose to keep El Salvador on the Watch List. In 1997, El Salvador was removed from all Special 301 lists. In March 1999, El Salvador signed a bilateral investment treaty with the United States, which the U.S. Senate ratified in late 2000. In April 2000, USTR did not place El Salvador on any of the 301 lists but did conduct an out-of-cycle review to assess that government's efforts to improve enforcement procedures and promote the use of authorized software in all government industries. Based on some progress made, El Salvador remained off all 301 lists.

Years ago, the copyright industries also attempted to invoke other trade remedies to resolve the problems of high levels of piracy and poor enforcement in El Salvador. IIPA filed a June 1993 petition with USTR, requesting it to initiate an investigation of El Salvador's copyright practices under the statutory provisions of the Generalized System of Preferences (GSP) program and the Caribbean Basin Economic Recovery Act (CBERA or CBI), both of which include discretionary criteria that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." The IIPA's 1993 GSP/CBI petition was not accepted.

In 1999, \$3.1 million of Salvadoran imports to the United States benefited from the GSP program, accounting for less than 1% of its total imports to the U.S. An additional \$59.1 million worth of goods entered the United States under the CBI in 1999, representing 3.7% of its total imports to the U.S. For the first 11 months of 2000, \$19.9 million of Salvadoran goods entered the U.S. under the duty-free GSP code, representing a 276.6% increase over the same time period last year. Another \$41.9 million of goods entered the U.S. under the CBI.

ESTONIA

In 1998, Estonia appeared on the USTR Special 301 list for the first time when USTR placed it on the Other Observations list. In both 1999 and 2000, IIPA recommended placement of Estonia on the Watch List because of significant deficiencies in the Estonian legal regime, the significant enforcement problems (particularly at street markets and the border) and the growing piracy problem across many industries (and the disruption it has caused in other countries). Estonia was not placed on any USTR list in 1999 or 2000.

Estonia currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$11.3 million of Estonian imports to the United States benefited from the GSP program, accounting for 4.9% of its total imports to the U.S. For the first 11 months of 2000, \$10.4 million of Estonian goods entered the United States under the duty-free GSP code.

GEORGIA

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Georgia, the agreement was signed on March 1, 1993 and entered into force on August 13, 1993.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List. Georgia does not appear on any Special 301 list. Georgia did not appear on any Special 301 lists in 2000.

GERMANY

Germany was placed on the Special 301 Watch List from 1991-1992. Though it was removed from any list in 1993, Germany was placed on the Other Observations list from 1994-1998, primarily due to heavy U.S. trade losses attributable to business software and audiovisual piracy. In those years, IIPA's Special 301 submissions focused on the problems with Germany's enforcement against end-user software piracy and its inadequate legal framework, especially the discriminatory failure to prohibit the unauthorized fixation, and subsequent reproduction and distribution, of live performances of U.S. artists (the "bootlegging" issue). The latter set of issues was resolved by the enactment of copyright law amendments in 1995.

In 1998, IIPA recommended the placement of Germany on the Watch List because of serious problems in the audiovisual industry (namely, the manufacturing and distribution throughout Europe of "smart cards" and "descrambling" devices) and in the software industries, where some jurisdictions were still denying *ex parte* search orders. In keeping Germany on the Other Observations list in 1998, Ambassador Barshefsky noted progress made in 1997 with respect to the availability of civil *ex parte* search orders, but shared the Alliance's concerns "regarding a major audiovisual piracy problem and the role of German firms in the manufacturing and/or exporting throughout Europe of pirated 'smart cards' and other 'de-scrambling' devices used to steal encrypted satellite, cable and broadcast transmissions, particularly of U.S. motion pictures." Though the Alliance recommended in our 1999 Special 301 Report that Germany be kept on the Other Observations list, Germany did not appear on any USTR list in 1999 or 2000.

GREECE

Greece was on the Watch List from 1989-1994 and was elevated to the Priority Watch List in 1995. Despite passage of a modern copyright law in March 1993 and a broadcast law in July 1995, there has been little change in levels of piracy and trade losses to U.S. copyright owners have continued to increase. Though the 1993 copyright law contained modern levels of protection, stiff minimum and maximum penalties, only isolated and sporadic progress has been achieved.

A TRIPS case was filed in 1997, and in May 1998, Greece passed an amendment to the Broadcast Law that finally began to improve the longstanding problem of TV piracy. The same month, USTR announced the commencement of WTO dispute settlement consultations. The consultations and the TRIPS case currently remain ongoing and in 2000, Greece remains on the Priority Watch List for the sixth consecutive year. In the May 1, 2000 Special 301 announcement, the USTR noted that "Greece has yet to provide assurances that it would implement its new enforcement procedure in a strong and consistent manner, and to take steps to improve the handling of intellectual property cases in the court system..."

GUATEMALA

After seven years on the Special 301 Watch List (1992-1998), USTR elevated Guatemala to the Priority Watch List in 1999 and 2000. In the May 1, 2000 Special 301 announcement, the USTR outlined several IPR problems: "Guatemala's Criminal Procedures Code requires that all criminal enforcement be brought as 'private actions', making criminal penalties difficult to obtain in cases of copyright infringement. Piracy, including by government agencies, is widespread, and the Government of Guatemala has failed to take effective enforcement action." Although new legislation enacted in September 2000 addresses some of these concerns (in particular, making infringements as "public" action), the law cut back on the levels of criminal penalties and civil damages.

In addition to Special 301 scrutiny, Guatemala has been the subject of other U.S. trade investigations. In June 1991, the Motion Picture Association (MPA) filed a petition to deny Guatemala preferential trade benefits under the Generalized System of Preferences (GSP) program because of that country's failure to provide adequate and effective protection to U.S. copyrighted films and television programming, which resulted in the widespread unauthorized interception and retransmission of U.S. programming by Guatemalan cable operators. USTR accepted this petition, and twice extended the investigation. Guatemala passed a cable law in June 1992 and issued implementing regulations in late 1993. After some progress was made in the licensing of programming by Guatemala City cable operators and the implementation of the cable law in the interior of the country, MPA withdrew its GSP petition on June 13, 1994.

Because of continuing problems with enforcement and the deficiencies in the 2000 copyright legislation, IIPA filed a GSP/CBI petition in August 2000, requesting a review of its IPR practices because of its failure to provide adequate and effective protection of U.S. copyrighted works. Unfortunately, the U.S. government rejected IIPA's petition, no doubt in part, to be consistent as it extended new trade benefits to Costa Rica under the U.S.-Caribbean Trade Partnership Act (CBTPA), which requires eligible countries to have very high levels of IPR protection.

In 1999, \$14.1 million of Guatemalan imports to the United States benefited from the GSP program, accounting for 1% of its total imports to the U.S., and \$285.3 million of Guatemalan goods benefited from the CBI program in 1999, accounting for 12.6% of its imports that year. For the first 11 months of 2000, \$28.8 million of Guatemalan goods entered the U.S. under the duty-free GSP code and \$224.7 million under the CBI.

HONG KONG

Hong Kong first appeared in IIPA's Special 301 recommendations in 1995, when we called for Special Mention status (equivalent to USTR's Other Observations category) in order to focus attention on the increased flow of pirate materials from China into Hong Kong, and to encourage enactment of tougher penalties for commercial piracy operations. By 1996, as this pirate flow across the Chinese border became a flood, IIPA recommended placement on the Watch List to encourage Hong Kong to devote more resources to copyright enforcement and to aggressively deploy new legal tools against piracy. USTR decided to list Hong Kong in the Other Observations category, and maintained it there after an out-of-cycle review that concluded in December 1996. In its 1997 filing, citing a flood of digital piracy in the Hong Kong market, and increasing evidence that some of it was originating within the territory, IIPA urged USTR to elevate Hong Kong to the Priority Watch List.

Because of the then-worsening piracy situation, the USTR placed Hong Kong on the Watch List on April 30, 1997, and maintained it there in a January 16, 1998 out-of-cycle review announcement, concluding that "the piracy situation in Hong Kong has not improved." In 1998, IIPA noted that despite Hong Kong's efforts, the digital piracy problem was out of control; the territory had changed from being an importer of pirate optical media product to being a major producer and exporter, trends that justified keeping Hong Kong on the Watch List. USTR, calling for full implementation of new antipiracy legislation, effective enforcement, and a significant reduction in piracy rates, kept Hong Kong on the Watch List. Hong Kong was removed from the Watch List after a February 1999 out-of-cycle review, but Ambassador Barshefsky added a September 1999 out-of-cycle review to assess Hong Kong's intellectual property progress.

On December 17, 1999, USTR announced that as a result of the September out-of-cycle review, Hong Kong would remain off the Special 301 Watch List because "Hong Kong has undertaken significant enforcement actions since April [1999] to address the problem of piracy, but significant follow-up efforts are needed as piracy problems continue. The USTR will monitor action by Hong Kong authorities to reclassify piracy as an organized and serious crime, to extend the mandate of the special anti piracy task force beyond December 1999, and to prosecute corporate policy and the illegal loading of software by dealers onto computer hard drives." Hong Kong did not appear on any Special 301 lists in 2000.

HUNGARY

On September 24, 1993, the U.S. and Hungary entered into a comprehensive bilateral Intellectual Property Rights Agreement, which obligated Hungary to make significant and important improvements in its copyright laws. In 1994 and again in 1997, Hungary adopted amendments to update its copyright law and to make it compatible with the TRIPS Agreement. In 1994, 1995 and 1996, Hungary did not appear on any Special 301 lists. In 1997, IIPA recommended that Hungary should be placed on the Special Mention list because of its enforcement and legal framework deficiencies. USTR did place Hungary on the Special Mention list in 1997 and 1998 at the urging of copyright owners because of the lack of effective enforcement.

Hungary implemented extensive changes to its copyright law in June 1999; these changes became effective on September 1, 1999. The amendments are intended to bring the Hungarian law into compliance with the TRIPS Agreement as well as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and to comply with several of the European Union Directives, such as the Term Directive.

In both 1999 and 2000, IIPA recommended, and USTR agreed, that Hungary be placed on the Watch List. In the May 1, 2000 Special 301 announcement, the USTR noted that despite the recent revision of copyright laws, "questions remain whether sufficient legal authority exists as required by the TRIPS Agreement for civil *ex parte* search procedures...[V]ideo and cable television piracy is widespread, and local television and cable companies regularly transmit programs without authorization."

Hungary currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$304.3 million of Hungarian imports to the United States benefited from the GSP program, accounting for 16.1% of its total imports to the U.S. For the first 11 months of 2000, \$292.8 million of Hungarian goods entered the U.S. under the duty-free GSP code.

INDIA

India was placed on the Priority Watch List in 1989 and was named a Priority Foreign Country in 1991. Its practices in the patent, trademark and copyright area, as well as market access for motion pictures, were declared by USTR as "unfair" on March 4, 1992, and a Section 301 investigation was launched against India at that time. The motion picture market access problems were substantially resolved by the end of 1992, but patent and copyright enforcement problems persisted. These kept India a Priority Foreign Country until June 30, 1994, when it was moved to the Priority Watch List after it adopted significant amendments to its copyright law. USTR subjected India to a special out-of-cycle review (OCR) in January 1995 and its position on the Priority Watch List was retained. In 1996, IIPA recommended that India remain on the Priority Watch List as its enforcement program began to take shape; USTR agreed.

In 1997, IIPA recommended that India be moved to the Watch List as a result of continued encouraging raiding activity. However, USTR disagreed and in April 1997 kept India on the Priority Watch List, in part because of copyright issues, but also because of serious patent protection shortcomings. In 1997, USTR initiated a WTO dispute settlement case against India on patent protection matters. In September 1997, the WTO panel agreed with the U.S. claim that India failed to implement its obligation under TRIPS to establish a "mailbox" system to receive patent applications, and on related matters. This case was the first intellectual property rights dispute to go through the WTO panel process. India appealed the case, lost and in April 1999, enacted legislation to address the WTO settlement.

In our 1999 and 2000 Special 301 filing, IIPA again recommended that India be placed on the Watch List in light of the progress on copyright issues. In both years the USTR elevated India to the Priority Watch List. In the May 1, 2000 Special 301 announcement, the USTR noted continued shortcomings in India's patent laws, concern over 1999 amendments which undermine TRIPS requirements for protection of computer programs, and lack of enforcement against cable piracy and imports of pirated products from Southeast Asia. The USTR also noted in the same announcement the possible initiation of a future WTO dispute settlement case against India for noncompliance with TRIPS obligations.

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$1.02 billion of India's imports to the United States benefited from the GSP program, accounting for 11.2% of its total imports to the U.S. For the first eleven months of 2000, \$1.1 billion of Indian goods entered the U.S. under the duty-free GSP code, representing an 11.9% increase over the same time period last year.

INDONESIA

IIPA has closely monitored developments in Indonesia since 1985, when, in its first submission to USTR on piracy, IIPA named Indonesia as Asia's second worst pirate country. In 1987, following a petition by IIPA to revoke Indonesia's GSP benefits, Indonesia adopted an improved copyright law and, in 1989, entered into a bilateral copyright agreement whereby U.S. works and sound recordings acquired protection under Indonesian law. Although government initiatives virtually wiped out audio piracy in 1988 and made great progress against videocassette piracy in 1991-92, Indonesia remained on the Watch List continuously from 1989 through 1995, because piracy of U.S. books and computer software soared over the years, and extensive market access barriers hampered the entry of U.S. companies into the Indonesian market. These continuing problems led USTR, on IIPA's recommendation, to elevate Indonesia to the Priority Watch List in 1996, where it remained until 1999.

In 2000, IIPA recommended that Indonesia be upgraded to the Watch List "[i]n recognition of the adverse conditions under which market liberalization, antipiracy, and copyright law reform efforts must proceed in Indonesia." The USTR agreed, and Indonesia appeared on the Watch List in 2000.

Indonesia currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective protection for intellectual property rights." In 1999, \$1.3 billion of Indonesian imports to the United States benefited from the GSP program, accounting for 13.6% of its total imports to the U.S. For the first 11 months of 2000, \$1.3 billion of Indonesian goods entered the U.S. under the duty-free GSP code.

IRELAND

Ireland first appeared on a Special 301 list in 1996 when USTR accorded it Special Mention status for patent law deficiencies. IIPA recommended Ireland for the Watch List in its February 1997 filing and highlighted at that time its significant enforcement deficiencies and high levels of piracy, particularly in the software and video areas. IIPA also included Ireland in its Priority Practices section in that February 1997 submission because its outmoded law (and its enforcement regime) were hopelessly out of compliance with its TRIPS obligations, which became effective in Ireland on January 1, 1996. USTR agreed with IIPA's recommendation and placed Ireland on the Watch List in April 1997. Simultaneously, Ambassador Barshefsky announced that USTR would commence a TRIPS case in the near future. During 1997, following a series of bilateral negotiations with Ireland, it became clear that the Irish government had no intention of introducing and adopting a TRIPS-compatible law within any reasonable time. As a result, USTR commenced the TRIPS case on January 9, 1998.

In early February 1998, following the commitment of the Irish government to "accelerate its implementation of comprehensive copyright reform legislation," USTR decided not to bring the case before a dispute settlement panel, though it reserved the right to do so if the timetables were not met. Ireland remained on the Watch List in 1998, 1999 and 2000, noting in the May 1, 2000 Special 301 announcement that "Ireland's commitment to enact comprehensive copyright legislation has not been met. We understand recent progress has been made toward finalizing this legislation and expect it will be enacted by parliament before its summer recess." Ireland enacted new IPR legislation in June 2000.

ISRAEL

IIPA first reported serious piracy problems in Israel in 1993. At that time, IIPA noted the need for copyright law modernization and urged USTR to place Israel on the Special 301 Watch List. No action was taken by USTR until 1994, when Israel was placed on USTR's Special Mention status, where it remained in 1995 and 1996. In 1997, USTR elevated Israel to the Watch List, noting the "rapidly growing rate of audio CD piracy for export" and the lack of a strong legal framework or effective enforcement to combat piracy.

In 1998, because of an antiquated copyright law, large-volume pirate CD production, lack of cooperation of Israeli Government authorities in raids and enforcement, and the increasing influence of organized criminal elements in the manufacturing, distribution and export of pirated CDs, videos and software, IIPA recommended that USTR place Israel on the Priority Watch List. USTR agreed, and Israel has remained on the Priority Watch List since 1998. In the May 1, 2000 Special 301 announcement, the USTR noted "[the US remains] very concerned about the unacceptably high rate of piracy of all forms of optical media in Israel. Israel remains a key distribution hub in a multi country network (including Western Europe and Russia) for pirated optical media product, much of which is still manufactured in Israel)." The USTR also noted the possible initiation of a future WTO dispute settlement case against Israel for noncompliance with TRIPS obligations.

ITALY

Italy has been on the USTR Watch List since the 1989 inception of the Special 301 program, primarily due to enforcement shortcomings that allowed piracy, especially of U.S. motion pictures, sound recordings/music and computer software to reach levels unmatched in any other Western European country. In 1993, when IIPA estimated trade losses in Italy due to inadequate enforcement to be the highest in the world, we recommended that Italy be designated as a Priority Foreign Country. Following bilateral consultations with the U.S., Italian authorities took action to improve and strengthen anti-piracy efforts in certain areas. It also became the first European Union member country to implement the EU Software Directive. Nonetheless, despite an increased volume of investigations and raids, piracy levels remained extraordinarily high, due in great part to the inadequate penalties authorized under Italian law, and the reluctance of many magistrates to impose even those penalties on commercial piracy operations. In April 1994, USTR kept Italy on the Watch List and conducted an informal out-of-cycle review with regard to its copyright enforcement.

In 1995 alone, losses due to piracy in Italy were estimated at over \$900 million and USTR maintained Italy's position on the Watch List in 1995, 1996 and 1997. By February 1998, Italy had still not passed the Anti-Piracy Bill and IIPA recommended its elevation to the Priority Watch List. The USTR agreed, and Italy was on the Priority Watch List in 1998 and 1999. In February 2000, the USTR kept Italy on the Priority Watch List, and added a September out-of-cycle review (OCR). The USTR also noted the possible initiation of a future WTO dispute settlement case against Italy for noncompliance with TRIPS obligations.

In recognition of the July 2000 passage of the Anti-Piracy Bill, the USTR announced in November 2000 that Italy would be moved from the Priority Watch List to the Watch List. In the November 8, 2000 OCR press release, the USTR noted that "[p]assage of this tough new legislation sends an important message that Italy will severely penalize piracy...We expect the Italian Government to strictly enforce this new law in a manner that reduces availability of pirate and counterfeit goods."

JORDAN

USTR first placed Jordan on the Special Mention list in 1995, where it remained in 1996 due to its inadequate intellectual property laws. USTR elevated Jordan to the Watch List in 1997, noting a law that “falls far short of international standards in most respects” and rampant piracy due to a lack of “effective enforcement mechanisms.” In 1998, IIPA recommended that Jordan be elevated to the Priority Watch List because of the “glacial pace” of Jordan’s efforts to pass the draft Copyright Law amendments and Jordan’s total failure to implement and enforce the copyright law. USTR decided to keep Jordan on the Watch List, in part because of Jordan’s April 1998 “Action Plan” designed to bring it into conformity with TRIPS within two years.

Despite passing the long-awaited copyright amendments in late 1998, in April 1999, Jordan remained on the Watch List because of what USTR described as limited progress in the implementation of the 1998 Action Plan and patent protection deficiencies. After Jordan took the initiative of passing further amendments, thereby bringing its law very close to TRIPS compliance, and joining the Berne Convention, Jordan was removed from the Watch List on December 10, 1999 after an out-of-cycle review. USTR described its reasoning as follows:

[the passing] of a number of strong intellectual property laws lay the legal foundation for an effective intellectual property regime consistent with the TRIPS Agreement. The Government of Jordan also has demonstrated its determination to ensure effective enforcement of the laws comprising Jordan’s improved regime for protection of intellectual property.

On April 11, 2000, Jordan joined the World Trade Organization, thereby making itself bound by the provisions of the TRIPS agreement. Six months later, Jordan signed a historic Free Trade Agreement with the United States. Jordan did not appear on any Special 301 list in 2000.

Jordan currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide “adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.” In 1999, \$5.1 million of Jordan’s imports to the United States benefited from the GSP program, accounting for 16.5% of its total imports to the U.S. For the first 11 months of 2000, \$9.4 million of Jordanian goods entered the U.S. under the duty-free GSP code, representing a 103.6% increase over the same time period last year.

KAZAKHSTAN

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. Kazakhstan signed its bilateral trade agreement with the United States on May 19, 1992; it entered into force on February 18, 1993.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

In June 1999, IIPA filed a petition with the USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition be on Moldova be withdrawn, as a result of cooperation with that government on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters. In 1999, \$188.1 million of Kazakhstan's imports to the United States benefited from the GSP program, accounting for 83.3% of its total imports to the U.S. For the first 11 months of 2000, \$309.3 million of Kazakh goods entered the U.S. under the duty-free GSP code, accounting for a 71.1% increase over last year.

KUWAIT

USTR first placed Kuwait on the Special 301 Special Mention list in 1995. In April 1996, USTR elevated Kuwait to the Watch List, where it remained through 1997, noting that Kuwait had been slow in adopting copyright legislation and that unauthorized duplication of software, particularly in government agencies, remained a major problem. In IIPA's 1998 Special 301 filing on Kuwait, we recommended that USTR elevate Kuwait to the Priority Watch List because of growing losses due to piracy and the Kuwaiti government's continued failure to enact a copyright law that fully satisfies Kuwait's TRIPS obligations. USTR agreed, elevating Kuwait to the Priority Watch List as a result of "heightened concern at the tardiness of Kuwait's action," and noting that while Kuwait claimed the developing-country transition period for complying with TRIPS, "the pace of work thus far has not been sufficient to complete the needed steps by January 1, 2000."

In 1999, IIPA recommended that Kuwait remain on the Priority Watch List but that Kuwait should be designated as a Priority Foreign Country if it failed to pass a new copyright law. USTR kept Kuwait on the Priority Watch List in 1999, agreeing to conduct a December out-of-cycle review to decide whether to designate Kuwait. As a result of the enactment of a new copyright law in late 1999, USTR moved Kuwait from the Priority Watch List to the Watch List in 2000.

KYRGYZ REPUBLIC

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Armenia, the agreement was signed on April 2, 1992 and entered into force on April 7, 1992.

In 1995 and 1997 IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

In June 1999, IIPA filed a petition with the USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In late 1999, the Kyrgyz Republic acceded to the World Trade Organization. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan and rejected the petition for review of the Kyrgyz Republic. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition be on Moldova be withdrawn, as a result of cooperation with that government on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters. In February 2000, IIPA learned that its GSP petition was not accepted by the Administration. In 1999, \$30,000 in Kyrgyz imports to the United States benefited from the GSP program, accounting for nearly 5.7% of its total imports to the U.S. For the first 11 months of 2000, roughly \$133,000 of Kyrgyz goods entered the U.S. under the GSP duty-free code, representing a 343.5% increase over the same time period last year.

LATVIA

IIPA first filed a Special 301 report on Latvia in 2000, when we recommended that Latvia be added to the Watch List for serious deficiencies in the Copyright Law, criminal code and implementation of the new customs code . The USTR accepted our recommendation, and placed Latvia on the Watch List for the first time in 2000. In the May 1, 2000 Special 301 announcement, the USTR noted that “[a]lthough pirate optical media production currently is not a problem, there exists a pervasive transshipment problem in Latvia, not only in optical media but in other copyrighted products as well, with much of Latvia’s pirated business software flowing over the border from Russia.”

Since then, Latvia has adopted a new Copyright Law, though it does not include a provision for civil *ex parte* searches, there is no right of remuneration for the public performance of sound recordings. The Alliance also remains concerned about Latvia’s inefficient copyright enforcement regime.

Latvia currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide “adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.” In 1999, \$5.1 million of Latvia’s imports to the United States benefited from the GSP program, accounting for 2.2% of its total imports to the U.S. For the first 11 months of 2000, \$10 million of Latvian goods entered the U.S. under the duty-free GSP code, representing a 122.3% increase over the same time period last year.

LEBANON

Isolated from normal world trade patterns due to years of civil strife, Lebanon did not appear in IIPA reports until 1995, when IIPA first recommended placement on the Special Mention list because of its high levels of piracy and outmoded copyright law. IIPA's 1996 filing stressed pervasive TV piracy, an ineffective judicial system, and lack of any progress toward copyright and broadcast law reform; we recommended that Lebanon be placed on the Watch List. In 1997, IIPA recommended once again that Lebanon be placed on the Special 301 Watch List, noting a video market dominated by piracy, increasing book and software piracy, an immobilized copyright reform process, and backlogged and inefficient courts that continued to pose major impediments to effective enforcement of copyright infringement across the board.

In 1998, IIPA again called on USTR to place Lebanon on the Watch List for failure to pass a new copyright law, and for uncertainty over whether the law would include a Berne- and TRIPS-incompatible "compulsory license" on computer software. USTR agreed for the first time to place Lebanon in its Other Observations category, noting "widespread copyright piracy and an inadequate law," and that "[u]nauthorized use of software is pervasive among private firms and government ministries." USTR's Ambassador Barshefsky called on the Lebanese Government "to pass a TRIPS-consistent copyright law, to take effective measures to eliminate use of unauthorized copies of software in Government offices, and reduce the rate of video piracy."

In June 1999, IIPA filed a petition with USTR to review Lebanon's GSP benefits for its failure to protect the intellectual property rights of U.S. copyright owners, because of the Lebanese Parliament's attempt to suspend provisions in the new copyright law to enforce against rampant cable piracy in Lebanon, inadequacies in the law and lax enforcement. The President of Lebanon refused to sign the bill to suspend the enforcement provisions. The GSP petition was not accepted by USTR in February 2000.

Lebanon was elevated to the Watch List in 1999 and kept there in 2000 largely because of the continued international deficiencies in the copyright law, pervasive piracy and inefficient enforcement against piracy. In the May 1, 2000 announcement, USTR noted that "optical media production facilities are reportedly being set up, with the potential for Lebanon to become an exporter of pirated product."

Lebanon currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$22.1 million of Lebanon's imports to the United States benefited from the GSP program, accounting for 38.25% of its total imports to the U.S. For the first 11 months of 2000, \$26.9 million of Lebanese goods entered the U.S. under the duty-free GSP code, representing a 37.9% increase over the same time period last year.

LITHUANIA

IIPA first filed a Special 301 report on Lithuania in 2000, when we recommended that Lithuania be added to the Watch List because of serious concerns over copyright enforcement at all levels, including criminal, civil, administrative and border measures. USTR agreed, and Lithuania was placed on the Special 301 Watch List for the first time in 2000. In the may 1, 2000 announcement, the USTR noted that a “pernicious transshipment problem” exists in Lithuania, “with many pirated products moving from Russia and Ukraine to Western Europe via Lithuania.”

Lithuania currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide “adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.” In 1999, \$3.3 million of Lithuania’s imports to the United States benefited from the GSP program, accounting for 3.6% of its total imports to the U.S. For the first 11 months of 2000, \$2.6 million of Lithuanian goods entered the U.S. under the duty-free GSP code.

MACAU

Macau never appeared on a Special 301 list until 1998. IIPA's 1998 filing described it as one of the world's leading sources of digital copyright piracy for export, thanks to a proliferation of pirate optical media production facilities, and recommended placement on the Priority Watch List. USTR agreed, citing an "explosion of illegal CD, CD-ROM and VCD manufacturing," and calling for better copyright enforcement and implementation of import and export licensing of optical media production equipment and finished product. Macau remained on the Priority Watch List in 1999.

In May 2000, in recognition of what the USTR described as "reasonable progress in attacking the piracy problems that led to its placement on the Special 301 Priority Watch List," Macau was lowered to the Watch List and USTR added an out-of-cycle review. In December 2000, USTR announced that Macau would remain on the Watch List, despite concerns that the "enforcement of the strong new intellectual property laws is not as vigorous as it needs to be."

MALAYSIA

IIPA first identified Malaysia in 1985 as a country with a serious piracy problem, and supported the bilateral negotiations that led to Malaysia's adopting a comprehensive copyright law in 1987, and joining the Berne Convention in 1990, thus extending protection to U.S. works.

In 1994, IIPA filed a "Special Comment" on Malaysia calling for judicial reforms so that deterrent sentences could be imposed on copyright pirates. In 1999, IIPA filed an "Open Recommendation" report on Malaysia focusing on optical media piracy and calling for the adoption and implementation of a comprehensive regulatory system for the import, export and operation of optical media production equipment and materials; sustained and consistent anti-piracy enforcement policies; and the prompt and consistent imposition of deterrent penalties on commercial pirates by Malaysian courts.

In the April 30, 1999 Special 301 announcement, the USTR announced that an out-of-cycle review (OCR) of Malaysia would be conducted in September 1999. As a result of the OCR, USTR announced in December 1999 that Malaysia would not appear on any Special 301 lists but would be monitored for both TRIPS compliance and the passage of a comprehensive optical disk law. Because Malaysia has been slow to enact and implement legislation to deal with the optical media piracy problem, and to carry out effective enforcement, the USTR placed Malaysia on the Special 301 Priority Watch List for the first time in 2000.

MEXICO

Mexico was first named to the Priority Watch List by USTR in 1989 as a result of its patent regime. In January 1990, USTR dropped Mexico from the list altogether following commitments to improve patent protection. Meanwhile the copyright industries were suffering high levels of piracy. In its 1991 Special 301 submission, IIPA recommended that Mexico be placed on the Priority Watch List as a result of Mexico's failure to adopt a new law protecting sound recordings and computer programs, and its failure to increase criminal penalties above the then-maximum of \$4. While IIPA believed that the massive piracy problem in Mexico warranted Priority Foreign Country status for Mexico, it did not make this recommendation, preferring to rely on the leverage created by Mexico's desire to join NAFTA. In June 1991, Mexico adopted a new copyright law as a condition precedent to the opening of NAFTA negotiations, which concluded in December 1992.

Following the adoption of NAFTA and completion of the implementing process in both the United States and Mexico, IIPA and its members focused their attention on the virtually nonexistent enforcement regime in Mexico, and by 1994 threatened to ask the U.S. to commence a NAFTA dispute settlement case. IIPA made no recommendation for Special 301 placement, however. IIPA pressed for Special Mention placement in its 1995 Special 301 submission, relying on the leverage of the NAFTA enforcement obligations. USTR again left Mexico off the list altogether. In 1996, IIPA still considered the staggering enforcement problem as best viewed as apart of Mexico's NAFTA implementation, and USTR placed Mexico back on the Special 301 list in the category of Special Mention. By this time, Mexico had become one of the largest pirate markets in the world. While IIPA and its members also pressed for legislative reform as an adjunct to the more critical need for Mexico to focus on enforcement, Mexico again chose to ignore the enforcement area, and to place its energy on other more marginal legislative reforms which were adopted in December 1996 (effective March 1997). Those amendments, while positive in certain respects, were close to disastrous in the enforcement area (e.g., they provided for decriminalization of sound recording and end-user software piracy), and under extreme U.S. government pressure, Mexico made corrective amendments which became effective in May 1997. Various meetings of the U.S.-Mexico IPR Working Group, set up in the NAFTA Agreement, proved to be of little utility, with the Mexican government evincing little interest in participating in this forum with any serious intent to improve the still-crippled enforcement system. The new law resulted in little improvement in the enforcement system.

In 1998 and 1999, IIPA urged that Mexico be placed on the Priority Watch List but the U.S., against the recommendations of USTR, kept Mexico on the Other Observations list despite Mexico's failure to resolve any of the identified problems. In 1999, Mexico was finally placed on the Watch List. In its April 30, 1999 announcement, USTR noted that "piracy and counterfeiting remain problems [despite Mexico's commitment] to implement and enforce high levels of intellectual property protection consistent with its international obligations." USTR also was "encouraged by the Government of Mexico's announcement of an initiative to combat piracy last year; and the passage of legislation yesterday of additional anti-piracy legislation."

Mexico did not appear on any Special 301 lists in 2000. For the last two years, the U.S. and Mexican governments have engaged in a series of periodic high-level bilateral meetings to engage on intellectual property rights issues ranging from criminal enforcement (raids and prosecutions), administrative enforcement (with IMPI), judicial reform, tax inspections, border enforcement, governmental legalization of business software, further copyright law reform, and other relevant matters.

MOLDOVA

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Moldova, the agreement was signed on June 19, 1992 and entered into force on July 2, 1992.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

In June 1999, IIPA filed a petition with the USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition be on Moldova be withdrawn, as a result of cooperation with that government on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters.

In 1999, \$364,000 in Moldavian imports to the United States benefited from the GSP program. For the first 11 months of 2000, about \$227,000 of Moldavian goods entered the U.S. under the GSP duty-free code.

NEW ZEALAND

Until 1998, New Zealand had never appeared on any Special 301 list. In 1998, at the urging of IIPA, the USTR initiated an out-of-cycle review in response to New Zealand's sudden decision to abolish the importation right for all copyright owners. This erosion of intellectual property protection, combined with what the USTR described as an "enforcement regime [that] does not effectively deter piracy," led the USTR to follow IIPA's 1999 recommendation and place New Zealand on the 1999 Watch List. New Zealand did not appear on any Special 301 lists in 2000.

NICARAGUA

In February 1995, IIPA recommended to USTR that Nicaragua be placed on the Watch List for its failure to afford adequate copyright protection and effective enforcement. At the same time, IIPA filed a petition with USTR, requesting that the President withdraw Nicaragua's beneficiary country status under the Caribbean Basin Economic Recovery Act (CBERA or CBI) because it failed to meet the intellectual property rights eligibility criteria of that trade law. Neither the petition nor the 301 recommendation was accepted by USTR.

Two years later, in April 1997, USTR added Nicaragua to the Special 301 Other Observations list. In January 1998, Nicaragua and the U.S. signed a Bilateral Intellectual Property rights agreement obligating Nicaragua to provide a higher level of protection than the TRIPS Agreement by July 1999. In her May 1, 1998 announcement keeping Nicaragua on the Other Observations list, Ambassador Barshefsky noted,

piracy of video recordings, unauthorized video and sound recordings, and U.S. satellite signals by local cable television operators remains widespread. The copyright law does not explicitly protect computer software. . . . We look to Nicaragua to update its legal structure, to reduce piracy rates affecting all forms of intellectual property, and to bring its IP regime into compliance with the obligations of the IPR agreement quickly.

Nicaragua did not appear on any Special 301 list in 1999 or 2000.

Part of the CBI discretionary criteria requires that Nicaragua provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$50.6 million of Nicaraguan imports to the United States benefited from the CBI program, accounting for 95% of its total imports to the U.S. For the first 11 months of 2000, \$52.6 million of Nicaraguan goods entered the U.S. under the CBI.

OMAN

IIPA reported on Oman for the first time in 1995, urging that Oman be placed on the Special Mention list (equivalent to USTR's Other Observations category) because it had no copyright law and was a potential haven for piracy in the Persian Gulf region. USTR agreed, and thereafter raised Oman to the Watch List in 1996, describing the intellectual property protection regime there as "minimal and stagnant." In 1997, USTR decided to keep Oman on the Watch List, noting that efforts to modernize Oman's copyright law were "progressing slowly."

In 1998 and 1999, IIPA recommended that Oman be kept on the USTR Watch List, as Oman's market was "dominated by piracy," and was "a haven for pirates fleeing less hospitable neighboring states." In 2000, IIPA recommended keeping Oman on the Watch List primarily for failure to stop piracy of business software. USTR agreed, keeping Oman on the USTR Watch List all three years. On May 21, 2000, Oman enacted copyright legislation as one of the final pieces in Oman's WTO accession process. In November 2000, Oman became the 139th member of WTO and is bound to protect copyright in line with the obligations contained in the WTO TRIPS Agreement.

Oman currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$54.6 million of Oman's imports to the United States benefited from the GSP program, accounting for 24.9% of its total imports to the U.S. For the first eleven months of 2000, \$45.1million of Oman's goods entered the U.S. under the duty-free GSP code.

PAKISTAN

Pakistan has been on the Special 301 Watch List since 1989. While it amended its copyright law in 1992, further revisions need to be made to bring it up to international standards. No significant progress against pervasive copyright piracy was made until 1994, when raids against video piracy began, and intensified in 1995. USTR engaged the Pakistani government on patent issues, initiating a WTO case; the Pakistani government then amended its patent law and regulations to comply with certain TRIPS patent provisions. In 1997 and 1998, USTR kept Pakistan on the Watch List, noting that piracy of computer software, videos, and books remained widespread. In 1999, IIPA recommended that Pakistan remain on the Watch List, and noted for the first time the sudden arrival of CD manufacturing capability. USTR kept Pakistan on the Watch List, noting the CD plants and Pakistan's TRIPS-incompatible law.

In 2000, IIPA recommended, and USTR agreed, to keep Pakistan on the Watch List, again noting the increasing pirate CD production problem. In the May 1, 2000 Special 301 announcement, USTR noted that "insufficient measures are being taken to curb illicit production of optical media" in Pakistan, and also noted the slow court system and the imposition of "nondeterrent penalties."

Pakistan currently participates in the U.S. GSP program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Pakistan meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." At the same time as Pakistan caused losses to the U.S. due to piracy and kept its law in violation of international treaty obligations, Pakistan imported \$64.2 million of products into the United States without duty in 1999 (3.7% of its total imports to the U.S.), and \$84.8 million of products into the United States without duty during the first eleven months of 2000 (4.4% of its total imports into the U.S.).

PALESTINIAN AUTHORITY

IIPA filed its first Special 301 comments on the Palestinian Authority in 1999, over concerns of the rapid growth of optical media and video piracy in the West Bank and Gaza Strip. IIPA recommended that USTR signal its engagement with the Palestinian Authority by placing it on the Watch List. In addition to recommending a Watch List designation again in 1999, IIPA also recommended that USTR conduct an out-of-cycle review to monitor the anti-piracy and legal measures undertaken by the Authority. The Palestinian Authority did not appear on any Special 301 lists in 1999. In 2000, raising increasing concerns over pirate production for export, IIPA recommended that the Palestinian Authority be placed on the Priority Watch List. On May 1, 2000, USTR announced that it would conduct an out-of-cycle review of the Palestinian Authority. The scheduled review has not yet occurred due to unrest in the area.

PANAMA

Panama was placed on the Special 301 Special Mention list (now known as Other Observations) in 1994 and again in 1996. In October 1996, USTR initiated a review of Panama's intellectual property rights regime under the Generalized System of Preference (GSP) program. IIPA participated in the GSP hearings in November 1996, during which the Panamanian Government acknowledged that its system for protecting intellectual property had not been fully implemented, although some enforcement actions were beginning to be taken.

On April 30, 1997, USTR elevated Panama to the Watch List and scheduled an out-of-cycle review (OCR) to assess Panama's efforts to "improv[e] its intellectual property laws and their enforcement." As a result of this out-of-cycle review in October 1997, USTR decided to remove Panama from the Watch List, given "visible progress" made since its placement on that list. Ambassador Barshefsky also made several observations:

[w]hile we do not believe that Panama has done all that is needed to enforce intellectual property rights and comply with its WTO TRIPS obligations, the level of commitment evident in the last half year is cause for optimism. Nevertheless, it remains incumbent upon the Government of Panama to do more to improve intellectual property protection and demonstrate that recent progress is a first step in a process of fundamental institutional reform.

In 1998, Panama was elevated to the Other Observations list amidst USTR's concerns that "inadequate enforcement continues to be a major problem." Ambassador Barshefsky noted that she looked for the authorities "to devote sufficient resources to IP protection and to continue to fulfill their action plan devised [in 1997]." Because of progress made in Panama during that year, USTR terminated the GSP review on October 26, 1998. In 1999, \$2.6 million in Panamanian imports to the United States benefited from the GSP program, accounting for 1% of its total imports to the U.S. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$46 million in Panama's goods entered the U.S., accounting for nearly 13.6% of total imports to the U.S. in 1999. For the first 11 months of 2000, \$1.8 million of Panamanian goods entered the U.S. under the duty-free GSP code and another \$40.1 million under CBI.

IIPA recommended that Panama remain on the Other Observations list in 1999 to monitor progress there; however, Panama did not appear on any Special 301 list in 1999 or 2000.

PARAGUAY

The bilateral history of engagement between the U.S. and Paraguay has been a lengthy and intricate one. Back in 1992, IIPA reported that Paraguay was the central point for the production, export and transshipment of pirate audiocassettes throughout South America. By that time, the recording industry had already spent several years working to improve the on-the-ground enforcement situation in Paraguay. In April 1992, USTR placed Paraguay on the Watch List. In early 1993, Paraguayan officials made a political commitment to end the widespread piracy of sound recordings. By April 1993, because Paraguay had substantially reduced the level of piracy of sound recordings and music, Ambassador Kantor removed Paraguay from the Watch List. In early 1994, despite some positive enforcement efforts made by Paraguayan authorities, the recording industry reported a recurrence of the pre-1993 problems involving the export of pirated product at the Brazilian border. In 1994 and 1995, USTR kept Paraguay on the Special Mention list for both years, despite industry recommendations to raise back to the Watch List. In 1996, IIPA recommended a Priority Watch List placement because of increasing piracy problems in Paraguay, especially at the border. USTR elevated Paraguay to the Watch List on April 30, 1996. During an out-of-cycle review in October 1996, USTR kept Paraguay on the Special 301 Watch List, noting "the Government of Paraguay must take strong, coordinated, government-wide action to institute effective enforcement systems."

In early 1997, IIPA recommended that USTR designate Paraguay as a Priority Foreign Country because of the longstanding problems of piracy, ineffective enforcement and an inadequate copyright law. In March 1997, member associations of the IIPA, along with U.S. trademark and patent industry representatives, traveled to Paraguay to meet with Paraguayan officials to discuss both enforcement and legislative concerns. In April 1997, USTR elevated Paraguay to the Priority Watch List, noting that "despite efforts of concerned Government officials, piracy and counterfeiting in Paraguay have reached alarming levels and much more needs to be done." On May 5, 1997, President Wasmosy announced a national anti-piracy campaign, but this campaign turned out to be little more than a public relations effort, which lasted over a year, through the rest of his administration.

In late 1997, USTR conducted an out-of-cycle review of Paraguay's Special 301 status. Because Paraguay simply failed to meet the standards laid out in that review, USTR designated Paraguay as a Priority Foreign Country on January 16, 1998. A Section 301 investigation commenced on February 17, 1998. During the investigation, U.S. and Paraguayan officials met several times for consultations. The U.S. had hoped for dramatic progress in many areas by July 1998, but this did not happen. Some accomplishments were made, however. On April 23, 1998, the Attorney General (Fiscal General) issued a circular to his prosecutors, urging them to apply the maximum penalties in cases of piracy, and requesting that they report on pending IPR proceedings. While this is a useful instruction, no copyright cases have reached the sentencing stage in Paraguay.

In terms of border enforcement, while Paraguay did not undertake the needed major overhaul of the its entire customs regime, some measures were implemented to improve

inspections of suspect product at the borders. For example, an agreement was signed between Paraguay and Taiwan on May 28, 1998, promising to exchange information regarding the flow of goods suspected of being used in piracy. For all intents and purposes, this agreement has not been used, and several reports point to Taiwan as having failed to comply with its end of the agreement to exchange information on suspect shipments going to Paraguay.

Because of the need to gear up IPR negotiations with the new Administration of President Grau and because some marginal progress had been made (primarily the passage of a trademark law), USTR extended the Section 301 investigation. Ambassador Barshefsky noted that "insufficient progress" had been made in the first six months of the investigation, and she urged "the new administration to use this short extension of the 301 investigation period to take swift enforcement actions to reduce piracy and bring into force adequate and effective intellectual property laws without further delay."

In August and September 1998, several major seizures were conducted, led by industry investigatory efforts. Public destruction ceremonies of infringing products were held, aimed at improving public awareness. Paraguayan Customs circulated a resolution targeting certain items for its agents to check on border entry. The new Copyright Law was passed in mid-October, 1998. In late October, the Public Ministry assigned two prosecutors to work on IPR investigations. While industry was hopeful at the onset that these prosecutors would be useful, we understand that they too had minimal effect on forwarding copyright enforcement, given the fact that the current criminal code requires public complaints for copyright (but not trademark) actions. While these raids did represent progress, the copyright industries remained gravely concerned that, at the foundation, not much had changed in terms of governmental efforts to conduct effective copyright enforcement actions. Piracy levels were unchanged, and imports of infringing product continued to flow through the porous Paraguayan borders.

On November 17, 1998, USTR announced that a comprehensive bilateral intellectual property agreement with Paraguay was concluded which "will significantly improve intellectual property protection for copyrights, patents and trademarks and ensure continued progress in the fight against piracy and counterfeiting in Paraguay." By signing the Memorandum of Understanding and Enforcement Action Plan, USTR decided not to take further trade action at that time and terminated both the Section 301 investigation as well as its review of Paraguay's IPR practices under the Generalized System of Preference, which had commenced in October 1996 as part of the 1995 GSP Annual Review. In 1999, \$16.2 million in Paraguayan imports to the United States benefited from the GSP program, accounting for 34.5% of its total imports to the U.S. For the first 11 months of 2000, \$18.2 million of Paraguayan goods entered the U.S. under the duty-free GSP program.

In IIPA's 1999 and 2000 Special 301 filings, IIPA supported USTR's continued Section 306 monitoring despite concerns that Paraguay had already missed most of the interim deadlines of the November 1998 MOU/Action Plan, and that Paraguayan courts had not yet issued a sentence in a copyright infringement case. In her May 1, 2000 announcement, the USTR said that the U.S. Government is seriously concerned that "Paraguay continues to be a regional center for piracy, especially of optical media, as well as for counterfeiting, and continues to serve as a transshipment point for an alarming volume of infringing products from Asia to the larger markets bordering

Paraguay, particularly Brazil. In addition, Paraguay has failed to implement its obligation under the WTO TRIPS Agreement and the bilateral MOU to enact a modern patent law, among other reforms.

PEOPLE'S REPUBLIC OF CHINA

After USTR placed China on the Priority Watch List in both 1989 and 1990 to encourage it to commence a law reform process, China passed a new copyright law in September 1990 (effective June 1, 1991). That law was incompatible with the Berne Convention and had numerous other defects, and as a result of these inadequacies as well as high and growing losses due to copyright piracy, USTR named China a Priority Foreign Country in April 1991. In January 1992, China and the U.S. settled the resulting Section 301 action by entering into a Memorandum of Understanding (MOU). This MOU committed China to adopt Berne-compatible regulations to its copyright law and to join the Berne Convention (which China did, effective October 15, 1992) and the Geneva Phonograms Convention (which it also did, effective June 1, 1993). U.S. works became fully eligible for protection in April 1992 under the 1992 MOU, and China was consequently placed on the Watch List in April 1992.

On September 30, 1992, China's Berne-compatible regulations went into effect (but only applied to foreign works, leaving domestic Chinese copyright and related rights owners with less protection for their works, performances and sound recordings than that enjoyed by foreign right holders). China remained on the Watch List in 1993 with IIPA and USTR pushing for passage of legislation to make copyright piracy a criminal offense, as well as to beef up enforcement measures. On November 30, 1993, Ambassador Kantor elevated China to the Priority Watch List due to China's failure to enforce its laws. In February 1994, IIPA reported significantly increased trade losses, up to \$823 million for 1993. Due to the absence of criminal penalties and a total lack of enforcement, USTR once again named China as a Priority Foreign Country in June 1994. Though the National People's Congress, through a "Decision" of the Standing Committee, adopted criminal penalties for copyright piracy in July 1994, it was not until 1995 that the Decision was implemented by a set of "Interpretations" issued by the Supreme People's Court. However, because the "Decision" appeared not to have the full effect of a "Law" (which was not adopted until March 1997, effective October 1997) the criminal provisions were rarely used and deterrence suffered accordingly. Meanwhile, U.S. trade losses continued to mount. On February 4, 1995, the U.S. government announced \$1.08 billion in retaliatory tariffs to compensate for trade losses due to copyright piracy in China. The imposition of these tariffs was narrowly averted by the U.S.-China IPR Agreement on February 26, 1995. As a result of this agreement, the second Section 301 case against China was terminated, China was made subject to monitoring under Section 306, and, on April 30, 1995, USTR moved China to the Watch List.

While some progress was made during 1995 to set up the enforcement infrastructure promised in the 1995 agreement, its principal provisions (those dealing with CD factories, with imposing deterrent penalties and with eliminating onerous market access barriers) remained largely unfulfilled. This led IIPA, in February 1996, once again to urge that China be named a Priority Foreign Country and that the previously terminated Special 301 investigation be reopened. USTR took these actions on April 30, 1996 and a retaliation list, comprising over \$2 billion worth of products, was published on May 15, 1996. This was followed by protracted and often heated discussions, which led to the closure of 15 CD factories, other enforcement actions by Chinese authorities, and the announcement of certain market-opening measures. Finally, on June 17, 1996,

the U.S. and China agreed on a set of announcements which averted the imposition of trade sanctions, and which led to the Section 301 action once more being terminated. This left China subject to monitoring of its compliance with the 1995 and 1996 agreements under Section 306 of the U.S. Trade Act as it remains today. The U.S. government, led by USTR, has continued since then to meet regularly with Chinese authorities to monitor compliance with China's agreements.

Since 1998, IIPA has continued to recommend, and the USTR has agreed, that China continue to be subject to Section 306 Monitoring to ensure its compliance with the 1995 IPR Agreement and the 1996 Action Plan.

PERU

USTR placed Peru on the Special 301 Watch List in 1992, where it remained for seven years. In February 1995, IIPA was greatly concerned about the inadequate copyright law and poor enforcement efforts in Peru and filed a petition to deny preferential trade benefits under both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA). Peru amended its copyright law in 1996 and established an administrative agency to handle copyright enforcement. As a result of such progress, these petitions were not accepted by USTR. USTR's April 1996 Special 301 announcement noted that some progress had been taken by INDECOPI (a quasi governmental agency), but urged the government "to intensify its anti-piracy efforts, particularly to combat sound recordings and book piracy." USTR kept Peru on the Watch List in both 1997 and 1998. Ambassador Barshefsky noted in her May 1, 1998 Special 301 announcement that, "[w]hile enforcement actions have been brought, the INDECOPI Appellate Tribunal's pattern of reducing fines it initially assessed seriously hinders enforcement efforts against piracy and counterfeiting. Piracy also continues due to problems with lax border enforcement and a cumbersome and slow judicial process. We will continue to monitor progress in these areas."

In both 1999 and 2000, IIPA recommended, and USTR agreed, that Peru should be elevated to the Priority Watch List. In the May 1, 2000 Special 301 announcement, the USTR noted

[Although] the software industry and INDECOPI have cooperated in creating a joint campaign of education, training and enforcement regarding software legalization...U.S. industry continues to express concern about decisions by the INDECOPI Tribunal that are not adequate to deter piracy. We look forward to seeing more complete results from these efforts by late 2000.

In June 1999, IIPA filed a GSP/ATPA petition for review of the intellectual property practices of Peru for its failure to provide adequate and effective copyright protection for U.S. copyright owners. However, when Peru developed a plan of action for IPR issues in early 2000, IIPA withdrew its GSP/ATPA petition (on February 7, 2000).

In 1999, \$54.7 million in Peru's imports to the United States benefited from the GSP program, accounting for nearly 2.9% of its total imports to the U.S. An additional \$631.2 million of Peruvian products benefited from the Andean Trade Preferences Act ("ATPA") in 1999, accounting for 33.7% of total imports to the United States. For the first 11 months of 2000, \$40.5 million of Peruvian goods entered the U.S. under the duty-free GSP code and an additional \$776.3 million under ATPA, representing a 39.5% increase in ATPA benefits over the same time period last year.

PHILIPPINES

In our Special 301 filings in 1992 and 1993, IIPA recommended that USTR identify the Philippines as a Priority Foreign Country, given the almost complete lack of attention by the Philippine government toward enacting copyright reform and improving enforcement. On April 6, 1993, the Philippine government exchanged letters with the U.S. government, committing the Philippines to provide strong intellectual property rights protection and improved enforcement. As a result of this agreement, USTR dropped the Philippines from the Priority Watch List to the Watch List in 1993, where it remains. Subsequent IIPA filings raised concerns about the Philippines' continued failure to fulfill its commitments under the 1993 exchange of letters, especially bringing its laws into compliance with Berne Convention standards, and increasing penalties to deterrent levels in order to fight piracy. In June 1995, IIPA filed a petition to request that USTR review the eligibility of the Philippines to participate in the Generalized System of Preferences (GSP) program, of which one criterion is the "adequate and effective" protection of intellectual property rights. USTR deferred any action on this petition, but in the end, this petition was not accepted.

In June 1997, the Philippines finally enacted a comprehensive modernization of its copyright law, which took effect January 1, 1998. In its 1998 filing, IIPA commended the Philippines on this long-awaited achievement, but noted ongoing problems with enforcement and the need to clarify omissions and ambiguities in the new law. For these reasons, IIPA recommended, and USTR agreed, that the Philippines stay on the Watch List in 1998 and 1999. IN 2000, IIPA called for the Philippines to be moved back to the Priority Watch List, noting that optical media piracy had taken root in the country and that fundamental improvements in the investigative, prosecutorial and judicial systems were needed to meet this challenge. In its May 1, 2000 Special 301 announcement, the USTR maintained the Philippines on the Watch List, but also noted the possible initiation of a future WTO dispute settlement case against the Philippines for noncompliance with TRIPS obligations.

In 1999, \$826.2 million of Philippine imports to the United States benefited from the GSP program, accounting for 6.7% of its total imports to the U.S. For the first 11 months of 2000, \$687.4 million of Philippine goods entered the U.S. under the duty-free GSP code.

POLAND

In 1992 and 1993, Poland was placed on the Priority Watch List in order to encourage the copyright reform and enforcement progress envisioned under the 1990 U.S.-Poland Business and Economic Relations Agreement. That 1990 agreement required that Poland “provide adequate and effective enforcement of intellectual property rights”; protection for U.S. sound recordings was clearly included within this obligation. In that agreement, Poland committed to adopt a Berne-compatible copyright law and to adhere to the substantive provisions of the 1971 text of the Berne Convention by January 1, 1991; the U.S. and Poland ratified the agreement in August 1994. In 1994, with enactment of a new copyright law, Poland was placed on the Watch List to monitor the progress of the implementation of that law; it remained on the Watch List from 1994 to 1999.

In the May 1, 2000 Special 301 announcement, the USTR elevated Poland to the Priority Watch List for its failure to bring its copyright regime in line with TRIPS obligations and Business Economic Relations Agreement, and noted the possibility of the initiation of a TRIPS case against Poland. In June 2000, Poland finally enacted TRIPS - compliant amendments to the copyright law. The USTR responded by moving Poland to the Watch List in a November out-of-cycle review, noting that “it is critical that Poland also addresses remaining intellectual property problems, including weak enforcement against piracy and counterfeiting.”

In addition to Special 301 oversight, Poland’s intellectual property rights practices have also been the subject of a review under the Generalized System of Preferences (GSP) program. IIPA filed a petition with USTR on June 1, 1993, asking that Poland lose its eligibility to receive preferential trade benefits under the GSP program. On July 24, 1995, Ambassador Kantor announced that he was extending Poland’s GSP review until February 1996 “in the expectation that, by that time, Poland will have taken the steps required to provide adequate protection to U.S. sound recordings.” Although this issue was not satisfactorily resolved, USTR terminated its GSP review of Poland on October 4, 1996. Given continuing legal deficiencies in Poland’s copyright law, IIPA filed a GSP petition with USTR to review of Poland for its failure to provide adequate and effective copyright protection for U.S. copyright owners. The Administration did not accept IIPA’s petition. In 1999, \$293 million of Poland’s imports to the United States benefited from the GSP program, accounting for nearly 36.4% of its total imports. For the first 11 months of 2000, \$289.5 million of Polish goods entered the U.S. under the duty-free GSP code.

QATAR

IIPA first reported on Qatar in 1995, when it recommended that Qatar be placed on Other Observations because of its lack of any copyright law or enforcement effort. USTR agreed, and placed it there in 1995 and 1996, noting that it expected Qatar to take steps to address shortcomings in its intellectual property regime. In 1997, USTR once again kept Qatar on the Other Observations list, noting that no enforcement had yet taken place. In 1998, IIPA recommended that Qatar be elevated to the Watch List, so that USTR could signal its engagement with Qatar over high piracy levels for all kinds of copyrighted products and an inadequate law, making Qatar a potential “haven of piracy.” USTR agreed, and in raising Qatar to the Watch List in 1998, Ambassador Barshefsky called upon Qatar to legalize the software used in government offices, improve copyright enforcement [and] implement its TRIPS obligations.” As recommended by IIPA, Qatar remained on the Watch List in 1999 and 2000 because of its failure to enact TRIPS - consistent legislation and serious enforcement problems.

ROMANIA

In a Side Letter to the 1992 trade agreement with the U.S., the Romanian government committed to take several actions to improve intellectual property rights, including adhering to the Berne Convention (1971 text) and the Geneva Phonograms Convention. Romania agreed to submit for enactment, no later than December 31, 1993, legislation necessary to carry out its obligations and to make "best efforts" to implement legislation by that date. In 1995, after Romania failed to meet these goals and deadlines, IIPA recommended that Romania be added to the Watch List, and USTR agreed. In 1996, USTR moved Romania to Special Mention following adoption of its new copyright law in February 1996. Romania remained as a Special Mention country in the USTR designations in 1997 and 1998 because of its lax enforcement and the bilateral Agreement shortcomings.

In our 1999 and 2000 filings, IIPA recommended that Romania be elevated to the Watch List as a result of unacceptable piracy rates, its non-TRIPS – compliant regime, and to encourage the commitment of resources to effective (and TRIPS required) enforcement of the Copyright Law. The USTR agreed, and Romania has been on Watch List since 1999.

Romania currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 1999, \$63.1 million of Romania's imports to the United States benefited from the GSP program, accounting for 14.6% of its total imports to the U.S. For the first eleven months of 2000, \$70.3 million of Romanian goods entered the U.S. under the duty-free GSP code, representing a 21% increase over the same period last year.

RUSSIA

In 1992, IIPA first recommended that Russia be placed on the Watch List in order to encourage its progress toward a modern and market-driven copyright regime (in 1991, IIPA made the same recommendation with regard to the U.S.S.R.). That progress, although delayed by events surrounding the breakup of the Soviet Union, culminated in the 1993 enactment of a new law on "Copyright and Neighboring Rights," and the October 1992 enactment of the "Law on the Legal Protection of Computer Programs and Databases." These laws, drafted and lobbied effectively by a small group of Russian legislators, led by Yuri Rhyzov, were generally Berne-compatible (with the major exception that the law's implementing decree failed to afford protection to pre-existing foreign sound recordings and pre-1973 "works" such as films, books, music, et cetera). The Copyright Law of 1993 enabled Russia to move toward adherence to the 1971 text of Berne and to the Geneva Phonograms Convention in 1995. In the 1992 U.S.-Russia bilateral trade agreement, Russia promised to join both these conventions by the end of 1992.¹ In December 1994, Russia deposited its instruments of accession to Berne and Geneva which both became effective on March 13, 1995. Throughout 1994 and 1995, IIPA and its members worked to secure amendments to the Criminal Code and other related civil and criminal procedural codes which would turn copyright piracy into a serious criminal offense and thus clear the way for commencement of enforcement programs by both U.S. and Russian industries. Some of these procedural changes were approved in July 1995, but the effective date of the Administrative Code amendments was dependent on adoption of the Criminal Code. President Yeltsin vetoed the Criminal Case amendment in December 1995; it was finally approved in June 1996. From the time the laws were passed in 1992 and 1993 until January 1997 when the Criminal Code amendments making piracy a crime took effect, Russia was completely without meaningful enforcement machinery. In that four-year period, hardcore criminal elements infiltrated copyright markets, and losses to copyright owners skyrocketed.

In its 1995 submission, frustrated by the lack of progress in criminalizing piracy, IIPA recommended Russia for the Priority Watch List. USTR moved Russia from the Special Mention category in 1994 to the Watch List for 1995. Also in 1995, IIPA petitioned to remove Russia's status as a "beneficiary developing country" under the Generalized System of Preferences (GSP) program. The GSP program expired on July 31, 1995 and was not renewed again until October 1996. During this hiatus, IIPA's petition was, in effect, not accepted. In February 1996, IIPA urged that Russia be named a Priority Foreign Country. USTR kept it on the Watch List, subject to an out-of-cycle review (OCR) which occurred in December 1996. While USTR again decided to keep Russia on the Watch List at that time (because of the expected passage of the criminal law amendments), Ambassador Barshefsky highlighted the need to significantly increase enforcement

¹This agreement, originally concluded with the Soviet Union in May 1990, was re-signed on behalf of the Russian Federation by President Yeltsin in June 1992 and put into force at that time by granting MFN treatment to Russia. The agreement was also the model for trade agreements signed with all the other countries of the CIS during the next two years.

actions under the existing law, to pass the laws necessary to make piracy a full crime, to provide retroactive protection, and to dismantle market access barriers.

In our February 1997 submission, IIPA again pressed for a Priority Foreign Country designation if by April 1997 Russia had not taken a series of steps, including commencement of major enforcement actions, and the introduction of legislation providing full retroactive protection for both pre-1995 sound recordings and pre-1973 works. Some more aggressive enforcement actions were undertaken during this period, but there was no movement on even drafting a bill (or decree) on retroactive protection and little optimism that this would soon occur. Shortly following its submission, IIPA again petitioned USTR to deny Russia duty free trade benefits under the GSP program, for its clear failure to provide “adequate and effective” protection for U.S. – copyrighted works. USTR moved Russia up to the Priority Watch List in its April 1997 announcement and later again denied IIPA’s GSP petition.

During the first year (1997) following adoption of the new criminal provisions making piracy a crime with real penalties, there was some progress in the enforcement area. In particular, raids commenced and some administrative actions were concluded; two criminal convictions with very low penalties were reported, only later to be voided by a government amnesty at the beginning of 1998. There was no progress at all with the legislative agenda concerning retroactivity or correcting other enforcement deficiencies.

From 1998 through 2000, IIPA recommended that Russia remain on the Priority Watch List because of massive piracy losses, a rapidly growing optical media piracy problem, virtually no enforcement or deterrent system, and some deficiencies in the IPR regime, particularly around retroactive protection for sound recordings. The USTR has followed our recommendation, and Russia has remained on the Priority Watch List ever since 1997.

In August 2000, IIPA filed a petition with the USTR requesting that the country eligibility of Russia under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In January 2001, the Administration announced that it accepted IIPA’s petition. The US government has not yet decided on whether to withdraw or suspend GSP benefits in Russia. In 1999, \$417.1 million of Russia’s imports to the United States benefited from the GSP program, accounting for 7.3% of its total imports to the U.S. For the first 11 months of 2000, \$486.3 million of Russian goods entered the U.S. under the duty-free GSP code, representing a 26.8% increase over the same period last year.

SAUDI ARABIA

Saudi Arabia was on the Priority Watch List from 1993 to 1995, after having been reduced from this status to the Watch List in 1990 following passage in that year of the Kingdom's first Copyright law. Effective July 1, 1994, Saudi Arabia adhered to the Universal Copyright Convention (UCC), which for the first time effectively extended the protection of the 1990 copyright law to foreign copyrighted works, including sound recordings.

Former Secretary of Commerce Ron Brown made intellectual property protection the centerpiece of talks at the January 1994 U.S. – Gulf Cooperation Council (GCC) Economic Dialogue. Later in November 1994, the U.S. government and IIPA cooperated to sponsor a U.S.-Saudi Arabia-GCC Enforcement Seminar in Riyadh. The seminar was successful and, we believe, resulted in the issuance of several circulars aimed at cracking down on shops dealing in unauthorized product. In April 1995, USTR kept Saudi Arabia on the Priority Watch List and added an out-of-cycle review (OCR) for October 1995. On November 13, 1995, USTR decided to keep Saudi Arabia on this list, and looked to the Saudi government to "increase its enforcement actions against pirate activity and to take action against the illegal use of computer software, particularly by large end-users in Saudi Arabia." In April 1996, Saudi Arabia was moved to the Watch List in recognition of end-of-1995 enforcement actions taken by the Ministry of Information. It remained on the Watch List in 1997.

IIPA and its members, in conjunction with the Riyadh Chamber of Commerce and Industry, held a three-day enforcement-training seminar in Riyadh in October 1997 to train police and other enforcement officials in copyright enforcement matters. IIPA recommended, and USTR agreed, that Saudi Arabia remain on the Watch List in 1998 and 1999, noting that copyright enforcement efforts by the Saudi Government had improved over 1997, but raising several concerns, including lack of "transparency" and failure to impose "strong deterrent penalties."

In 2000, IIPA recommended that Saudi Arabia be re-elevated to the Priority Watch List, for its failure to commit adequate resources to enforcement against burgeoning retail piracy, provide transparency in the copyright enforcement system, legalize software usage within the government, and amend its copyright laws and regulations to bring them into line with international standards. USTR kept Saudi Arabia on the Watch List in 2000.

SINGAPORE

Singapore, notorious as the “world capital of piracy” until the late 1980's, changed course and rigorously enforced its 1987 copyright law for several years thereafter. In 1994, IIPA recommended that Singapore be placed on the Watch List, reporting that Singapore had become a major transshipment point for pirated copyrighted works, and that its government virtually refused to pursue criminal prosecutions against flagrant software piracy. USTR decided to place Singapore in its Other Observations category. In 1995, USTR elevated Singapore to the Watch List, citing weakened patent protection, and it remained there in 1996 and 1997, primarily because of its failure to bring its copyright laws up to the standards of the TRIPS Agreement. In 1998, IIPA called for Singapore to be elevated to the Priority Watch List, stressing that Singapore's unique “self-policing” system was inadequate to deal with rising levels of digital piracy, and that further legislative improvements, and better regulation of optical media production facilities, were urgently needed. Agreeing that the “self-policing” policy was “outdated and ineffective,” USTR decided to keep Singapore on the Watch List for 1998, citing evidence of more active government enforcement against piracy, as well as the progress made toward achieving TRIPS-consistent copyright law.

In 1999 and 2000, IIPA recommended and USTR agreed that Singapore remain on the Watch List. In the May 1, 2000 Special 301 announcement, the USTR noted that while “[o]verall piracy rates in Singapore decreased slightly during 1999 the open retail availability of pirated CDs, VCDs and CD-ROMs in notorious shopping malls and at stalls continues to be a serious problem.”

SOUTH AFRICA

USTR placed South Africa on the Special 301 Watch List in 1995. After South Africa made progress on trademark issues, USTR provisionally removed it from the Watch List in April 1996, placing it in USTR's Other Observations category. USTR conducted an out-of-cycle review (OCR) in September 1996 to confirm that legislative changes that South Africa had committed to implement were being carried out, and that other measures had been taken to resolve outstanding concerns regarding trademarks. As a result of this review, South Africa was taken off the Special 301 list. In 1997, IIPA recommended that South Africa be placed on the Other Observations list because of resurgent book piracy and TRIPS deficiencies in South Africa's copyright law. USTR included South Africa in the 1997 National Trade Estimate (NTE) release, noting "substantial software losses, book piracy, and satellite signal piracy." In addition, USTR recognized that "[e]nforcement remains a problem in part because of a lack of availability of enforcement resources."

In 1998, USTR placed South Africa on the Watch List because of continuing problems in the patent system, "TRIPS deficiencies," and U.S. copyright industry estimates that losses to copyright piracy increased by 26% between 1996 and 1997. In 1999, IIPA recommended, and USTR agreed, that South Africa remain on the Watch List. In her April 30, 1999 announcement, Ambassador Barshefsky added a September 1999 out-of-cycle review, noting that "the U.S. copyright industry estimates that trade losses due to piracy of copyrighted works increased more than 35 percent between 1997 and 1998." As a result of a health initiative related to pharmaceutical patents, USTR decided to remove South Africa from the Special 301 lists in late 1999, and despite an IIPA recommendation in 2000, South Africa did not appear on any Special 301 list in 2000.

South Africa currently participates in the U.S. GSP program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that South Africa meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." In 1999, \$449.4 million of South Africa's imports to the United States benefited from the GSP program, accounting for 14.1% of its total imports to the U.S. In 2000, \$534.0 million of South Africa's imports into the United States benefited from the GSP program, accounting for 13.7% of its total imports into the U.S.

SOUTH KOREA

South Korea made its first appearance on the Priority Watch List in 1989, and remained there, except for 1990 and 1991, until 1997, when it was moved down to the Watch List. South Korea made considerable progress in bringing enforcement in the video, audio and book areas up to commendable levels after 1993, but software piracy remained a serious concern, and the book piracy situation deteriorated. IIPA's reports in the mid-1990s also focused on TRIPS compliance issues, and market access barriers affecting the motion picture and computer software industries. USTR's decision in 1996 to maintain South Korea on the Priority Watch List noted software end-user piracy and the "failure to provide full retroactive protection for pre-1957 works as required under the TRIPS Agreement" as major problems. In 1997, USTR lowered South Korea to the Watch List because of its continued progress in the fight against piracy. In 1998, and 1999 IIPA recommended that South Korea remain on the Watch List, highlighting the persistence of software piracy, the lack of full protection for pre-1957 works, and a lack of transparency in some aspects of the enforcement system. USTR kept South Korea on the Watch List both years.

In 2000, IIPA recommended that South Korea again be elevated to the Priority Watch List because of unacceptable enforcement policies against institutional end-user software pirates, legislative action weakening the protection for computer programs, and an increase in piracy of audiovisual products, sound recordings, and books. The USTR agreed, and placed South Korea on the Priority Watch List in May 2000. After a December out-of-cycle review, South Korea remains on the Priority Watch List.

SPAIN

Spain appeared on USTR's Special 301 Watch List from 1989 through 1994. In IIPA's 1994 Special 301 filing, the business software industry hoped that Spain's implementation of the E.U. Software Directive would improve enforcement efforts. After some initial success in obtaining raids on end-users after that legislation was enacted, action by the courts had slowed to the point where it became clear that renewed attention to the problem was required.

In 1998, IIPA recommended that Spain be placed on the Special 301 Watch List, primarily due to continuing high levels of piracy and losses experienced by the software industries. On May 1, 1998, Ambassador Barshefsky placed Spain on the Special 301 list of Other Observations. While noting the high levels of business software piracy in Spain, the Ambassador added, "The United States is concerned that judicial proceedings are frequently delayed and that penalties assessed against infringers are inadequate to serve as a deterrent against piracy." However, in 1999 IIPA recommended that Spain be placed on the Special 301 Watch List due to one of the highest levels of piracy of business software in Europe. USTR agreed and elevated Spain to the Watch List for the first time since 1994. In 2000, IIPA again recommended that Spain remain on the Watch List for one of the highest levels of piracy for business software in the European Union. The USTR agreed, and kept Spain on the Watch List in 2000.

TAIWAN

Taiwan was the subject of the IIPA's first report on worldwide piracy in 1985. U.S. efforts to reduce the massive levels of piracy in Taiwan began in earnest in 1988-89 with the negotiation of a new bilateral treaty governing copyright protection. Concerns surged in the early 1990s over new pirate CD manufacture and export from Taiwan, escalating cable piracy, and mushrooming export levels of pirated software. U.S. trade losses reached an unprecedented \$370.0 million in 1991, and almost doubled in 1992, when Taiwan was named by USTR as a Priority Foreign Country. However, under the threat of retaliation, Taiwan adopted a new copyright law in May 1992, and finally signed a comprehensive Memorandum of Understanding (MOU) containing specific and wide-ranging commitments to improve copyright protection.

While some steps had been taken by April 1993 to implement the MOU, enough commitments remained unfulfilled for USTR to decide to keep Taiwan on the Priority Watch List pending compliance with an "immediate action plan" that included a requirement that it finally adopt its long-pending cable law, legitimize the cable industry and reduce piracy. In 1993, Taiwan passed its cable law, implemented an export control system to block the export of counterfeit software and pirated CDs, and finally began to mete out serious fines and jail terms to convicted pirates. These improvements, and sharp reductions in piracy losses, led IIPA to recommend that Taiwan be moved to the Watch List in 1994. USTR agreed, and kept Taiwan in the same position in 1995.

In 1996, IIPA pointed to the prominent Taiwanese role in massive software piracy networks encompassing "Greater China" as a growing problem that Taiwan needed to address. Just before USTR's Special 301 announcement in April 1996, Taiwan adopted an 18-point "Action Plan" that pledged improvements in tackling the "Greater China" piracy problem as well as other enforcement issues, including reform of the Export Monitoring System (EMS). Because this plan had the potential for continuing the "significant strides" Taiwan had made in improving IPR enforcement, USTR decided that Taiwan should be moved from the Watch List to Special Mention, with an out-of-cycle review (OCR) to be conducted in October 1996. On November 12, 1996, the USTR announced that Taiwan's "considerable success" in implementing the Action Plan justified removing it from Special 301 lists. In 1997, IIPA noted that some issues addressed in the April 1996 Action Plan, such as bootleg audio products and the Export Monitoring System, had yet to be fully resolved, while other issues, such as the ongoing cross-straits networks for production and worldwide export of pirated videogames, were not adequately addressed by the Action Plan. While USTR decided to keep Taiwan off the Special 301 list, it continued to monitor the situation in Taiwan, reporting on Taiwan in the 1997 National Trade Estimate (NTE) release.

In 1998, IIPA recommended that Taiwan be placed on the Watch List, noting that Taiwan remained a "node" in a web of "Greater China" piracy of entertainment videogames; CD, CD-ROM, CD-R and audio bootleg piracy remained problems, as did various structural deficiencies including the failure of the EMS to curtail exports of pirate videogames and components, and unreasonable documentary requirements imposed on plaintiffs by the Taiwanese courts (including the requirement that powers of attorney be signed by the CEO of a corporation). The USTR, in

specially mentioning Taiwan, stated that Taiwan had made “recent assurances” and that USTR would “closely monitor implementation of the specific measures over the next several months.” The result of that monitoring was to place Taiwan on the Watch List on August 11, 1998, because of “continuing concerns about enforcement of intellectual property rights in Taiwan.”

In 1999, IIPA recommended, and USTR agreed, to keep Taiwan on the Watch List. In her April 30, 1999 statement, Ambassador Barshefsky, noting that the Taiwanese “enforcement system is time consuming and cumbersome,” said,

[t]here has been little evidence to suggest that existing legal requirements and enforcement actions are reducing the extent to which Taiwan is a source of pirate optical media production [and] pirated material from Taiwan continues to surface in the United States, Central and South America.

In 2000, IIPA recommended that Taiwan remain on the Special 301 Watch List, with an out-of-cycle review to monitor the country. With trade losses growing to over \$314 million by 1999, doubling video piracy levels and rapidly increasing piracy rates for sound recordings, musical works, business and entertainment software, the Alliance voiced its concern for the worsening situation that would effect the entire Greater China region. USTR agreed, and placed Taiwan on the Watch List in 2000.

TAJIKISTAN

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Tajikistan, the agreement was signed on July 1, 1993 and entered into force on November 24, 1993.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

THAILAND

IIPA first identified Thailand in 1985 as one of the countries with the worst piracy records. In January 1989, following a petition filed by IIPA in 1987, President Reagan revoked Thailand's preferential trade benefits under the Generalized System of Preferences (GSP) program for its failure to provide "adequate and effective" copyright protection and enforcement. In April 1992, Thailand was named a Priority Foreign Country under Special 301. In Spring 1993, under the threat of trade retaliation, the Thai Government initiated strong enforcement actions and raids, primarily in the audio and video areas. The Thai government also began drafting a revised copyright law, and in August 1993, Thailand pledged to the U.S. to continue aggressive raiding, amend the copyright law to bring it up to Berne and TRIPS standards, and create a specialized intellectual property rights (IPR) court empowered to give improved remedies. On the basis of these commitments, USTR removed Thailand from its status as a Priority Foreign Country and placed it on the Priority Watch List. In November, 1994, after Thailand enacted its new copyright law, USTR moved Thailand from the Priority Watch List to the Watch List, where it has remained ever since.

GSP benefits were partially restored in August 1995, and the specialized IPR Court was authorized in 1996, although it did not begin operations until December 1997. 1998's IIPA filing focused on lack of progress in reducing persistently high piracy rates since the enactment of the new copyright law, but noted the potential for the new court to advance this goal by imposing deterrent penalties on commercial pirates, and recommended that Thailand remain on the Watch List. USTR agreed, pledging to monitor the activities of the new court to see if tough sentencing would reduce piracy rates. Subsequently, in June 1998, the U.S. restored virtually all Thailand's GSP benefits, as the Thai government committed to an ambitious action plan for better enforcement against piracy. IIPA's 1999 and 2000 filings stressed the growing role of Thailand as a source of pirate optical media production and export, and the need for the IPR court to impose deterrent penalties on commercial pirates.

In 1999, \$1.97 billion in Thailand's imports to the United States benefited from the GSP program, accounting for 13.8% of its total imports to the U.S. For the first 11 months of 2000, \$2.04 billion of Thai goods entered the U.S. under the duty-free GSP code.

TURKEY

Turkey has been a regular on the Special 301 lists, and its intellectual property rights legislation and practices are currently under scrutiny as part of an ongoing investigation under the Generalized System of Preferences (GSP) program. On June 1, 1993, IIPA filed a petition urging the President to withdraw Turkey's eligible beneficiary status under the GSP program for its failure to provide "adequate and effective protection" to U.S. copyrights. USTR accepted IIPA's petition, and the case remains open. The investigation now enters its eighth year.

Despite such trade pressure, there has been only minimal and sporadic progress on copyright issues during this engagement. Turkey has been on the Special 301 Priority Watch List every year since 1992 and before that, it was on the Watch List for three years. In IIPA's 1993, 1995 and 1996 Special 301 submissions, IIPA recommended that Turkey be designated a Priority Foreign Country for its failure to enact copyright reform and its lack of enforcement efforts to combat high levels of piracy.

In 1997 USTR outlined six benchmarks for progress in Turkey, which included: taking effective enforcement actions to their conclusions to address widespread piracy, passing copyright and patent law amendments to bring Turkey into compliance with its TRIPS and Berne obligations, amending the Cinema, Video and Music Works Law to include higher, non suspendable fines and jail terms, issuing a directive to all government agencies to legalize software, starting a public anti-piracy campaign about the software end-use problem and continuing training of enforcement officials so that the levels of piracy decline, and equalizing taxes on the showing of foreign and domestic films. To date, the first three of these copyright-related goals have not been met.

As a result of the 1997 Special 301 out-of-cycle review on Turkey, the USTR announced on January 16, 1998, that USTR would not consider any requests to expand the scope of preferential trade benefits Turkey receives under the Generalized System of Preferences (GSP) trade program. Although the USTR noted in 1998 that "Turkey's future benefits under the Generalized System of Preferences (GSP) will depend on progress on the remaining benchmarks," in 1999, \$335.3 million in Turkey's imports to the United States benefited from the GSP program, accounting for nearly 12.9% of its total imports to the U.S. For the first 11 months of 2000, \$403.2 million of Turkish goods entered the U.S. under the duty-free GSP program, representing a 32.6% increase over the same period last year.

In both 1999 and 2000, IIPA recommended, and the USTR agreed, that Turkey should remain on the Priority Watch List. In the May 1, 2000 Special 301 announcement, the USTR noted that "Turkey has not yet addressed all of the benchmarks set out in the 1997 review," and that enforcement efforts remain ineffective.

TURKMENISTAN

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Turkmenistan, the agreement was signed on March 23, 1993 and entered into force on October 25, 1993.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

UNITED ARAB EMIRATES

The UAE has been on the USTR Watch List since 1991, after being named by IIPA as a major pirate exporter of audiocassettes in the Gulf Region. Although the UAE passed a copyright law in 1992, piracy losses continued to rise until September 1, 1994, when the Ministry of Information and Culture (MOIC) began its enforcement campaign following a moratorium to permit shops and manufacturers to sell off existing pirate stock. By early 1995, audio piracy had been virtually wiped out, and video piracy sharply reduced, but little had been done to clear pirate software from the market. Because of software piracy and the continuing need for the UAE to bring its copyright law into compliance with international standards, USTR kept the UAE on the Watch List after an OCR in November 1995. In April 1996, Ambassador Barshefsky maintained the UAE on the Watch List, noting continued deficiencies in the copyright law. In 1997, the UAE was kept on the Watch List by USTR, who noted that efforts to reduce software piracy had "not been sufficient enough to reduce the level of illegal activity."

In 1998, IIPA, in recommending that the UAE be kept on the Watch List, noted that the UAE authorities had taken sufficient enforcement actions to reduce piracy rates for nearly all the copyright industries, but that a court decision (Shama Delux) potentially jeopardized the protection of all foreign works in the UAE. Ambassador Barshefsky, in announcing USTR's 1998 decision to keep the UAE on the Watch List, called upon the government "to clarify that U.S. copyrighted works are protected," and to ensure that the copyright law is "TRIPS-consistent before the end of the transition period for developing countries."

In 1999, IIPA recommended that USTR drop the UAE to the Other Observations listing, to acknowledge the progress of the UAE government in "fighting piracy through a sustained enforcement campaign." Ambassador Barshefsky kept the U.A.E. on the Watch List for certain deficiencies in the patent area, but dropped the UAE because of significant progress in eradicating piracy in 2000.

UKRAINE

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Ukraine, it signed its bilateral trade agreement with the United States on May 6, 1992 and put that Agreement into force on June 23, 1992.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

In 2000, Ukraine became Central and Eastern Europe's number one pirate CD – producing country. Fueled by serious reform and on-the-ground enforcement deficiencies, IIPA recommended that the USTR designate the Ukraine as a Priority Foreign Country. The USTR placed Ukraine on the Priority Watch List, with the caveat that it was prepared to designate the Ukraine as a Priority Foreign Country if sufficient action was not taken to curb pirate production by August 1, 2000. When Presidents Clinton and Kuchma endorsed a Joint Action Plan to address the piracy problem in June 2000, the USTR announced that it would defer a decision on whether to identify Ukraine as a Priority Foreign Country.

In June 1999, IIPA filed a petition with the USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition be withdrawn, as a result of cooperation with the government of Moldova on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters. In 1999, \$27.3 million in Ukrainian imports to the United States benefited from the GSP program,

accounting for nearly 5.2% of its total imports to the U.S. For the first 11 months of 2000, \$36.6 million of Ukrainian goods entered the U.S. under the GSP duty-free code, representing a 47.1% increase over the same period last year.

URUGUAY

USTR placed Uruguay on the Other Observations list in 1996 and again in 1997 to encourage Uruguay to “accelerate its efforts to enact TRIPS-consistent legislation and to continue its IPR enforcement efforts.” In July 1998, the President of Uruguay, Dr. Julio Marie Sanguinetti, met with Ambassador Barshefsky to discuss regional issues and intellectual property issues in his country. Reportedly the President responded positively to the Ambassador’s entreaties to press for passage of the long-pending copyright bill, indicating that he will work with the Uruguayan legislature to pass a good law. Unfortunately, passage of this bill has not yet been achieved and the most current draft legislation is still problematic, and not TRIPS compliant. USTR kept Uruguay on the Watch List in 1999 and 2000. The USTR noted in its May 1, 2000 Special 301 announcement the possible initiation of a future WTO dispute settlement case against Uruguay for noncompliance with TRIPS obligations.

Uruguay currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide “adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.” In August 2000, IIPA filed a petition to review Uruguay’s eligibility to maintain GSP benefits. Unfortunately, the petition was rejected. In 1999, \$56.8 million in Uruguay’s imports to the United States benefited from the GSP program, accounting for nearly 29.4% of its total imports to the U.S. For the first 11 months of 2000, \$76.1 million of Uruguayan goods entered the U.S. under the duty-free GSP code, representing a 46.9% increase over the period last year.

UZBEKISTAN

In 1992, the U.S. government put into force identical wide-ranging bilateral IPR trade agreements with Russia and each of the other 11 republics of the former Soviet Union. These bilateral agreements contained very specific IPR legal and enforcement obligations for each of the former Soviet republics. In the case of Armenia, the agreement was signed on April 2, 1992 and entered into force on April 7, 1992.

In 1995 and 1997, IIPA requested that the USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost all of the CIS countries had not met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from Special 301 list, and the Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 announcement, the USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and the Ukraine are on the Priority Watch List.

In June 1999, IIPA filed a petition with the USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition be on Moldova be withdrawn, as a result of cooperation with that government on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in any of the four remaining countries: Armenia, Kazakhstan, Ukraine or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters. In 1999, \$3.7 million in Uzbek's imports to the United States benefited from the GSP program, accounting for nearly 13.7% of its total imports to the U.S.

VENEZUELA

Venezuela has been on the Special 301 Watch List continuously since 1989. In an effort to spur government action to take copyright reform and reduce the high levels of piracy, IIPA filed a petition on June 1, 1993 asking that Venezuela's eligibility to receive preferential trade benefits under the Generalized System of Preferences (GSP) program be reviewed. After the Venezuelan Congress passed the new Copyright Law in August 1993, USTR accepted IIPA's request to withdraw the petition, and no formal GSP review was initiated. In 1999, \$533.5 million in Venezuela's imports to the United States benefited from the GSP program, accounting for 5.1% of its total imports to the U.S. For the first 11 months of 2000, \$684.8 million of Venezuelan goods entered the U.S. under the duty-free GSP code, representing a 43.8% increase over the same time period last year.

In 1999 and 2000, Venezuela remained on the Watch List, as recommended by IIPA. In her May 1, 2000 Special 301 announcement, USTR Barshefsky noted,

Venezuela's protection of intellectual property rights has not improved significantly during this past year, with piracy remaining at about the same level. ... Copyright piracy also remains rampant, and COMANPI enforcement has been minimal.

VIETNAM

Vietnam first appeared on the Special 301 list in 1995 in the Other Observations category, after IIPA reported that its market was completely dominated by piracy. In 1997, IIPA renewed its call for Priority Watch List status, citing the troubling trend of government involvement in audiovisual piracy, and the failure to take any meaningful steps toward protection of U.S. works in Vietnam. On the eve of USTR's 1997 Special 301 decision, the U.S. and Vietnam announced the conclusion of a bilateral copyright agreement providing such a point of legal attachment. Ambassador Barshefsky called this "an important step in bringing Vietnam's copyright system into line with international standards," but because of the serious and growing piracy problem in Vietnam, she placed the country on the Special 301 Watch List. IIPA renewed its Priority Watch List recommendation in 1998, because the bilateral copyright agreement had not been implemented, piracy levels remained at or near 100 percent, and the Vietnamese government appeared to be consolidating its role in audio visual piracy. USTR decided to keep Vietnam on the Watch List, calling copyright piracy "the most pressing problem" to be faced, and scheduling an out-of-cycle review (OCR) for December 1998. That OCR was subsequently postponed, and on December 27, 1998, the U.S.- Vietnam Bilateral Copyright Agreement went into force.

In 1999, IIPA recommended that Vietnam remain on the Watch List so that USTR could effectively monitor and support governments efforts to implement the commitments of the Bilateral Copyright Agreement. USTR agreed, and Vietnam maintained its position on the Watch List. In 2000, the USTR agreed with IIPA's assessment of continuing IPR problems in Vietnam, and retained Vietnam on the Watch List.