

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT

**SUBMITTED TO THE
UNITED STATES TRADE REPRESENTATIVE**

FEBRUARY 15, 2002

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2002 SPECIAL 301 REPORT

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February 15, 2002

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. 66429 (Dec. 26, 2001)

Dear Mr. Papovich:

This filing responds to the Request for Written Submissions appearing on December 26, 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 51 separate country reports. We also highlight six initiatives in this letter, and identify 13 countries which we have not recommended be on a Special 301 list but which merit ongoing attention by the U.S. government.

One country deserves special mention – Mexico. While not recommending any announcement or ranking with respect to Special 301, IIPA highlights the importance that we attach to addressing long-standing piracy problems in Mexico. Losses to U.S. copyright industries in Mexico approach a staggering \$1 billion per year, warranting *immediate* steps to address this grave situation. Given the special relationship that exists between our countries, our two Presidents, and our cultures, we believe that both governments must make this issue a priority in their bilateral relationship, and we look forward to seeing tangible results in the very near term. Should bilateral engagement not yield results and produce significant decreases in the current levels of piracy, we believe that the U.S. will need to reconsider whether other available trade tools, including Special 301, NAFTA and TRIPS, should be used to ensure the protection of U.S. copyrighted materials as required under U.S. and international trade laws.

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

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,100 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; 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. IIPA expects to release a new economic study this spring.

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 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 2002; (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 13 additional countries;
- 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;

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 C, which includes all the country surveys;²
- Appendix D, which provides a historical chart of countries' placement on Special 301 lists by USTR since 1990; and
- 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.

C. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2002

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 both to 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.

In our last three Special 301 filings, IIPA outlined a series of challenges facing the copyright-based industries. This year, we have updated and reorganized these priorities, and added an additional one – improving copyright law and enforcement in the context of bilateral and regional Free Trade Agreements (FTAs).

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 these objectives this year. The following objectives are not necessarily listed in order of priority, since different issues may demand priority attention in different countries.

ELECTRONIC COMMERCE, COPYRIGHT PIRACY ON THE INTERNET AND THE WIPO INTERNET TREATIES

The Scope of the Problem: Copyright piracy on the Internet, a serious problem for the past several years, has undergone explosive growth and threatens to undermine the very foundations of electronic commerce in this new millennium. In part, this is due to the increased level of access to high-speed Internet connections in many countries around the world. While broadband offers exciting prospects for the legitimate dissemination of copyrighted materials of all kinds, too often its immediate impact has been to enable online piracy by making it faster and easier to distribute unauthorized copies of sound recordings, software, videogames, literary material, and, increasingly, even motion pictures.

Prior to the advent of the Internet, pirates who engaged in wholesale infringements of copyrighted works served mostly local or regional markets, except in limited cases such as the optical media pirates in Asia and Central Europe who served global markets. The unprecedented growth of the Internet, however, coupled with

² Country surveys were prepared by Eric H. Smith, IIPA President; Steven J. Metalitz, IIPA Senior Vice President, Maria Strong, IIPA Vice President and General Counsel; Eric J. Schwartz, IIPA Vice President and Special Counsel; and Michael N. Schlesinger, IIPA Vice President and Associate General Counsel, and are based on information furnished by IIPA member associations. We also thank our law clerks, Ryan Lehning and Chris Nunes, and our staff, Pam Burchette, Melissa Braford, Michael P. Murphy, Lauren Braford and Paula Jones-Yates for their contributions to preparing, producing and distributing this submission.

increased availability of broadband connections, have 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.

The Legal and Enforcement Solutions: Quantifying the economic losses due to Internet piracy, and allocating those losses to particular countries, are extremely challenging problems. Because of these challenges, IIPA's estimates of piracy levels and of trade losses due to piracy do not yet take into account piracy on the Internet. Internet piracy is growing rapidly and an urgent response is greatly needed. The adoption of adequate legislation and its effective enforcement online will promote the healthy growth of legitimate electronic commerce in copyrighted materials. We must act quickly before Internet piracy spins out of control.

IIPA recommends that USTR work with our industries to adopt a focused and comprehensive strategy to attack Internet piracy before it becomes so dominant that it can no longer be effectively controlled. The challenge is two-tiered. First, governments need to adopt stronger laws that are tailored to address online copyright piracy. Second, those laws must be vigorously enforced.

Well established international norms such as the WTO TRIPS Agreement contribute valuable elements to the needed legal infrastructure to protect electronic commerce and combat Internet piracy. In particular, WTO TRIPS contains a technology neutral obligation to provide "expeditious remedies to prevent infringements and remedies which constitute a deterrent to future infringements" (Article 41). The fight against this new form of piracy must be conducted under the copyright principles contained in this Agreement, and particularly through application of the existing enforcement tools described there, accompanied by effective deterrence of this new type of illegal conduct. In addition, the two treaties adopted by the World Intellectual Property Organization (WIPO) Diplomatic Conference in Geneva in December 1996 provide an additional and more tailored framework for what is needed to protect 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 help 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. The first phase of these efforts – bringing the treaties into force through the accession to each of at least 30 countries – is on the verge of completion. Following is the global status of the WIPO treaties' domestic ratifications and official deposits with WIPO.³

	WIPO COPYRIGHT TREATY (WCT)	WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)
NUMBER OF SIGNATORIES	51	50
NUMBER OF DOMESTIC RATIFICATIONS	34	31
NUMBER OF DEPOSITS WITH WIPO (30 NEEDED TO PUT TREATIES INTO FORCE)	31	28

³ As of February 15, 2002.

These two treaties are part of the international legal standards that countries must comply with in order to provide the “adequate and effective” protections for copyright that are demanded under the Special 301 program. These standards include clarifying exclusive rights in the online world, and specifically prohibiting the production of or trafficking in tools that circumvent technological protection measures (TPMs) for copyrighted works. Ensuring that these standards are effectively embodied in national law is the heart of the critical second phase of the WIPO treaties implementation effort. Success in this phase will mean that the appropriate legal infrastructure for e-commerce in copyrighted materials is in place in all major markets.

Since the treaties were adopted, IIPA has been monitoring those countries that are amending their statutory regimes to make them compatible with their TRIPS obligations. We have encouraged these countries to bring their laws into conformity with the WIPO Internet treaties as well. If countries delay in making these needed changes, the prejudicial impact on electronic commerce and the protection of intellectual property online might become irreversible. The coming into force of the WCT and WPPT provide a powerful additional reason for countries to make the necessary legal changes now. The U.S., which has already implemented the changes to its laws needed to meet the standards of the treaties by enacting Title I of the Digital Millennium Copyright Act, should make it a priority to encourage other countries to follow this path.⁴

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 giving 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 the roles of industry and government in policy, enforcement and education. Close coordination will be the key to success in this challenging new environment.

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, CD-Rs 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

⁴ 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.

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 identification tools that flag the plant in which production occurred and that help 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. Ukraine just recently adopted a system of regulatory controls as well, but we are concerned that these are flawed and we are working to address the present inadequacies. We urge the U.S. to press every country in the regions most affected by pirate optical media production and export – including East Asia, South Asia, Russia and the countries of the former Soviet Union – to put comprehensive optical media regulatory controls into place promptly. Otherwise, pirate syndicates will continue to transfer their optical media operations across borders in an effort to stay one step ahead of enforcement efforts.

Finally, even after the adoption of regulations controlling and monitoring production, it is critical that these be enforced aggressively, to accompany general copyright enforcement. Governments must be given the authority to conduct surprise inspections of optical media production facilities to ensure full compliance, and they must use that authority vigorously. Deterrent penalties – including license revocation, confiscation of equipment and raw materials, and heavy fines and imprisonment – must be consistently and efficiently imposed on optical media pirates.

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 governments. In many cases, these powerful criminal networks use copyright piracy to fund other illicit businesses, such as drug smuggling, trade in illegal munitions, money laundering, and even terrorist activities.

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. This year, we report on death threats issued by optical media pirates against more than a dozen senior government enforcement officials in Malaysia. 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.

IMPLEMENTATION OF THE TRIPS ENFORCEMENT TEXT

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.⁵ 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, 1996.⁶

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.

Non-Compliance with TRIPS as a Matter of Performance: 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.⁷ 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 the context of Special 301,⁸ as well as directly through the initiation of a dispute settlement proceeding in the WTO.

U.S. Government Actions in the TRIPS Copyright-Related Realm: USTR has already brought a number of successful cases in the WTO against developed countries for violations of TRIPS copyright and copyright enforcement obligations. Five 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

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Articles 65 and 66.

⁶ 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 January 1, 2002, 144 countries were members of the WTO, including all countries surveyed in this submission with the exception of Armenia, Azerbaijan, Bahamas, Belarus, Kazakhstan, Lebanon, the Russian Federation, Saudi Arabia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.

⁷ Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314(c), 108 Stat. 4809 (1994) (also known as the URAA).

⁸ 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).

civil *ex parte* searches; (3) Ireland, for its inadequate copyright law; (4) Greece, for its failure to enforce its laws against broadcast piracy; and (5) Denmark, for its failure to provide civil *ex parte* searches.⁹

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,¹⁰ CBI,¹¹ ATPA,¹² CBTPA¹³ and AGOA,¹⁴ 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.

IMPROVING COPYRIGHT PROTECTION AND ENFORCEMENT THROUGH FREE TRADE AGREEMENTS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. Commitments to make such improvements in national law are already on the table in the Chile and Singapore FTA negotiations, and in the discussions on a Free Trade Area of the Americas (FTAA). Similar commitments should also be sought in any other FTAs that are opened for negotiation in the year to come. The FTA negotiations process could prove to be a vital tool for advancing all the objectives cited in this letter, as well as for encouraging compliance with other evolving international trends in copyright standards, such as extensions of copyright terms of protection beyond the minimum levels guaranteed by TRIPS, as has already been done in the U.S. IIPA looks forward to working closely with U.S. negotiators to achieve these goals in the FTA fora.

USE OF LEGAL SOFTWARE IN GOVERNMENT AND BUSINESSES

The Issue: The unauthorized use and copying of software by businesses and government entities — corporate and/or government “end-user” piracy in the private and public sector — result in tremendous losses to the U.S. and global economies. The great majority of the billions of dollars lost to U.S. companies from business software piracy in 2001 was attributable to this corporate/government end-user software piracy. 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

⁹ Snapshot of WTO Cases in the United States (updated Oct. 11, 2001) at <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).

¹⁰ 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.).

¹¹ 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.).

¹² 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.).

¹³ 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.).

¹⁴ 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.).

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.

Progress: 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. Over 27 nations, including China, Korea, Philippines, Taiwan, Thailand, Ireland, France, Czech Republic, Spain, U.K., Greece, Hungary, Bolivia, Chile, Colombia, Paraguay, Jordan, Kuwait and Turkey have already joined the United States by issuing government legalization decrees from their 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 THE 2002 SPECIAL 301 LISTS

This year IIPA has considered deficiencies in copyright protection in 51 countries and has recommended them for placement in the categories of Priority Foreign Country, Section 306 Monitoring, Priority Watch List, and Watch List. We also highlighted specific issues in 13 countries.

IIPA recommends that USTR continue to pursue its investigation and imposition of trade sanctions against Ukraine, which was designated a Priority Foreign Country last year. Ukraine has not implemented the Action Plan outlined in a joint statement issued by President Clinton and Ukrainian President Kuchma in June 2000, and the production and distribution of illegal optical media discs continues unabated. 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 17 countries be placed on the Priority Watch List: Argentina, Brazil, Costa Rica, Dominican Republic, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, Pakistan, the Philippines, the Russian Federation, South Korea, Taiwan, Turkey and Uruguay. IIPA also recommends that 31 countries be designated on the Watch List. We also recommend that out-of-cycle reviews be taken in seven countries which already appear on the various 301 lists: Colombia, Lebanon, Malaysia, the Philippines, Poland, Taiwan and Thailand.

Appendix C contains a survey of 51 countries or territories. The countries appear by recommended category and in alphabetical order within each category.

PRIORITY FOREIGN COUNTRY	SECTION 306 MONITORING	PRIORITY WATCH LIST	WATCH LIST	OTHER COUNTRIES DESERVING ADDITIONAL ATTENTION
Ukraine (GSP)	Paraguay People's Republic Of China	Argentina Brazil (GSP) Costa Rica Dominican Republic (GSP) Egypt India Indonesia Israel Kuwait Lebanon + OCR (GSP petition) Pakistan (GSP petition) Philippines + OCR Russian Federation (GSP) South Korea Taiwan + OCR Turkey (GSP) Uruguay (GSP petition)	Bolivia Bulgaria Chile CIS (10) ¹⁵ Armenia (GSP) Azerbaijan Belarus Georgia Kazakhstan (GSP) Kyrgyz Republic Moldova Tajikistan Turkmenistan Uzbekistan (GSP) Colombia + OCR Czech Republic Ecuador El Salvador Estonia Guatemala Hungary Italy Lithuania Malaysia + OCR Peru Poland + OCR Qatar Romania Saudi Arabia South Africa Thailand + OCR (GSP petition) Venezuela	Australia The Bahamas Cambodia Croatia Greece Laos Latvia Macau Macedonia Mexico Myanmar Spain Vietnam
1	2	17	31	13

Appendix D provides a history of countries appearing on IIPA and USTR lists since 1990, a year after the Special 301 legislation became effective. Fifteen of these countries have appeared on a Special 301 list each year since 1990, and fifteen 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."¹⁶ Under this criterion, these fifteen 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.

¹⁵ "CIS" in this filing denotes 10 former Soviet republics. Russia and Ukraine are treated separately from the CIS in this filing.

¹⁶ Uruguay Round Agreements Act Statement of Administrative Action, reprinted in H.R. Doc. No. 103-316, vol. I, at 362 (1994).

Ongoing GSP IPR Reviews: 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 were held on March 9, 2001 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. For the 2001 GSP Annual Review process, IIPA filed GSP petitions against Lebanon, Pakistan and Uruguay. A coalition of six copyright-based associations also submitted a petition against Thailand. These four 2001 GSP IPR petitions remain pending before USTR; no decision on their acceptance or denial has yet been made as of the submission of this Special 301 filing.

E. COUNTRIES DESERVING ADDITIONAL ATTENTION IN 2002

In addition to the 51 countries which IIPA has provided comprehensive country reports, IIPA highlights issues in 13 countries for which there are no surveys in Appendix C. Thirteen of these countries deserve attention in bilateral efforts during the year. IIPA mentions the Macau Special Administrative Region to commend the government there for the successful handling of the optical media piracy problem that plagued the peninsula for several years. We split these 13 countries into two categories: optical media issues or concerns and other bilateral concerns.

Bilateral Concerns

Australia: The House Standing Committee on Legal and Constitutional Affairs conducted an inquiry into copyright enforcement upon the Attorney General's request and on December 4, 2000 presented its report to the House and to the Attorney General. The recommendations include:

- i. making corporate end-user piracy a criminal offense;
- ii. introducing a system of statutory damages;
- iii. introducing a presumption of copyright ownership in civil and criminal proceedings; and
- iv. introducing guideline judgments in relation to copyright offenses.

The government has yet to release its response to these recommendations. IIPA urges the Australian government to accept these recommendations and to institute them in 2002.

The Attorney General requested the Copyright Law Review Commission to conduct an inquiry into the relationship between copyright law and contract law. The Issues Paper states that, "licenses to use copyright works...may contain clauses that purport to exclude or modify the statutory exceptions to copyright infringement," and that the main questions before the Commission are "the extent to which this occurs and should be permissible." The Commission is also examining mass marketing agreements used to grant access to copyright material. IIPA filed a submission to the Commission emphasizing the importance of licensing to the protection of copyright industries. The Commission is expected to issue its report to the Attorney General on April 30. The Attorney General will then determine whether to make the report public and what, if any, action to take.

The Bahamas: The Bahamas has made very little progress in meeting the commitments it undertook in an exchange of letters between its government and the U.S. government dated October 26 and November 9, 2000, or to implement its commitments contained in a letter of April 2000. These series of commitments involve the need for legal and regulatory reform of the Bahamas' copyright law and regulations which created an overbroad compulsory license for unauthorized re-transmission by cable television systems of any copyrighted work transmitted over its territory, including encrypted transmissions. Such provisions violate the Bahamas' obligations under the Berne Convention. Bahamas' efforts to amend the copyright law, address remaining problems in its regulations, and engage rightsholders in the regulatory process have not resulted in concrete action to satisfy its bilateral commitments. Therefore, the Motion Picture Association of America (MPAA) will be filing a Section 301 action against the Bahamas for violation of a trade agreement.

Croatia. The lack of effective and sustained enforcement activities is a concern in Croatia, particularly for the business software and entertainment (videogame) software industries. The level of piracy experienced by these industries remains at an unacceptably high level: for example, the piracy rate for business software was 63% in 2000 (2001 figures are not yet available). With respect to business software, the Business Software Alliance (BSA) reports considerable delay before undertaking criminal raids. The police have acted in only about 40% of the cases brought to them by BSA; many of these requests for action have been pending for over a year. All the copyright industries report the police lack sufficient resources, as well as the appropriate equipment and expertise to effectively conduct their enforcement efforts, even while maintaining good relations with the industries. For example, the Ministry of Interior's decision to suspend its anti-piracy program in 1997 reduced government resources and led to a noticeable increase in video piracy according to the MPAA. On a positive note, in January 2002, that same Ministry announced the creation of a special police unit for computer crime and intellectual property protection within the Ministry of Interior. The software industry reports that the State Inspectorate (market police) did act on referrals from industry in a timely manner, but coordination between the State Inspectorate and police is minimal, leading to cases that are never acted upon or never properly prosecuted under Croatian law. Civil injunctions often take longer than six months to be issued, as compared to three days to three weeks for the rest of Central Europe on average. The absence of effective border enforcement has hurt all of the copyright industries; the proper legislation was never adopted as required under TRIPS, so actual enforcement at the borders has been non-existent. It is hoped that effective border enforcement legislation will be enacted early in 2002; there are also revisions to the copyright law moving forward which need to be closely monitored, especially for WIPO digital treaty compliance.

Greece: IIPA continues to commend Greece for taking actions against broadcast piracy, reducing it to around 5%, following conclusion of the TRIPS case. Nevertheless, Greece continues to have the highest piracy rates in Western Europe. The entertainment software industry is particularly concerned by a piracy rate of 85%, with CD-R burning of games, and their marketing over the Internet and in small shops, being the major problem. Most industries are reporting better police cooperation and increased cooperation of the tax authorities. BSA is pleased with the results it has been getting in its civil end-user piracy cases, especially through its use of civil search remedy provisions, and is also pleased with the government's recent efforts to combat online piracy. Overall, lack of deterrent penalties imposed on pirates and relatively inefficient court systems are holding Greece back from reducing its piracy rates.

Latvia: In the mid-1990s, Latvia made significant progress with copyright legal reforms, but it continues to lag behind other countries in the region in terms of actual progress with on-the-ground enforcement. Latvia still needs to improve its Criminal Code and Criminal Procedure Code, to add *ex parte* search provisions into its Civil Code, and to implement its Customs Code and regulations (now over two years old) so that effective border and internal enforcement actions can be undertaken in compliance with TRIPS. Latvia continues to struggle to make its copyright enforcement regime effective with proper criminal, civil, administrative and border action. The copyright industries continue to report high piracy rates as a result of this poor enforcement activity. The enforcement problems include insufficient financial and human resources for the Economic Police to carry out

effective seizures of material, and Municipal Police that are ill-prepared for street raids at open city markets, kiosks and supermarkets selling all forms of illegal copyright material (music, business and entertainment software, and audiovisual material). There is also reportedly poor cooperation with the prosecutors in moving cases forward, as well as numerous evidentiary and other bureaucratic obstacles that must be overcome. A major weakness in the enforcement regime remains the lack of effective border enforcement, especially the failure of customs officials to commence actions without court order and the need for these officials to target materials trans-shipped through (and stored in) Latvia for other territories.

Macedonia: Copyright enforcement is particularly weak in Macedonia according to all of the copyright industries active there. This should be considered for serious discussion by the U.S. government as Macedonia moves toward WTO accession (possibly in 2002). High levels of piracy, for example, in the business software sector are reported including widespread use of unlicensed software within government agencies. The police, prosecutors, and the customs officials lack the necessary equipment and expertise to conduct raids, investigations, and to commence cases against copyright infringers. Nevertheless, the police recently started to take action, for example, against software pirates. In 2001, the Business Software Alliance (BSA) reported the first three raids undertaken by the police. In contrast, the Copyright Inspectorate (which can only take administrative enforcement actions) has failed to refer cases that merit criminal investigation to the police and prosecutors. In addition, the State Market Inspectorate does not even have the authority to enforce the copyright law, thus burdening the already scarce police resources. Customs authorities do not take the necessary actions to prevent transshipment of pirated products across the borders, in particular along the borders with Kosovo and Bulgaria. The software industry reports that it is very rare for courts to issue injunctions in criminal cases, even though provisions providing for such action are found in the Copyright Law. Severe delays, and the issuance of only minimal fines rather than deterrent prison sentences in IPR cases, continue to plague the Macedonian court system.

Mexico: See discussion above on page 1.

Spain: Spain has among the highest piracy rates in Europe for business software (more than one in every two copies is pirated). The recording industry also reports that piracy levels in Spain have skyrocketed over the last year. There have been some improvements in business software cases in 2001, including a successful nationwide police sweep against pirate resellers (police have indicated an interest in conducting a similar sweep on Internet pirates), the courts' issuance of several positive civil damage awards, and the Government's adoption of a software asset management plan (albeit a weak one). Unfortunately, the deterrent effect of these important activities continues to be undermined by significant judicial delays in civil and criminal proceedings. These delays remain among the longest in the EU. Although courts are moving more quickly than in the past, it can still take weeks or even months to get a civil *ex parte* search application granted (a process that takes days in most EU markets) – at which point the evidence is stale and the raid is untenable. And proceedings on the merits often take years, leading pirates to recognize that there will be no immediate consequences to their illegal acts. Also problematic, Spain's proposed legislation to implement the E-Commerce Directive's liability rules on hosting omits the Directive's constructive knowledge element, and instead suggests that service providers must take action only when they are made "aware" by a court that they are hosting illegal content. Right holders have repeatedly invited the Spanish government to fix this flaw and to implement the Directive faithfully, but without much success to date."

2. Optical Media

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.

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.

Macau: In a relatively short period of time, the government of Macau SAR has managed to virtually rid the peninsula of pirate production of optical media product. As of February 2002, most of the once-bustling optical disc factories have either been sealed or moved out from Macau (and neighboring islands that together make up Macau SAR). Raids, seizures and arrests throughout 2000 and again in 2001 led to favorable court judgments imposed on commercial pirate producers and distributors, massive seizures of pirated product destined for export, and forfeiture of equipment used to produce such contraband. By these actions, the Macau government has demonstrated the willingness to effectively seize and destroy the tools of piracy. Today, only one optical disc replicating factory and three mastering factories are still active. Nonetheless, the government must remain vigilant, as, for example, it is still believed that some of the pirated DVD and VCD stampers and pirated CDs and VCDs presently flowing into China are from factories located in Macau. The copyright industries look forward to working with the recently appointed Commissioner of Customs (the Macau Customs agency was newly established in November 2001), in continuing the fine work that has been accomplished by the Economic Services and Marine & Customs Police to date.

Myanmar (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.

Vietnam: IIPA applauds the recent entry into force of a Bilateral Trade Agreement between the U.S. and Vietnam, and notes that, as a result, Vietnam will probably be the focus of increased attention from U.S. trade officials this year. Although creative works of U.S. copyright owners have been officially protected in Vietnam ever since the 1998 bilateral copyright agreement, in practice the market remains dominated by piracy and largely closed to legitimate distribution of U.S. works. Besides working to dismantle market access barriers for U.S. copyright industries, U.S. efforts should seek to build up Vietnam's institutional capacity to enforce its copyright laws. Thus far, Vietnam has been able to forestall any large-scale movement of pirate optical media production facilities into its territory. It must be encouraged to continue and increase its vigilance in this regard, lest it become the next destination of choice for pirate syndicates that are fleeing intensified enforcement policies in some of its ASEAN neighbors

F. ESTIMATED LOSSES DUE TO PIRACY

As a result of the deficiencies in the copyright regimes of these 51 countries for which losses have been estimated, the U.S. copyright-based industries suffered estimated trade losses due to piracy of nearly \$8,380 billion in 2001.

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 2000 and 2001. 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 1996 through 2001. 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 51 SELECTED COUNTRIES IN 2001 (in millions of U.S. Dollars)**

Industry	Estimated Losses
Motion Pictures	1,288.0
Sound Recordings and Musical Compositions	2,034.7
Business Software Applications	2,653.5
Entertainment Software	1,767.1
Books	636.4
Total	8,379.7

Appendix B summarizes each 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 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,



Eric H. Smith
President
International Intellectual Property Alliance

APPENDIX A

ESTIMATED TRADE LOSSES DUE TO PIRACY & PIRACY LEVELS (2000-2001) FOR IIPA's 2002 SPECIAL 301 RECOMMENDATIONS

IIPA 2002 "SPECIAL 301" RECOMMENDATIONS
IIPA 2000-2001 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and 2000-2001 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Motion Pictures				Records & Music				Business Software Applications ¹				Entertainment Software				Books			
	Loss		Video Piracy		Loss		Piracy		Loss		Piracy		Loss		Piracy		Loss		TOTAL LOSSES	
			Level				Level				Level				Level					
	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000
PRIORITY FOREIGN COUNTRY																				
Ukraine (GSP)	40.0	40.0	80%	99%	170.0	200.0	85%	95%	NA	23.7	NA	89%	NA	NA	NA	NA	NA	NA	210.0	263.7
306 MONITORING																				
Paraguay ²	2.0	2.0	80%	80%	253.6	200.0	99%	90%	11.5	8.5	79%	76%	NA	9.7	NA	99%	3.0	3.0	270.1	223.2
People's Republic of China	160.0	120.0	88%	90%	47.3	70.0	90%	93%	714.7	765.1	93%	94%	455.0	NA	92%	99%	130.0	130.0	1507.0	1085.1
PRIORITY WATCH LIST																				
Argentina	30.0	32.0	45%	45%	78.2	76.0	47%	46%	139.9	92.9	60%	58%	NA	141.4	95%	94%	8.5	8.5	256.6	350.8
Brazil ³ (GSP)	120.0	120.0	33%	33%	302.0	300.0	55%	53%	303.1	264.1	58%	58%	NA	248.2	99%	94%	14.0	18.0	739.1	950.3
Costa Rica	2.0	2.0	40%	40%	4.8	3.0	40%	40%	15.6	14.9	69%	68%	NA	0.2	NA	50%	NA	NA	22.4	20.1
Dominican Republic (GSP)	2.0	2.0	60%	60%	7.7	2.0	65%	80%	8.0	6.7	70%	68%	NA	6.0	NA	NA	1.0	1.0	18.7	17.7
Egypt	15.0	15.0	35%	35%	9.2	12.0	41%	48%	8.5	10.0	53%	56%	NA	14.9	90%	94%	32.0	30.0	64.7	81.9
India	70.0	47.0	60%	60%	NA	6.0	40%	40%	238.4	181.6	69%	63%	NA	NA	90%	80%	37.0	36.0	345.4	270.6
Indonesia	27.5	25.0	90%	90%	67.9	21.6	87%	56%	49.2	55.7	87%	89%	NA	NA	NA	99%	30.0	32.0	174.6	134.3
Israel	15.0	15.0	50%	50%	40.0	45.0	25%	30%	40.0	51.3	39%	41%	66.5	52.0	89%	NA	1.0	1.0	162.5	164.3
Kuwait	9.0	8.0	85%	85%	NA	3.0	50%	50%	NA	6.6	NA	80%	NA	NA	85%	NA	2.5	2.5	11.5	20.1
Lebanon (OCR) (GSP petition)	8.0	8.0	80%	60%	2.0	2.0	40%	45%	1.3	1.3	78%	83%	NA	1.5	NA	96%	2.0	2.0	13.3	14.8
Pakistan (GSP petition)	11.0	10.0	NA	60%	60.0	65.0	90%	90%	28.3	24.5	87%	83%	NA	NA	NA	NA	44.0	45.0	143.3	144.5
Philippines (OCR)	28.0	25.0	80%	70%	23.9	1.4	36%	33%	24.2	21.8	65%	61%	NA	41.0	99%	98%	44.0	44.0	120.1	133.2
Russian Federation (GSP)	250.0	250.0	80%	90%	285.0	250.0	64%	70%	92.7	89.0	83%	88%	173.6	NA	90%	94%	48.0	48.0	849.3	637.0
South Korea	25.0	20.0	25%	20%	4.0	7.0	14%	19%	134.2	177.2	47%	56%	487.7	157.0	63%	90%	35.0	39.0	685.9	400.2
Taiwan (OCR)	35.0	30.0	30%	30%	51.7	60.5	48%	44%	107.0	123.9	52%	53%	119.4	319.3	70%	90%	20.0	20.0	333.1	553.7
Turkey (GSP)	50.0	50.0	40%	50%	3.5	4.0	35%	40%	58.9	78.6	64%	63%	23.7	116.2	90%	96%	27.0	28.0	163.1	276.8
Uruguay (GSP petition)	2.0	2.0	40%	65%	4.0	4.0	50%	35%	13.0	7.9	74%	66%	NA	16.3	NA	82%	2.0	2.0	21.0	32.2
WATCH LIST																				
Bolivia	2.0	2.0	100%	100%	15.0	15.0	85%	85%	3.0	2.8	79%	81%	NA	1.5	NA	NA	5.5	5.5	25.5	26.8
Bulgaria	3.0	3.0	20%	25%	3.0	NA	65%	NA	9.4	8.1	81%	78%	NA	NA	84%	NA	0.3	NA	15.7	11.1
Chile	2.0	2.0	40%	40%	12.2	5.0	35%	30%	35.0	33.1	49%	49%	NA	41.0	NA	80%	1.1	1.0	50.3	82.1
CIS (listed below)																				
Armenia (GSP)	NA	NA	NA	NA	4.5	5.0	85%	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.5	5.0
Azerbaijan	NA	NA	NA	NA	13.0	12.0	85%	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	13.0	12.0
Belarus	NA	NA	NA	NA	20.0	28.0	75%	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	20.0	28.0
Georgia	NA	NA	NA	NA	6.0	5.0	86%	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.0	5.0
Kazakhstan (GSP)	NA	NA	NA	NA	25.0	25.0	78%	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	25.0	25.0
Kyrgyz Republic	NA	NA	NA	NA	8.0	10.0	85%	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	8.0	10.0
Moldova	NA	NA	NA	NA	5.0	6.0	86%	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	5.0	6.0
Tajikistan	NA	NA	NA	NA	3.0	3.0	83%	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	3.0	3.0

IIPA 2002 "SPECIAL 301" RECOMMENDATIONS
IIPA 2000-2001 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and 2000-2001 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Motion Pictures				Records & Music				Business Software Applications ¹				Entertainment Software				Books			
	Loss		Video Piracy		Loss		Piracy		Loss		Piracy		Loss		Piracy		Loss		TOTAL LOSSES	
			Level				Level				Level				Level					
	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001	2000
WATCH LIST (continued)																				
Turkmenistan	NA	NA	NA	NA	NA	5.0	NA	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	5.0
Uzbekistan (GSP)	NA	NA	NA	NA	NA	30.0	NA	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	30.0
Colombia (OCR)	40.0	40.0	90%	90%	73.0	60.0	65%	60%	35.0	33.2	53%	53%	NA	39.0	NA	85%	5.3	5.0	153.3	177.2
Czech Republic	8.0	8.0	10%	18%	8.4	3.4	48%	35%	NA	36.2	NA	43%	54.8	45.0	90%	81%	3.0	4.5	74.2	97.1
Ecuador	NA	NA	95%	NA	18.0	NA	90%	NA	9.5	8.2	68%	65%	NA	NA	NA	NA	2.3	NA	29.8	8.2
El Salvador	2.0	2.0	30%	50%	5.0	5.0	40%	40%	9.8	9.7	78%	79%	NA	NA	NA	NA	1.0	1.0	17.8	17.7
Estonia	1.5	2.0	40%	60%	9.0	9.0	60%	60%	0.8	NA	69%	NA	NA	3.7	90%	98%	NA	NA	11.3	14.7
Guatemala	2.0	2.0	60%	60%	NA	4.0	NA	60%	13.4	12.3	75%	77%	NA	0.1	NA	60%	2.5	2.3	17.9	20.7
Hungary	18.0	18.0	40%	40%	4.5	3.0	30%	20%	NA	33.3	NA	51%	43.3	9.6	90%	86%	4.0	4.0	69.8	67.9
Italy	140.0	140.0	20%	20%	40.0	50.0	23%	25%	285.0	327.0	43%	46%	NA	NA	74%	65%	23.5	23.5	488.5	540.5
Lithuania	1.5	1.5	NA	80%	7.0	7.0	85%	85%	2.5	NA	76%	76%	NA	3.5	NA	98%	NA	NA	11.0	12.0
Malaysia (OCR)	40.0	41.0	80%	80%	148.9	15.6	70%	65%	63.0	75.4	62%	66%	56.4	NA	93%	98%	8.2	8.0	316.5	140.0
Peru	4.0	4.0	50%	75%	57.8	55.0	97%	96%	13.5	12.6	59%	61%	NA	3.8	NA	70%	9.0	9.5	84.3	84.9
Poland (OCR)	25.0	25.0	27%	25%	37.0	31.0	30%	30%	55.8	82.7	49%	54%	115.8	103.1	90%	85%	6.5	7.0	240.1	248.8
Qatar	0.5	0.5	30%	25%	NA	0.2	NA	25%	3.5	3.0	84%	79%	NA	NA	NA	NA	0.2	NA	4.2	3.7
Romania	6.0	6.0	65%	60%	14.0	11.0	70%	55%	NA	17.1	NA	77%	NA	6.9	95%	91%	2.0	2.0	22.0	43.0
Saudi Arabia	30.0	40.0	45%	65%	12.0	8.0	42%	40%	NA	17.7	NA	59%	115.7	28.0	83%	NA	14.0	14.0	171.7	107.7
South Africa	12.0	12.0	15%	10%	NA	11.0	NA	13%	67.5	44.2	55%	45%	26.1	22.4	57%	70%	19.0	21.0	124.6	110.6
Thailand (OCR) (GSP petition)	24.0	24.0	65%	60%	16.6	15.6	45%	45%	38.6	42.7	76%	79%	29.1	130.5	93%	98%	28.0	33.0	136.3	245.8
Venezuela	25.0	25.0	65%	65%	54.0	30.0	62%	62%	19.7	16.9	58%	58%	NA	47.0	NA	78%	20.0	22.0	118.7	140.9
	1288.0	1221.0			2034.7	1800.3			2653.5	2821.5			1767.1	1608.8			636.4	653.3	8379.7	8104.9

Endnotes:

¹ BSA estimates for 2001 are preliminary. BSA's trade loss estimates represent losses to U.S. publishers only, and differ from the BSA trade loss numbers generally released by that association which reflect losses to (a) all software publishers in that country and (b) losses to distributors/retailers in the country in question.

² Paraguay: RIAA reports that its estimated losses to the sound recording/music industry include both domestic piracy in Paraguay and estimated losses caused by transshipment.

³ Brazil: RIAA reports the 55% piracy level in Brazil for 2001 reflects an amalgamated rate; the level of audiocassette piracy is 99% and the level of CD piracy is 47%.

APPENDIX B

METHODOLOGY USED TO CALCULATE ESTIMATED PIRACY LOSSES AND PIRACY LEVELS

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 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 2002 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 nonexistent 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:

1. Home: new shipments
2. Non-Home: new shipments
3. Home: replacement shipments
4. 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.

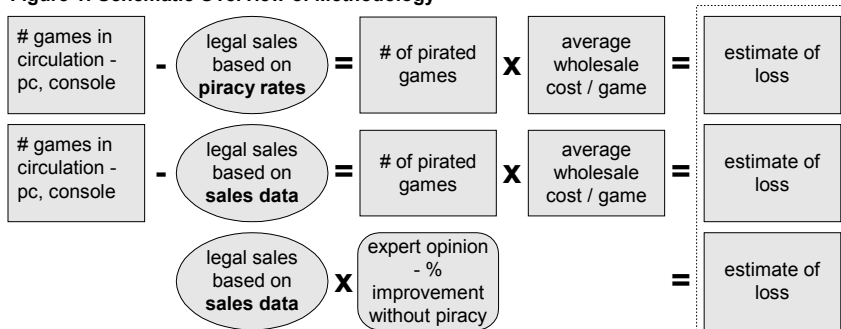
Dollar Losses: The legal and pirated software revenue was calculated by using the average price per application. This is a wholesale price estimate weighted by the amount of shipments within each software application category.

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 overall logic of IDSA's proprietary piracy estimation approach was to estimate piracy using several different methodologies and sources of data, and to draw conclusions based on a conservative reading of the numbers. The assessment methodology is illustrated schematically in Figure 1. One methodology subtracted the value of games in circulation from the value of legal sales, based on reported sales data. The second approach used the same equation, but substituted piracy rates for reported sales data. The third methodology

Figure 1: Schematic Overview of Methodology



used expert opinion about how business would improve, given minimal levels of piracy. The process was iterative. Quantitative findings were reviewed for plausibility. Revisions and/or additional data were then obtained as necessary to resolve issues. Calculations were carried out separately for console and computer-based games in each country of interest. Separate analyses for computer and console games were needed because these products differ in three key respects – prices per game, ratios of games per platform, and data sources. *Games in circulation* were derived from industry data on games per console (for different kinds of consoles), and games per computer, with a special emphasis on residential machines. *Sales data* came in two forms – directly from actual sales figures, and indirectly from knowledge or piracy rates. *Rates* were derived from observations by people in a position to know about piracy in specific countries. *Prices* were wholesale, as reported by game publishers. Because many of the estimates needed in these calculations were of necessity approximate, considerable effort was expended to cross-reference multiple sources of information whenever possible. Data sources include:

- Public information, e.g., population figures, seizure data, or articles in the trade press.
- Confidential industry reports related to game and hardware use.
- Confidential company-specific data, e.g., sales, software/hardware ratios.
- Expert opinion from representatives of IDSA's member companies. Typically, these were individuals who were either close observers of local conditions in countries of interest, or corporate staff with the responsibility of designing, implementing and monitoring each company's piracy assessment and enforcement efforts.

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 video product and the number of shops and vendors that sell pirate video product are multiplied by the average number of pirate video product rented or sold per shop or vendor each year.
 - b. The resulting total number of pirate video product sold and rented each year in the country is then multiplied by the percent of pirate video product that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
 - c. The figure resulting from the foregoing calculations is an estimate of the number of legitimate sales of U.S. motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate video product, to equal losses due to video piracy.

2. For partially developed markets:
 - a. The number of legitimate video product 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 video product sold or rented annually in the country.
 - b. The resulting total number of pirate video product sold and rented each year in the country is then multiplied by the percent of those pirate video product that would have been sold or rented legitimately and adjusted to reflect the U.S. producers' share of the market.
 - c. The figure resulting from the foregoing calculations is an estimate of the number of legitimate sales of U.S. motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate video product, to equal losses due to video piracy.
3. For fully pirate markets:
 - a. Either: (a) the number of blank video media sold in the country annually is multiplied by the percent of media used to duplicate U.S. motion pictures to equal the number of pirate copies of U.S. motion pictures estimated to be sold in the country each year; or (b) the number of VCRs/VCD/DVD players in the country is multiplied by an estimated number of U.S. motion pictures on video that would be rented and sold per VCR/VCD/DVD player per year.
 - b. The figure resulting from each of the foregoing calculations is an estimate of the number of legitimate sales of U.S. motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate video product, to equal losses due to video piracy.

Television and Cable: Losses are estimated using the following method.

1. The number of broadcast television 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 broadcast television 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 transmission, 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 the unauthorized systematic photocopying of books.

APPENDIX C

COUNTRY SURVEYS

PRIORITY FOREIGN COUNTRY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

UKRAINE

EXECUTIVE SUMMARY¹

On March 12, 2001, Ambassador Zoellick designated Ukraine as a Priority Foreign Country (PFC) for its failure to implement the Joint Action Plan agreed to by then-President Clinton and President Kuchma in Kiev on June 1, 2000. The designation in March commenced a formal investigation of the IPR protection and enforcement failures in Ukraine, consistent with Special 301 legal requirements. On December 20, 2001 that formal investigation ended and the U.S. government announced the imposition of trade sanctions amounting to \$75 million, effective on January 23, 2002, as the result of the continued and complete failure on the part of the government of Ukraine to meet its obligations under the Joint Action Plan, namely to properly regulate optical media production and to engage in effective enforcement of copyright law in Ukraine. The imposition of sanctions in January 2002 were in addition to the complete withdrawal of trade benefits to Ukraine under the Generalized System of Preferences program; that suspension was announced on August 10, 2001, effective August 24, 2001.

On January 17, 2002, the Ukraine Parliament (Rada) adopted a severely deficient law that was intended to regulate optical media production and distribution (Optical Disc Licensing Bill #8278-1). This law, signed by President Kuchma on February 7, 2002, has many significant shortcomings and will likely not permit effective regulation of the production and distribution of illegal optical media discs as required by the Joint Action Plan. It is unfortunate that, after working with the copyright industries for two years to craft an effective bill consistent with international standards and experience, the Ukraine Parliament chose to adopt a watered-down version that falls far short of the proper implementation called for in the Joint Action Plan. The U.S. government properly reacted to that bill calling it an insufficient measure and refusing to forestall the trade sanctions or to re-institute the GSP benefits.

In sum, Ukraine has not adopted an effective optical media regulatory regime and failed to implement the Joint Action Plan by providing adequate and effective copyright protection and enforcement. For these reasons, IIPA recommends that in 2002 Ukraine be retained as a Priority Foreign Country (PFC).

The optical media law is only one part of an overall weak legal regime in Ukraine. That law, coupled with the absence of any meaningful enforcement activity by the government, has resulted in a climate that, during the course of 1999 to 2000, made Ukraine the largest producer and exporter of illegal optical media discs (CDs, CD-ROMs, DVDs) in Central and Eastern Europe. During 2001, heeding close international governmental scrutiny and media attention, some of the existing plants either suspended their operations or moved them to neighboring countries – namely Russia and Belarus.

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

While the current plant production (and capacity) is below the levels reported in early 2001, the illegal distribution network remains and the environment is still ripe for Ukrainian producers of illegal material to quickly ramp up to the once high levels of illegal production. Furthermore, because of the overall weak enforcement regime, especially at the borders, pirate inventory continues to be shipped from Ukraine, and other pirate product is transshipped throughout, to other countries in Eastern and Central Europe.

Without the adoption of an effective optical media law and without the implementation of a legal infrastructure that can effectively police against large-scale commercial piracy, Ukrainian plants could, at any time, easily restart illegal operations back up to the capacity they had in 2000 and 2001. That is why Ukraine remains a major threat to the growth of legitimate markets domestically and in the region. Ukraine also has failed to use its criminal code to crack down on the organized crime syndicates distributing material in and out of Ukraine, and has failed to properly police its borders that permit this wide-scale shipment and transshipment of these materials.

The key to Ukraine's success will be how quickly it can get itself back on track to adopt and implement the effective laws it pledged to adopt in June 2000. On June 5, 2000, Ukraine formally announced the Action Plan in a joint statement issued by then-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. Now, 16 months after the agreed to enactment date, that plan remains a well-intentioned but unimplemented scheme.

The Action Plan consists 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 significantly improve the copyright law and to introduce other legal reforms, including criminal and administrative penalties, necessary to implement a modern copyright regime.

The optical media law adopted in January 2002 (Optical Disc Licensing Bill #8278-1) is deficient in a number of key areas. An Implementing Decree signed on January 30, 2002 has not directly improved the prospect for effective optical media regulation and does not address the deficiencies of the Optical Disc Law. To name just a few of the many deficiencies: the Optical Disc Law (and Decree) do not cover all of the equipment used in the production of (illegal) discs, especially the matrices used in the manufacturing process; they leave room for manipulation of the use of international identification practices (unique identifiers); they do not effectively regulate the issuance, suspension, or revocation of a license for plants producing or distributing discs; they fail to provide for effective means to seize equipment and discs; and they do not permit effective or proper inspections of the plants. So unfortunately, Ukraine has still not implemented the Action Plan in the first two key parts detailed above. Even with this new law and the late-January Decree, the production and distribution of illegal optical media discs can continue without effective enforcement.

In early 2001, the problem of optical media production consisted of at least five known CD plants capable of producing over 70 million discs a year, which was more than Bulgaria produced at the height of its capacity. Currently the plant capacity is limited to at least two operating plants,

but with several other plants still in Ukraine having suspended operations. Unfortunately, with an ineffective law now in place, these plants could restart their operations without effective enforcement by the copyright industries. In 2000 losses to the music industry were estimated at \$200 million; in 2001, the estimated losses were \$170 million, reflecting the plant migration and suspension.

The plants in Ukraine mostly produce illegal musical CDs, as well as business and entertainment software CD-ROMs. More recently in late 2001, one of the plants began to produce blank CDs and then orchestrated other underground reproduction facilities to press music on those CDs (at so-called "CD-R plants"); the original plant then completes the piracy of these recordings by printing and inserting the disc's art work for final sale into the illegal marketplace.

Even with the suspension or closure of some of the plants and the migration of others into third countries, the overproduction of years past was so huge that back-catalog material continues to flood 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 and the Middle East. Plenty of previously produced material also is still being stored in or distributed through Ukraine. Illegal discs produced in Ukraine have been seized by police in the following 16 countries: Romania, Hungary, Poland, Bulgaria, Peru, United Kingdom, Finland, Germany, Italy, Lithuania, Moldova, the Slovak Republic, Greece, Israel, New Zealand and the United States. The recording industry reports seizures made by their own local representatives in a number of additional countries. This is evidence of the wide-scale disruptive effect of the Ukraine optical media production and distribution problem.

As IIPA reported last year, audio CDs and software CD-ROMs are not the only materials being reproduced and distributed in Ukraine. Audiovisual VCDs have also been the subject of piracy; in one case in April 2000, over 11,000 VCDs made in Ukraine were seized by the motion picture anti-piracy organization in Bulgaria.

In 2001, customs authorities began to take some action, seizing several thousand CDs. However there still has not been the promised follow-up to these seizures with the commencement of criminal investigations and convictions. Much more needs to be done by customs authorities in order to stop the trafficking of material into and out of Ukraine by seizure and confiscation and by application of the criminal laws. In addition, in a step backwards, an onerous customs registration system was adopted by a decree in May 2001.

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. A further positive step was the passage of copyright law amendments effective in September 2001, including finally fixing the protection for older (pre-existing) works and sound recordings.

Until passage of the copyright law amendments in July 2001 (effective date September 5, 2001), 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) were unprotected in Ukraine. Ukraine made progress in 2001 by finally correcting this problem for both works and sound recordings. Now, in order to create legitimate markets for music and motion picture materials, Ukraine police will have to properly implement the 2001 law to rid the marketplace of back-catalog material that has flooded the market (along with optical media products) because of the past and present legal and enforcement deficiencies.

In addition to the optical media regulations, other major legal reforms are needed to provide effective protection and enforcement for works and sound recordings. Criminal code amendments were adopted by the Parliament in April 2001 and went into force on September 1, 2001. These amendments fixed one problem – applying the criminal penalties for the first time, to neighboring rights violations; but the code was not amended to remove the “substantial material harm” threshold that will continue to act as a bar to the effectiveness of the criminal provisions.

Ukraine still must also amend its criminal procedure code, its customs code, and its administrative/regulatory code to effectively address systematic violations of copyright and neighboring rights laws, including amendments to correct all of the shortcomings in the optical media production provisions. Ukraine must make these changes (and fix its overall enforcement scheme) in order to comply with the World Trade Organization TRIPs Agreement for its eventual accession. The current package of legislative proposals under discussion in Ukraine in the context of WTO accession falls short of bringing the intellectual property protection regime into compliance with TRIPs, and are not likely to lead to improvements in the overall enforcement situation on the ground.

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 (this law was significantly amended in July 2001, effective September 5, 2001).

On October 25, 1995, Ukraine adhered to the Berne Convention (Paris Act); Ukraine also adhered to the Universal Copyright Convention on December 25, 1991 but acknowledged their successor status to the Soviet Union’s membership in the U.C.C., effective May 27, 1973. On February 18, 2000, Ukraine adhered to the Geneva Phonograms Convention. All of these acts were obligations, even if some were 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 with its legal reforms, 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 created conditions ripe for piracy: Until 2000, foreign sound recordings weren’t protected at all; older material including pre-1973 works and pre-1995 sound recordings were unprotected until September 2001, thereby undercutting any marketplace for newer material; the optical media plants continue to operate freely and without effective control mechanisms – the new law has yet to be put into force (and given its deficiencies there are low expectations that it can be in any way effective); organized criminal syndicates continue to distribute material in and out of Ukraine with impunity; there are no administrative sanctions being imposed, and the new criminal sanctions have not yet been put to use, nor are there any aggressive 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). Criminal sanctions do exist for violations of copyright pertaining to works and neighboring rights and were, for the most part, improved by amendments effective in 2001. However, they have not deterred commercial piracy for two reasons: (1) the penalties have a “significant material harm” threshold that remains cloudy and this is a bar to the use of the provisions; and (2) simply, the criminal sanctions (old or new) have yet to be used to convict anyone in a copyright or neighboring rights case. These provisions must be used against the criminal syndicates involved in wide-scale piracy of recorded music as a first step.

To be more effective, the criminal code must be amended to remove or clarify (and set at a low level) the “significant material harm” threshold. The criminal procedure code also 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; neither recently adopted amendments, nor the recently proposed (further) changes fix the loopholes and difficulties facing effective border enforcement. These failures permit illegal material to flow freely into and out of Ukraine. The customs code must be amended to permit *ex officio* border enforcement actions; border enforcement action needs to be effective and must be carried out in cooperation with rightsholders.

Equally important as Ukraine’s other 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 – and 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.

IIPA GSP PETITION AND PARTICIPATION IN THE PFC INVESTIGATION AND DETERMINATION HEARINGS IN 2001

The IIPA’s GSP Petition and Testimony at the U.S. Government’s PFC Investigatory Hearing Detailed Ukraine Practices That Result in Huge Industry Losses

As a result of its NTR status, Ukraine is qualified to be 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 status for 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 that it provides “adequate and effective protection of intellectual property rights . . .” This includes that a country is providing adequate and effective protection and enforcement of copyright and neighboring rights. Ukraine has not been fulfilling the statutory obligations of GSP. In fact, at the same time that Ukraine was causing millions of dollars of losses to the U.S. due to piracy, it was

enjoying trade benefits worth close to \$40 million without duty, or over 4.6% of its total imports into the U.S. in 2000.

As a result of this situation (under similar circumstances 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.

At the same time as the GSP investigation was underway by the U.S. government, Ambassador Zoellick on March 12, 2001 designated Ukraine as a Priority Foreign Country. The PFC investigation moved on a parallel track with the GSP case. Public hearings were held on April 27, 2001 with IIPA testifying and filing voluminous written material in support of its petition. In the filings, the IIPA identified the losses to its members resulting from Ukraine's acts, policies and practices. The IIPA estimated that these losses (from just three of its members with available statistical information) was \$216.8 million in 2000—that is, but for the Ukrainian piratical practices, \$216.8 million would have been repatriated back into the U.S. economy.

The IIPA estimates were as follows: the Recording Industry of America (RIAA) estimated \$160 million in losses; the Motion Picture Association of America (MPAA) estimated \$40 million in losses; and the Business Software Alliance (BSA) estimated its U.S. company losses were \$16.8 million in 2000. The other members of the IIPA, namely the Association of American Publishers (AAP), the American Film Marketing Association (AFMA), the Interactive Digital Software Association (IDSA), and the National Music Publishers Association (NMPA) did not have loss figures available. However, these industries were then and continue to be hurt by piracy in Ukraine and the failure of the government of Ukraine to deter piracy. To illustrate, the illegal optical media discs seized by authorities in Ukraine and in the other 16 countries where these Ukraine discs have been illegally distributed, contain unauthorized recorded music (RIAA), audiovisual material (MPAA and AFMA), underlying musical compositions (NMPA), business software (BSA), entertainment software (IDSA), and literary material (AAP). The PFC investigation figures of \$216.8 million are losses to American repertoire that resulted from Ukraine's practices anywhere in the world. So, for example, the arrest of individuals in London (in December 2000) with illegal discs of the Beatles album #1 produced in Ukraine was not counted in the PFC investigation losses because that is British, not U.S., repertoire.

On August 10, 2001 the U.S. government, satisfied by the evidence presented about the ineffective Ukraine legal and enforcement regime, announced it was suspending all of the GSP benefits to Ukraine, effective August 24, 2001. If retained for a full year, this would result in roughly \$40 million in losses to Ukraine judging by the last year when GSP benefit figures were available (2000), as noted above.

On December 20, 2001 the formal PFC investigation ended and the U.S. government announced the imposition of trade sanctions amounting to \$75 million, effective on January 23, 2002.

The GSP benefit withdrawal and PFC trade sanctions are the result of Ukraine's complete failure to meet its obligations under the Joint Action Plan to provide for an adequate and effective copyright protection and enforcement regime in Ukraine. These steps by the U.S. government were fully supported by IIPA. It remains the hope of the IIPA that these harsh steps undertaken by

the U.S. government in 2001 and early 2002 of withdrawing and suspending trade benefits and imposing trade sanctions will act as a call to action for the Ukraine government to take the positive steps laid out in the Joint Action Plan in 2000 to eradicate the optical media production and distribution problem and to develop an effective copyright legal and enforcement regime. If undertaken properly, this will encourage investment for the benefit of U.S. and other foreign investors, as well as for Ukrainian authors, producers, and copyright industries.

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 allowed Ukrainian plants to become a major source of the production, distribution and export of illegal optical disc media (CDs containing musical works, audiovisual VCDs, and CD-ROMs containing entertainment and business software). Even with the current plant production slow-down, the past practices have left a flood of illegal optical media product in Ukraine and the export of millions of pirate CDs throughout Eastern, Central and Western Europe over the past several years. The current inability to properly regulate means that production of even more unauthorized material is a looming threat that can be restarted at any time.

In early 2001, it was estimated by the recording industry (International Federation of the Phonographic Industry, IFPI) that the production capacity of optical media material was around 70 million units per year. The demand for legitimate CDs in Ukraine is still approximately 5 million units. In late 2000/early 2001, initial reports of the closure of some of the plants by the Government of Ukraine turned out to be false when it was discovered that previously government-inspected and supposedly “closed” plants were still in operation. So it was the case that until the second half of 2001, at least five plants (identified in last year’s report) continued to produce predominantly pirate product. In a September 2001 *Kyiv Post* article, a Ukraine government minister announced that four of the five plants had been closed, but acknowledged that the closure was not permanent, and that some of the plant lines may have been exported to other countries.

At present, the IFPI reports that one of the five plants reported on last year has suspended all or part of its operations and moved its production lines to Belarus and Russia. Of the remaining three (known) CD plants in Ukraine, one is cooperating with the international recording industry on establishing proper identification coding and production operations. However, one of the remaining (known) plants in Kiev has transformed its illegal CD production and now makes “legal” blank recordable CDs but orchestrates that legal production with the sale of these CD-Rs to CD-burning establishments. The plant further coordinates this activity with the illegal production of artwork which is collated with the disc and then sold in Ukraine and/or shipped abroad. As noted, the other plants that suspended their operations could, at any time, restart and expand their illegal production lines. Now that a weak optical media law is in place, this becomes a very real threat and one that will only be “legitimized” by the implementation of this law. In the meantime, illegal discs of music, software (business and entertainment) and audiovisual material (VCDs) are prevalent

at street kiosks and widely distributed by commercial enterprises for distribution in Russia and other C.I.S. countries as well as other parts of Eastern and Western Europe.

In May 2001, the Ukrainian government finally agreed to direct the General Prosecutor's Office to collect the wealth of evidence (including forensic tests) submitted by the copyright industries of the massive piratical activity by the Ukraine CD plants, and to commence a criminal investigation of the illegal plant activity. On January 31, 2002, after eight months, the Prosecutor's Office announced that it was terminating that investigation because of a lack of sufficient evidence of any violations of the law. So, the plant operators will not be prosecuted by the criminal laws even though the plants have been producing and distributing more illegal material than those in any other country in Europe and have been doing so for years. On this point, there is no dispute since optical media regulation was the basis of the Joint Action Plan, and the Ukraine government has openly acknowledged plant piracy.

The Action Plan originally announced by the Ukraine and U.S. governments in June 2000 was intended to properly and completely address this problem by taking the steps necessary to regulate optical disc plants, and by improving 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 in the Ukraine and in other countries, 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 the individuals 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 disc media). All of the plants would be required under the Action Plan to adopt source identification (SID) codes to deter plants from infringing production of optical discs.

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); it was signed into law on November 15, 2000. That law was not aimed at and does not achieve improvements in copyright enforcement against CD plants. Adopted over the objections of the copyright industries, that law is not an alternative to plant licensing regulations, and it remains unclear whether the 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 effective January 1, 2001. As predicted, the Hologram Sticker law proved itself to be open to abuse and fraud. To make

matters worse, the law completely exempted exports, the real problem with overproduction in Ukraine; and it exempted manufacturers, the real source of the problem. It established an unworkable administrative burden on legitimate businesses and kept legal product from the market, thus permitting more pirate material to flourish in the vacuum. The Hologram Sticker law was not repealed by the January 2002 Optical Disc Law.

After almost two years of debate, the Ukraine Parliament adopted Optical Disc Licensing Bill #8278-1 on January 17, 2002 as its response to the Joint Action Plan. That law which was signed by President Kuchma on February 7, 2002, goes into effect 60 days after its official publication.

In fact, the Optical Disc Licensing Bill has numerous flaws that will likely prevent it from effectively stopping piracy in the production and distribution of optical media discs. The experience of the copyright industries in many countries other than Ukraine has shown that there are at least six basic features of an effective optical media regulatory scheme.

To be effective, an optical disc plant law must (1) require plants to obtain a business license to commence production; (2) establish a basis for regulators to deny, suspend and revoke the license upon evidence of illegal activity; (3) require import and export licenses and transparent searches of these licenses; these licenses must cover the goods (discs) and machinery and equipment (including the raw materials) used in the production of optical discs; (4) require the plants to apply internationally recognized identifiers on the goods and machinery, to keep records of production and distribution licenses, and to cooperate with the police upon inspection; (5) require plant inspections and in particular, “surprise” plant visits, including means for the rightholder organizations to participate in such plant visits, to obtain evidence and forensic tests, and access the plant’s records; and (6) require a comprehensive list of enforcement procedures, remedies, sanctions, powers granted to authorized officers, including the powers to seize equipment and discs during plant visits.

The Ukraine Optical Disc Law of January 2002 falls short of these key features. In addition, there is now a patchwork of conflicting laws (including the General Licensing Law), decrees, and regulations. This will only cause confusion when the OD Law is finally implemented.

On its face, the Optical Disc (OD) Law has several deficiencies. The OD Law does not properly regulate all of the equipment used in the production of (illegal) discs, in particular it essentially does not cover the matrices used in the manufacturing process and keeps some of the important records and licensing information out of reach from investigators seeking information on possible illegal activity. It leaves loopholes in the requirement that Ukrainian plants comply with the international identification practices, namely SID coding, in all production facilities; nor are the plant operators required to keep sample copies of the discs; all of this evidentiary and coding information is essential to identify the source of the illegal material. The OD Law does not effectively regulate the issuance, denial, suspension, or revocation of a license for plants producing or distributing discs—the law allows convicted plant operators to be reissued a license, and delays the suspension of licenses even in cases of clear violations. The OD Law does not permit effective or proper inspections of the plants – for example, surprise inspections are permitted only after compliance with cumbersome and timely procedures that will eviscerate their effectiveness; it also does not allow for either the effective securing of evidence or the seizure of equipment and discs during plant visits. The OD Law contains loopholes for import and export of some of the tools (matrices and manufacturing equipment) essential to produce discs. Finally, the liability for

violators is too limited—with low minimum penalties; no provisions for confiscation or destruction of discs, material or equipment; weak administrative penalties; and weak criminal penalties (a high threshold will bar use of the criminal penalties in many cases).

Overall, the OD Law needs significant improvement before it can be enforced in a way to bring meaningful protection and enforcement in Ukraine. Already, there is disagreement among Ukraine experts as to how this law will be implemented; the January 31, 2002 Decree, according to some experts, could be used to improve the plant inspection deficiencies in the law, while other experts disagree. Many in the Ukraine Parliament and government worked closely with the copyright industries for two years crafting legislation that incorporated the experience of industry experts in other countries (such as Bulgaria) to create the proper legal framework to regulate the plants and to rid Ukraine of the influence of organized criminal syndicates in the plant production businesses. Instead, in the end, Ukraine unfortunately chose to enact a weakened bill that will likely prove ineffective.

Last, there is one additional lingering issue preventing effective enforcement in Ukraine. In 1999, the Ukraine Copyright Agency (SCAU) was closed and then reorganized into a much weaker structure. The government of Ukraine never clarified 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, CIVIL CODE, AND OTHER LEGAL REFORMS

Amendments to the Copyright Act and Related Enforcement Laws Were Adopted; Need for Proper Implementation

In 2001, two important pieces of the Ukraine legal regime were amended. The Copyright Law of 2001 (effective September 5, 2001) significantly revised the Copyright Law of 1993. Also, the Criminal Code was amended on April 25, 2001, effective September 1, 2001. In addition, Ukraine made very positive steps to modernize its legal regime by acceding to and implementing (at least in part) the two WIPO Internet treaties in 2001. Still, important pieces of Ukraine's legal regime remain to be adopted—most importantly, the criminal procedure code, the customs code, and key administrative remedies. A lingering fear is that adoption of a new civil code with extensive IPR provisions will undermine the copyright law and its enforcement.

Until 2001, the legislative deficiencies in Ukraine included 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). In 2001, Ukraine fixed item 1 above, the protection for pre-existing works and sound recordings; and, it amended the criminal penalties provisions (item 4 above) making some improvements, though additional changes are still necessary.

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). All during this time, the United States has unilaterally provided 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.

Following the breakup of the Soviet Union, the Ukraine Parliament passed a 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 later adopted.

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) was incompatible with its bilateral trade agreement with the U.S., as well as with Ukraine's Berne Article 18 and national treatment obligations.

On February 18, 2000, Ukraine adhered to the Geneva Phonograms Convention, also an obligation of the bilateral trade agreement. However, the copyright law of 1993 did not provide protection for pre-existing sound recordings. That created 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 disc piracy of foreign musical recordings to flourish. And by excluding pre-existing sound recordings, Ukraine held itself out as a safe haven for back-catalog pirates.

Fortunately, there was good news in 2001 on this issue. As part of the Action Plan, Ukraine had agreed to correct this deficiency with amendments to the copyright law for both works and sound recordings. In the September 5, 2001 Copyright Law amendments, Ukraine added provisions intended to fully comply with its obligations to grant pre-existing foreign works and sound recordings protection if they are less than 50 years old. Although these provisions provide a shorter term of protection than the protection afforded by the United States to Ukraine works and sound recordings, it is a vast improvement from the pre-2001 situation. Also, although the intention of the drafters was clear, the actual provisions are difficult to understand especially for material that was never protected in Ukraine such as sound recordings (pre-February 2000) and for nonrenewed U.S. works (covered under the pre-1978 U.S. copyright laws). However, numerous Ukraine copyright law experts and government officials assured the IIPA and U.S. government officials during talks in 2001 that the provisions in the September 2001 Copyright Law do provide full 50-year "retroactive" protection for works and sound recordings, and that that will be the outcome when the provisions are put to use by Ukraine enforcement officials or the courts.

Another major legal shortcoming in Ukraine has been the lack of effective criminal penalties to deter piracy. 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. In April 2001, the Ukraine Parliament adopted amendments to the criminal code, including a new Article 176 applicable to infringement of copyright and neighboring rights. The adoption of this provision applicable to protect infringements involving producers of sound recordings or performers was a step in the right direction, closing a gaping loophole in the old law. Unfortunately, the new provisions deleted an interim law with tougher five-year penalties and reverted to sanctions that provide for up to two years' imprisonment and fines ranging from 100 to 400 times the minimum wage (roughly U.S. \$2,000 to \$8,000) for copyright and neighboring rights violations. These fines can multiply up to 200 to 800 times the minimum wage for repeat offenders, and up to 500 to 1000 times the minimum wage in certain instances (for officials abusing their "official positions").

One major shortcoming of the criminal code provisions that remains after the September 2001 amendments is that the penalties can only be imposed for "substantial material damage" – this is a standard that creates an unwarranted threshold for copyright piracy. This provision creates two problems: (1) it sets a threshold that is too high; and (2) the threshold will be impossible to prove with the certainty necessary for criminal proceedings. The law should have been (and now needs to be) amended to include a low and clear threshold to instigate a criminal action—IIPA recommends a threshold no higher than 50 times the minimum daily wage. Not only would this help to identify criminal infringing acts for prosecutors, but it would 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. In any case, none of the existing or new penalties have ever been applied in any copyright or neighboring rights case, so they are not being used to deter commercial piracy as they could.

As part of the Action Plan, Ukraine agreed not only to enact a criminal penalties bill, but also appropriate administrative remedies to deter piracy. These administrative remedies must be properly implemented alongside available and properly implemented criminal penalties at levels sufficient to deter piracy for effective copyright protection, as well as to meet any future 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. Ukrainian criminal procedures currently require rightholders to file complaints to initiate actions. Prosecutors, not the police, are responsible for initiating infringement cases. Enforcement would be significantly improved if the police were afforded *ex officio* authority to initiate cases without any formal complaint of the copyright owner. None of this is currently permissible under the existing criminal procedures code. The current criminal procedure code must therefore be amended to grant this authority as soon as possible in 2002.

Ukraine still does not have an effective customs code to deter piracy at the border. Neither recently adopted amendments nor newly proposed ones properly amend the loopholes and deficiencies in the current border enforcement scheme. These failures permit illegal material to flow freely into and out of Ukraine. The customs code must be amended to make border enforcement effective as soon as possible in 2002.

Amendments to the Civil Code (Chapter IV) pertaining to copyright continued to circulate for another year for consideration by the parliament. For many years, IIPA has urged that this draft law not be passed because it is a dangerous development jeopardizing effective application of the Copyright Act, and would be 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. In December 2001, the latest draft of Chapter IV of the Civil Code had been reduced to 14 articles. This is an improvement over earlier drafts that contained over 140 articles (and then 50 in a subsequent draft), many which would have undercut the copyright law. However, even the shorted version with 14 articles is confusing and could overlap the copyright provisions; and, because it makes reference to over 90 other laws this could make it obsolete if and when any of the other laws referred to are amended. IIPA continues to urge that the civil code Chapter IV should not be adopted, certainly not in a manner that would in any way weaken the copyright law or its enforcement.

In 2001, Ukraine officials reported to IIPA that the Ministry of Education agreed with the U.S. and European software industries to adopt a “legal” software program, in other words a software asset management program for the educational sector, to ensure that Ukrainian schools used only licensed software. In exchange, the software industries agreed to provide their software at special rates for use in Ukrainian schools. The agreement will be implemented by June 2002. However, the software industry reported that a government-wide program to this effect was not finalized in 2001. That was disappointing to the software industries. The business software industry has been trying to convince the Ukraine government for a number of years to adopt a software asset management decree—to get the government ministries to use legal copies of business software—but so far, without success.

Ukraine was not a signatory to either of the two new WIPO Internet treaties when these were completed in 1996. But on September 20, 2001, the Ukraine Parliament ratified legislation to accede to both of the treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). On November 29, 2001 Ukraine deposited its instruments of accession to both treaties with the WIPO (on March 6, 2002 the WCT will go into force and it is expected that sometime later in 2002, the WPPT will also enter into force once 30 countries have acceded to).

The Copyright Law of 2001 also included amendments to implement these treaties. These actions by Ukraine, if properly enforced, are intended to protect against Internet and other forms of digital piracy, and should help with the development of electronic commerce in Ukraine. This is an important step for Ukraine and the other C.I.S. members since 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 the 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 WIPO.

ENFORCEMENT

Until the Action Plan is fully implemented, the enforcement situation for the copyright industries will continue to be a failure. The inadequate enforcement regime has, for many years, been preventing entry by the U.S. creative industries into the country, and stifling the development of local copyright industries. Without the passage of an effective optical media law and the other key enforcement tools (such as strong customs laws), there is no way to stop the illegal optical media production and distribution, or to combat the failures at the border to stop or even slow the exporting or transshipment of that material, not to mention the failures of the police or judicial bodies to crack down on commercial pirates, much less on retail-level activities.

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. Second, levels of piracy in the entire region will not get better until the Ukrainian government fully implements the Action Plan and imposes strict monitoring of the illegal optical disc media production facilities in Ukraine, steps up its border enforcement, and imposes criminal penalties aimed at the commercial pirates, especially the criminal syndicates, that are producing, distributing, and transshipping materials into, through, and out of Ukraine, mostly for foreign consumption.

In the first six months of 2001, Ukraine law enforcement officials reported that officers had inspected around 11,000 shops, businesses and warehouses and seized 217,000 videotapes, 166,000 audiotapes and 183,000 CDs. All told over UAH 5 million (US\$939,700) worth of material was confiscated. There were no reports of the final disposition of the material confiscated, such as its destruction and/or the conviction and sentencing of any offender of the IPR laws. Instead, the Ukraine government said that 44 criminal investigations were commenced in the first six months of 2001 compared with 19 criminal cases instigated in all of 2000. In addition, the police reported a “major raid” against the Petrivka CD market in late January 2002, seizing about 13,000 CDs, videotapes, and software CD-ROM discs, according to a Ukraine news report. It was reported as the “first large crack-down on street vendors of illegal CDs in the last few years.”

The copyright industries reported the following enforcement statistics in 2001:

The Business Software Alliance (BSA) reported 61 raids conducted; 49 cases were commenced; two defendants were convicted; four were acquitted or dismissed, and there are 43 cases pending. There was one case that resulted in a jail sentence; one resulted in a suspended prison term. But unfortunately, in the only two cases involving business software that commenced in 2001 that led to a conviction in the court of first instance, both of these cases have been appealed by the defendants so neither of the software sentences have actually been served to date according to IIPA’s information. There were only two cases in which a criminal fine was imposed.

The International Federation of the Phonographic Industry (IFPI) and the Recording Industry Association of America (RIAA) reported that there were 116 cases commenced under the criminal code (Art. 176), of which 90 involved music piracy. The industry reported that the new criminal code provisions actually created obstacles to the investigation of copyright crimes that were not present under the old provision (Art. 136). Many of the criminal cases resulted in the confiscation

of the products and some fines (the amounts were not available). None of the cases resulted in prison sentences; many of the cases never went to trial, but were dismissed.

Under the administrative code violations, the IFPI and RIAA reported that there were 3,542 registered cases, most involving the sale of copyrighted product without hologram stickers (and about 60% of these were CDs and audiovisual material cases). The administrative penalties meted out for these violations were not reported.

MPA reported a single case in which a pirate received a suspended (five year) sentence.

In all, the copyright industries reported that the Economic Police seized 135,248 videocassettes; 104,080 audiocassettes; and 77,271 CDs in 2001. In total, the Economic Police, the Tax Police and other agencies seized 1 million items, but only a small percentage of these were destroyed.

IFPI and RIAA report that Ukraine is still the second largest music market after Russia in the C.I.S. The recording industry reports that piracy of international repertoire is estimated to be at least 85%. The total value of pirate sales, including exported CDs, is estimated at some \$170 million.

Ukraine continued to export millions of pirate CDs in 2001. These include not only declared exports of product, but also many thousands of smuggled shipments as well. Police inspectors reported (in one newspaper account in October 2001) that one quarter of the material they inspected was pirate and that they seized 21,000 items through October 2001. The industry reported that the formation of a special IP unit in the Economic Crimes Department in the Ministry of Internal Affairs has led to an increase in the quantity of police raids; however, these raids have not focused on the large distributors, but rather on the small retailers. This has not deterred piracy. Further, there were almost no customs seizures conducted on the Ukrainian-Russian border where illegal traffic is the most active, and little or no import/export activity anywhere aimed at optical disc piracy. This compares sharply with effective customs seizures in neighboring countries such as Poland, on goods leaving Ukraine. In sum, the lack of effective police and customs activity means that pirate production continues to damage not only the Ukrainian market, but also other markets in the region, as well as in the EU.

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.

According to the Business Software Alliance (BSA), the estimated trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$29.7 million in 2000; the level of piracy was estimated to be 89% in 2000. Figures for 2001 have not yet been finalized. In 2001, the software industry continued to experience exceptionally high levels of pirate product from Ukraine in particular, so a big part of the estimated losses above reflect piracy in Ukraine. 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 discs were seized. So, the software industry is vulnerable to the same optical media production and distribution problems that plague the recording and audiovisual industries.

In April 2001, the business software industry began working with the Ukrainian police and prosecutors to undertake the first raids ever against computer shops installing illegal copies of

business software onto the hard disks of computers which are sold to consumers (this is known as HDL reseller piracy). Between April and June 2001, a total of 10 HDL resellers were raided by the police; this was seen as a very encouraging development. However, instead of continuing their focus on these important targets, beginning in the fall of 2001, the police shifted their efforts to easier targets such as small computer clubs and Internet cafes. By the end of 2001, the software industry recorded a total of 61 police raids involving illegal business software; 14 HDL raids; 36 raids of computer clubs or Internet cafes; and 11 raids against small CD-ROM resellers.

In 2001, the business software industry received favorable judgment in two cases, in the court of first instance. On July 23, 2001, the Goloseevskiy District Court sentenced the director of an HDL reseller firm to a suspended imprisonment term of five years (with a three-year probationary period). The defendant was also ordered to pay a \$320 fine and was banned from holding a directorship position in other companies in the future. In a second HDL reseller case decided by the same court on November 29, 2001, two persons from a shop were fined \$640 and sentenced to pay damages to the rightholder (totaling \$11,000). The respective defendants have appealed both cases.

Although the business software industry has had some success with the Ukraine police, prosecutors and the courts, as described above, it is discouraging that in many other cases, strong leads and information provided by right holders to the police resulted in no action being undertaken. To date, all raids conducted by the police were initiated without consulting the right holders. Further, civil litigation remains nonexistent, as a result of the absence of *ex parte* provisions in practice, which makes it impossible for rightholders to collect evidence without police assistance. Disappointingly, ongoing attempts to persuade the government to issue a software asset management 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 material currently or previously produced in Ukraine, is still being widely distributed in the region. As in the music industry, the Ukraine producers created a regional problem with their unregulated production, and now with the distribution and export of material throughout Ukraine, Romania, Poland, the Czech Republic, 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 the video piracy rate is over 80%; optical disk piracy is at 99%; and broadcast piracy remains at 95%.

As in prior years, the main piracy problem for the MPA remains rampant video piracy in shops and street kiosks. It is estimated that for all types of audiovisual piracy the levels are over 80%. 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. Pirate DVDs were also reported seized in at least three raids in 2001, but the details remain unclear, as these investigations are still ongoing. Police lack legislative enforcement tools, and organized criminal groups are believed to be heavily involved. Government stickers created to combat piracy are widely produced and can be easily purchased.

Broadcast television piracy is also widespread. There are three national television stations, two of which are run by Ukrainian State Television and 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. copyright anti-piracy warning at the beginning of those videos. Cable piracy is now an increasing problem.

The Ukrainian Copyright Agency and the National Council for Television and Radio, which have licensing authority over Ukrainian television, have still 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 2001 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.

One other enforcement tool remains unused. 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. In 2001, the committee finally was organized and met several times, but the copyright industries reported no concrete proposals were issued to effectively deal with IPR crimes, and that there remains a problem of information not being shared among the enforcement agencies. This is unfortunate, because this committee and information sharing by the agencies could be an effective tool in the battle against the spread of pirated material, especially if aimed at the production and distribution of optical disc media.

As already noted, 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 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 use the new criminal code, as well as acquire the proper tools in the criminal procedure, customs, and administrative codes to deal appropriately with the problem. Clear government strategies and lines of authority should be developed. 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

2002 SPECIAL 301 REPORT

PARAGUAY

EXECUTIVE SUMMARY

IIPA supports continued monitoring of copyright developments in Paraguay under Section 306 of the U.S. Trade Act of 1974. Piracy levels remain high, and estimated losses due to copyright piracy rose to \$270 million in 2001. Enforcement efforts taken by Paraguayan authorities remain ineffective in deterring piracy. Sadly, few elements of the 1998 Memorandum of Understanding (MOU) which terminated USTR's Special 301 investigation against Paraguay have been effectively implemented.

Paraguay still serves as a major transshipment point for pirated optical media product from Asia. Paraguay also produces 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 taken have been the result of industry-led, not government-led, investigative efforts. There is limited support from the government, but only after the industry conducts the investigation and presents the case to the few judicial authorities who act independently and apply the law accurately. Despite high hopes that specialized IPR prosecutors could improve matters, prosecutions remain few. The Paraguayan border is open, and the various mechanisms Paraguay promised to implement to improve border checks have proven ineffective overall. The judiciary, as a whole, remains a hurdle to effective enforcement.

PARAGUAY ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings/ Musical Compositions	253.6	99%	200.0	90%	200.0	90%	280.0	90%	130.0	90%	100.5	68%
Motion Pictures	2.0	80%	2.0	80%	2.0	80%	2.0	80%	2.0	85%	2.0	85%
Business Software Applications ¹	11.5	79%	8.5	76%	6.7	83%	5.2	85%	4.1	87%	4.6	89%
Entertainment Software	NA	NA	9.7	99%	8.1	99%	8.4	99%	8.3	99%	7.5	97%
Books	3.0	NA	3.0	NA	3.0	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS	270.1		223.2		219.8		298.1		146.9		117.1	

¹ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$6.6 million at 82% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

BILATERAL ENGAGEMENT ON IPR

The 1998 Special 301 Investigation

Four years ago, USTR identified Paraguay as Priority Foreign Country under Section 301 of the U.S. trade law. A nine-month investigation began 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 on Intellectual Property Rights” (MOU) in which the Paraguayan government committed to take a number of near- and long-term term actions to address its inadequate practices. USTR terminated both the Section 301 investigation and 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.²

The MOU and Enforcement Action Plan

The November 1998 MOU contains nine articles and an annex which comprises the “Enforcement Action Plan,” which includes both near-term and long-term commitments made by the Paraguayan government.³ The MOU focuses heavily on concrete actions related to enforcement and commitments to make maximum efforts to strengthen enforcement efforts, pass certain legislation, improve training of enforcement officials and enhance public awareness, and provide deterrent penalties and civil remedies, among other important elements. A regular consultation mechanism was implemented to schedule meetings, and the agreement will remain in effect until January 1, 2003.⁴

Although some of the specific action items listed in MOU (and the “Enforcement Action Plan”) have been successfully completed by the Paraguayan authorities, a good many have been either completely disregarded or abandoned. Here is an illustrative (non-exhaustive) list of several key elements from the MOU which have not yet been met fully or satisfactorily, in the view of the industries:

- The Inter-Institutional Brigade and frequent, unannounced raids. The 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 (MIC) created an interagency anti-piracy group called “GAP” (*Grupo Anti-Pirateria*, or more

² In 2000, \$18.9 million in Paraguayan imports to the United States benefited from the GSP program, accounting for 45% of its total imports to the U.S. For the first 11 months of 2001, \$9.6 million of Paraguayan goods (or 33% of Paraguay’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP program, representing a 47.5% decrease from the same period last year.

³ The full text of the MOU is available on the U.S. Department of Commerce Website, at http://199.88.185.106/tcc/data/commerce/html/TCC_Documents/ParaguayIPR.html

⁴ After the January 1, 2003 date, either country may give 60 days’ written notice to the other to terminate the MOU.

formally, *El Consejo Nacional para la Protección de los Derechos de Propiedad Intelectual*). Decree No. 14870 provided 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 was to be comprised of 15 intelligence officers who were to perform investigations. Its formation was formalized on paper, but not in practice until mid-2001. This group was to perform active investigations, especially post-raid, with access to intelligence files of other police agencies. Despite several requests, the private sector has never been kept apprised of the group's activities and we assume it does not exist. Since such an inter-institutional brigade (or any other Paraguayan enforcement agency, for that matter) is barely organized, not functionally operational, this certainly does not satisfy the MOU obligations to conduct frequent, unannounced raids of warehouses, distributions center and retail outlets and arrest persons engaged in copyright or trademark infringement (see discussion below, on enforcement).

- “Quick Response Team”: This team of prosecutors and officials from other ministries was to verify and investigate complaints submitted to it. While a decree was issued to establish this force (to be headed by the Ministry of Industry and Commerce), as a matter of practice this “team” does not exist.
- The “red channel” system at the border: Paraguayan Customs claims it has met the MOU requirement that it maintain its “red channel” system at Asunción Airport and extend such to the Ciudad del Este Airport and all other main customs checkpoints. Customs is to maintain a list of products which are commonly infringed, and officials 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, industries report that this system has not been properly implemented, given that large shipments of infringing products have crossed into Paraguay. Furthermore, this system is subject to the influence of corruption (see enforcement discussion, below).
- Specialized IPR prosecutors: While these prosecutors were in fact finally appointed to their posts, the problem remains that they are constantly being re-assigned to work on non-IP cases and are frequently rotated.
- Timely prosecution of all copyright cases and ensure that prosecutors seek deterrent penalties: Only since 2000 have there been any criminal sentences, and those have been very few, especially given the high levels of copyright piracy in Paraguay.
- Ensure the legal authority for rights holders to obtain civil *ex parte* search orders: While the law was amended to afford such authority on-the-books, as a matter of practice, it remains difficult to obtain and conduct an *ex parte* order in an expeditious manner. One major problem is that some courts are taking at least 45 days to issue such orders; by that time, it is very likely that the evidence will have been moved or destroyed.
- Take actions to investigate and initiate legal actions against persons and entities which fail to pay taxes or report revenues on imports or sales of infringing products: This potentially useful enforcement tool has not been used to its full advantage. Meanwhile, copyright

piracy depletes the Paraguayan economy of jobs, tax revenues and economic and cultural prosperity.

- Government software legalization: The Paraguayan government also promised to issue a decree governing the proper use and acquisition of computer software in its agencies by December 31, 1998, and to ensure that all ministries eliminated any and all pirate copies of software by December 31, 1999. This executive decree (*Decreto* No. 1524) was issued on December 31, 1998, and entered into effect immediately. The problem is that an inventory of software was never completed, and the terms of the decree have not been implemented in practice.
- Adequate resources: Paraguay fails to ensure that there are enough budgetary sources allocated for the officials and agencies involved in IPR enforcement. This is a constant struggle.

In sum, the copyright industries remain very concerned that the Paraguayan government has not fully implemented the provisions it committed itself to undertake back in 1998. While there has been some progress in the 3½ years' existence of the MOU, the results which are most striking to the public eye are the explosion of new forms of piracy in a market already overwhelmed by piracy (of both the home-grown and transshipment varieties), the involvement of organized crime factions, few criminal investigations, raids and prosecutions, and a judiciary unwilling to issue deterrent sentences (with rare exceptions).

COPYRIGHT PIRACY IN PARAGUAY

Optical Media Piracy: Transshipment and CD-Rs

In 2001, 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 Latin American region as a transshipper of pirate product to its neighbors continued last year. Ciudad del Este businesses continue to boldly offer and sell obvious counterfeit optical media products from the gaming, music, software and video industries.

However, in 2000, 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. This situation worsened during 2001 as that amount climbed to a dramatic level of 104 million units. Paraguay does not have the market to absorb that amount, and these discs are found bearing illegal sound recordings, mainly throughout Brazil. These 104 million CD-Rs could supply 100% of the current legitimate CD music market in Brazil, however, it should be noted that not all blank CD-Rs are destined for music only.

In addition to their clandestine industrial CD production capacity, the pirates of Ciudad del Este shifted their replication method by spreading it out through the use of CD burners. Hundreds of labs have substituted the previous underground illegal CD plants, but it is obvious that those burning facilities source pirate kingpins who coordinate their work and provide the small labs with

the blank CD-R's. These "sprayed" plants serve Paraguayan, Argentine, Uruguayan and mostly Brazilian illegal CD-R duplicators.

Paraguay's role as a substantial local manufacturer of pirated optical media was revealed in 1999 when 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 (for comparison's sake, 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, and as of this report no real evidence has surfaced regarding any new plants. Nevertheless, the Ministry of Industry and Commerce (MIC) authorized (in violation of agreements arranged with the recording industry) the importation into Paraguay of one CD-R manufacturing plant under the Law de Maquila and the Investment Law. The record industry found this CD-R facility during one of its routine investigations. Additionally, the music industry found another CD-R manufacturing plant that was ready to be assembled in Ciudad del Este. The first, SCA Technologies based in Ciudad del Este, is currently operational and producing approximately 40-50,000 blank CD-Rs daily. Much of its product has been found bearing illegal sound recordings in investigations in Brazil. The second plant was never opened due to a major fire that destroyed most of the machinery and the infrastructure. The Paraguayan government has not kept industry informed of SCA's production output, nor have they maintained regular audits of the plant as mandated by law. The government was obliged to inform the recording industry – under several anti-piracy Memoranda of Understanding and agreements that have been signed – about the existence of such plants. This did not happen.

Organized Crime Elements Control Piracy in Paraguay

Organized criminal groups remain involved in the production and distribution of pirated and counterfeit product 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 surplus in 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.

During 2001, several cases of official corruption were highly noted in the press. Corruption is widespread in Paraguay, and the media has done a great job informing about it. For example, the Prosecutor's Office executed a warrant search in a store of a software retailer in Ciudad del Este in April 2001. There was evidence to suggest that this store was owned by an individual with ties to organized crime. In fact, during the last two years, BSA member companies have filed at least three different criminal complaints against this individual and his partners. During the raid, the prosecutor found and seized substantial evidence of software piracy on a commercial scale. Over 13,000 CDs burned with illegal software were confiscated. The prosecutor also arrested two individuals, one of them with two previous indictments for software piracy. The Paraguayan Criminal Procedure Code prescribes that a defendant can not be released on bond (*libertad provisional*) if there is likelihood that he might flee the country. After being arraigned, both defendants were released on a bond which was not properly issued and therefore was not valid.

The judge who granted the order to release the defendants and the clerk of the Court who drafted the judge's resolution knew that both of these individuals have their domiciles in Brazil. They also knew that one of the defendants had two other indictments for copyright piracy in the last two years. It remains to be seen whether these defendants will appear for their trials scheduled for later this year. The Prosecutor's Office has appealed the judge's decision. The appeal is still pending. The Clerk of the Court handling the case has been publicly accused by another judge for taking bribes in another matter before her docket.

Domestic Piracy Remains Widespread in Paraguay

The recording industry reports that level of piracy of its products in Paraguay have swept away the legitimate market; the music piracy level in 2001 was 99%. As a result, estimated trade losses due to recording and music piracy in Paraguay rose to \$253.6 million last year; this figure includes both losses due to local piracy as well as that caused by transshipment. 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 domestic Paraguayan market has basically been lost to the pirates. 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 at 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 and CD-R piracy, audiocassette piracy continues to be rampant in Paraguay.

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, 2000, and 2001, Ciudad del Este resellers continue to advertise brazenly and sell pirated software. Second, 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 violating the MOU. Preliminary estimated trade losses due to business software piracy in Paraguay are \$11.5 million, with an estimated 79% piracy level in 2001. On a positive note, the BSA conducted a massive legalization campaign during November and December 2001 which was sponsored by the Ministry of Industry and Commerce (MIC).

The piracy situation for entertainment software appears not to have changed very much over the past year. The manufacture, sale, import and export of pirated videogames and cartridges in Paraguay are widespread; at last report, the estimated level of piracy was 99% in 2000. 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. Paraguayan assemblers of counterfeit videogame products (i.e., counterfeit Nintendo®

cartridges) must import sophisticated counterfeit videogame chips⁵ from Taiwan. The videogame chips are assembled, along with other components, into completed counterfeit Nintendo videogame products. The industry has had some success in working with Paraguayan customs to seize shipments and destroy infringing product. Estimated losses due to piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Paraguay for 2001 are not available.

Highly integrated copyright piracy has nearly destroyed the local market for audiovisual product. Paraguay is also a significant threat to other Latin American markets because of the large pirate market in Ciudad del Este. 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. The overwhelming majority of illegal VHS production for export takes place in Ciudad del Este, along the border with Brazil and Argentina. Recent investigations indicate an increase in VCD export in this area. The impact of Paraguay-based piracy on neighboring countries is far more troubling. 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 VCDs and DVDs. 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 higher learning. Estimated 2001 trade losses due to book piracy are \$3.0 million.

COPYRIGHT ENFORCEMENT IN PARAGUAY

The key to effective enforcement in Paraguay is straightforward and was clearly articulated in the 1998 MOU: cooperation between the Paraguayan government and the IPR Industries by providing the latter with information, figures and allowing the specialized anti-piracy groups to participate in meetings; 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 important. Prosecutors must press the cases, and judges must issue search orders and deterrent sentences. 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. 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.

⁵ "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.

On June 4-8, 2001, the U.S. Embassy helped coordinate an IPR training program for government officials and expert witnesses. While this training was effective, it did not translate into concrete action on the ground. High-level political support from senior Paraguayan authorities is necessary to reinvigorate effective enforcement against this endemic piracy.

The police are generally helpful, but only after the industries conduct the investigations.

The police have not shown any proactive efforts to enforce intellectual property rights in Paraguay. The Prosecutor's Office relies on the police only for physical protection during the criminal raids. The Division of Economic Crimes of the Police, the department in charge of enforcing IPR laws in Paraguay, has been publicly accused of requesting bribes to different retailers in Ciudad del Este. Most if not all of the investigations are carried by private investigators paid by the industry. The results of these investigations is later submitted to the Prosecutor's Office with a criminal complaint.

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. However, since the business model for pirates has changed from large-scale operations to loosely knit, small-scale groups, the tasks of identifying and immobilizing these organizations has become more difficult. In 2001, the pirating organizations with ties to terrorists and organized crime groups in Lebanon and Southeast Asia compartmentalized their operations to minimize losses and prevent total disruption of their operations. It is clear, due to recent events, that the more sophisticated criminals and terrorists involved in music piracy groups have adopted the "cell" structure of operations. In most cases, no one of significance appears or is present at any replicating facility. The recording industry continued to conduct raids based on its own investigations. In 2001, it conducted 64 raids, which resulted in the seizure of over 1,574,760 units of infringing products (mostly music CDs) and the closure of 30 manufacturing facilities, most of the small- to mid-sized CD-R replication facilities and 30 storage facilities of different sizes. Two major organized crime cases with international nexuses are currently under investigation. A 5-million-unit shipment of contraband blank CD-Rs, allegedly destined for the pirate market, was seized by Paraguayan authorities based on information provided APDIF/Paraguay. Several other multimillion-unit blank CD-R shipments are under investigation for under declaration of tax levies. It should be noted that the Paraguayan government has never started any big investigation on its own initiative. The absence of the Finance Ministry is total; Customs helps (albeit it could help more), and the Ministry of Industry and Commerce does exactly the opposite of what has been agreed to in the various bilateral MOUs with the U.S. government.

Regarding business software enforcement, the BSA formally launched its anti-piracy campaign in Asunción in August 1999.⁶ 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

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.

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 Iguazú, Brazil. During 2001, BSA conducted 12 criminal raids against software resellers in Ciudad del Este and Asunción. Several of these raids were conducted against the same resellers that were raided during 2000. The majority of their merchandise was seized by the authorities. Most of the resellers raided would be open for business the next day, with a complete display of counterfeit software. Although BSA member companies have been filing criminal cases since 1999, no final decision in any of these cases has ever been issued. There are two cases dated from 1999 that are still pending in the courts of Ciudad del Este.

In 2001, the MPA took its first enforcement actions in two years in Paraguay. Following the June training session organized by the U.S. Embassy, MPA coordinated with the Ministry of Commerce and Industry to raid 32 video stores involved in video piracy. Neither the results nor the process were impressive, despite large promises made by upper level government officials during the June training sessions. A key frustration for MPA is the serious lack of resources given administrative copyright enforcement, and the ministry's opinion that MPA should provide financial incentives for action.

Lack of Effective Prosecution and Deterrent Sentencing

There are four specialized IPR prosecutors in Paraguay, all in Asunción. The prosecutors now have, temporarily, 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. At present, only one of these prosecutors is assigned full-time to IPR cases. The prosecutors are constantly being removed from their official duties and being assigned to other criminal areas.

The recording industry reported last year that, in 2000, Paraguayan courts issued nine criminal judgments against pirates of sound recordings. Sentences included imprisonment of 13 months, and fines up to \$36,900 were imposed. The recording industry initiated 77 actions, and 39 remain pending. In 2001, the courts issued three convictions against pirates of sound recordings; however, no one was imprisoned. All of the prison sentences were under one year and all were suspended. Community service of some kind was the usual mandate from the judge. There are a total of 43 actions pending in the courts. No fines were levied against infringers in 2001.

The unreasonable delay of the courts in prosecuting the cases and the lack of any exemplary judgments against pirate software resellers have turned this illegal activity into a very lucrative one. In a worst-case scenario, a pirate software reseller can expect to be raided once or twice a year; lose some of the illegal merchandise that is seized during the raid; and pay a bond and attorney fees, to be back in business.

For example, BSA reported last year that 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 defendant 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 that case was 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.

Civil End-User Actions and Civil *Ex Parte* Searches

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. In total, the BSA brought six end-user civil raids during 2000. In 2001, BSA conducted 10 civil inspections. Three of these cases have been settled, while the rest are still pending resolution. One of the main problems that BSA faces with civil enforcement is the sometimes unreasonable delay of some courts in granting *ex parte* search orders. In many cases, it could take a minimum of 45 days to obtain a civil warrant search.

In addition, litigating a case in Civil Court in Paraguay could turn out to be a lengthy process. It takes an average of three years to reach a decision from a District Court and an additional year if the case is appealed.

Paraguayan Border Measures Remain Ineffective

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 Paraguayan Customs system is an ineffective enforcement authority which cannot conduct searches without a court order. This notorious problem has been unresolved for years.

Paraguayan customs has also done an inadequate job of allowing the importation of legitimate products into Paraguay. For example, in December 2001, one BSA member company sent a shipment of CDs containing software worth approximately \$70,000 to a reseller. The container disappeared a few days later while it was in customs' custody waiting for clearance. According to customs officials, the container was stolen. Paraguayan Customs is currently conducting an internal investigation to determine the whereabouts of the shipment.

The recording industry reports that the situation with customs continues as *status quo*, although there has been improvement in the flow of information based on leads developed by APDIF/Paraguay. The fact that customs still needs court orders to perform thorough inspections hinders their enforcement capability and gives the pirates more time to corrupt public officials outside of the customs jurisdiction. In terms of the "red channel" operations, these may be successful, depending on the information the music industry provides. However, this system continues to be highly corruptible, depending on the personal contacts of the smuggler. A typical example of this situation was the December 2001 seizure of 5 million blank CD-Rs in Ciudad del

Este. The shipment should have been caught under the “red channel” procedure because it was being taxed on the lower scale of magnetic recordings, instead of the scale for optical discs. The difference here amounted to more than \$30,000 in lost taxes to the Paraguayan government, probably destined for a corrupt official and a rogue dispatcher.

In the experience of the entertainment software industry, the border authorities have only conducted a few random searches at the Paraguay/Brazil border, some with success. For example, in several cases involving seizures of pirated videogames, Paraguayan customs did confiscate suspect shipments. In September 2001, customs authorities conducted several seizures. In Asuncion, 4,000 counterfeit Nintendo® videogame products, including multiple variations of videogame hardware systems and accessories, were seized. All the products originated in China and were transshipped through Chile before reaching Paraguay. The products were taken to the District Attorney's warehouse for evaluation. A second customs seizure took place at the Chaco-i Customs House, where over 4,000 units of N64 controllers and “Polystation” hardware were confiscated. Each “Polystation” system is incorporated with built-in Nintendo® videogame software. The shipment again came through the Iquique, Chile free zone. Seizures were also made at the Ciudad del Este Customs House, where approximately 18,000 products (including "Super Power Kits," protection shells, and accessory lights), in violation of the Nintendo® *Game Boy Advance™* trademark, were confiscated. The seized products were taken to the District Attorney's warehouse, and an official investigation was initiated against the importer.

COPYRIGHT LAW IN PARAGUAY

WIPO Treaties

Paraguay already has deposited 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). The 1998 law represented 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). IIPA has summarized disappointing elements and deficiencies in the 1998 Copyright Law in prior Special 301 filings:

- 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 temporarily corrected by legislation in mid-1999; see below).
- Neither the public communication right (for authors) nor the digital communication right (for producers) tracks 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 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 materials 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

- 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) 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 continues to bring cases based on the copyright law, but all the general provisions regarding penalties follow the criminal code. As a result, nobody goes to jail and there is no real application of the criminal sanctions. The recording industry has been forced to bring cases for different violations (such as contraband, tax evasion, etc.) rather than violation of copyright.

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, 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. Unfortunately, we understand that this law will sunset in July 2003; the Paraguayan office in charge of judicial training has issued a public statement to that effect.

Government Software Management

The Paraguayan government missed its 1999 deadline and also failed to do an inventory on installed software. 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 was to be completed annually in March. Importantly, all unauthorized programs must be legalized or removed from government computers by December 31, 1999. The government has failed to meet its obligations under the MOU. Up to date, the only ministry that has finished its audit and legalized most of its installed software base is the Ministry of Industry and Commerce. The rest of the ministries and government agencies have not even started the audit process. BSA urges the Paraguayan government to resume and finish this legalization process before the end of 2002 to meet its bilateral obligations under the MOU.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

PEOPLE'S REPUBLIC OF CHINA

EXECUTIVE SUMMARY

On November 1, 2001, the Standing Committee of the National People's Congress took the necessary domestic action for China to finally join the WTO. On December 11, 2001, China officially became a WTO member following the approval of its accession protocol by the world's trade ministers gathered in Doha, Qatar in mid-November. Immediately before taking this historic step on November 1, the NPC, on October 27, adopted amendments to China's 1990 copyright law, intended to bring the law into TRIPS compliance and, as well, to make additional amendments dealing with on-line distribution of copyrighted material, looking eventually to China's ratification of the two WIPO "Internet" treaties. In December, the Chinese government issued new software regulations and began drafting new copyright regulations to implement the new amendments.

These historic developments were accompanied by other actions during the year designed to better regulate the audio and audiovisual market, to deal with corporate end-user piracy of software and to begin tackling the mammoth problem of wholesale journal piracy throughout the Chinese government, its research institutions, and its universities and libraries. These actions were accompanied by statements from Chinese leaders citing the critical need for China to better protect its intellectual property and to do a better job fighting rampant piracy throughout the land. All these were very positive developments – indeed, IIPA members believe that China is now fully aware at the highest levels that intellectual property protection must become a part of the national tapestry of economic growth.

Yet piracy remains at or over 90% within the vast Chinese market and losses to U.S. and Chinese creators and companies continue at staggeringly high levels. The Chinese authorities, despite expressions of political will, have simply not devoted sufficient resources and taken the actions necessary to make any serious dent in national piracy levels. From the piracy viewpoint, China continues to remain one of the worst markets in the world for legitimate copyright businesses, though progress has been made in some of the big cities, particularly Shanghai, and in Beijing and even Guangzhou in the South. Now that China is a full WTO member, it must acknowledge openly that it is not yet in compliance with its WTO obligation to provide deterrent enforcement against commercial scale piracy. With 90% piracy rates, there is simply no denying this critical and unfortunate fact.

China has also put major emphasis on e-commerce and the growth of the Internet. Internet use is growing at high rates, with 33.7 million Internet users at the end of 2001.¹ With an estimated 3.5% of global Websites, it is essential that China put its enforcement house in order so that this new piracy threat does not spin out of control as did optical media piracy starting in the mid-90s and continuing even now.

¹ Source: CNNIC Internet Report 2002/01.

While IIPA applauds these positive developments, described in more detail below, we must continue to recommend that China remain subject to Section 306 monitoring under Special 301 and that the U.S. government engage China in undertaking a thorough review of its progress toward complying with its TRIPS and upcoming WIPO Treaties obligations generally and, in particular, with its TRIPS enforcement obligations.

PEOPLE'S REPUBLIC OF CHINA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	160.0	88%	120.0	90%	120.0	90%	120.0	90%	120.0	75%	120.0	85%
Sound Recordings / Musical Compositions ²	47.0 ²	90%	70.0	85%	70.0	90%	80.0	56%	150.0	56%	176.8	53%
Business Software Applications ³	714.6	93%	765.2	93%	437.2	91%	808.4	95%	987.9	96%	507.5	95%
Entertainment Software	455.0	92%	NA	99%	1,382.5	95%	1,420.1	95%	1,409.4	96%	1,380.0	97%
Books	130.0	NA	130.0	NA	128.0	NA	125.0	NA	125.0	NA	125.0	NA
TOTALS	1,506.6		1085.2		2137.7		2553.5		2792.3		2309.3	

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 over 90% despite the seizure of a record number of pirate disks in 2001. IIPA members report that the Chinese authorities conducted over 20,000 raids against optical media pirates (production, wholesale and retail) in 2001 and seized over 51 million VCDs, CDs and CD-ROMs and 4.9 million DVDs. Given that Chinese authorities are seizing but a small fraction of the pirate product circulating in China, these statistics show the massive levels of piracy in China. Fortunately, this also shows that the Chinese enforcement authorities are taking action; but, unfortunately, it seems to be having little effect on the overall national piracy rate. The authorities also raided six underground, unlicensed CD factories and seized one DVD mastering line, one VCD mastering line, four DVD replication lines and nine CD replication lines. By the end of 2001,

² The estimated losses to the sound recording/music industry due to domestic piracy are US\$47 million for 2001, and excludes any losses on sales of exported discs, which have decreased substantially in the last few years. This number is also based on sales at pirate prices. Using a "displaced sales" methodology, the industry estimate for losses would be US\$418.5.

³ BSA loss numbers for 2001 are preliminary.

Chinese enforcement authorities had seized a cumulative total of 133 replication lines since the 1995 U.S.-China bilateral IPR agreement. Industry estimates are that as of January 2002, there are 72 factories operating 162 replication and mastering lines in China, with 18 lines producing DVDs. Overall capacity, not including underground plants that continue to spring up around China, is estimated at close to 567 million units annually.

In last year's submission through 1999 there were virtually no licensed plants producing more than negligible pirate product. This began to change in 2000, with reports that even licensed plants were producing measurable amounts of pirate product for domestic consumption. Pirate production in both licensed and unlicensed plants continued throughout 2001, and industry now estimates that approximately 80% of the plants operating in China produce some pirate product to satisfy a huge domestic demand. Much of this production is accomplished through fraudulent licensing documents from Hong Kong, Taiwan and other Asian territories and is admittedly difficult to control. However, this means there continues to be a marked fall-off in the monitoring of licensed plants by the appropriate authorities. Adding to the plant production increases is the new and increasingly widening phenomenon of commercial "burning" of CD-Rs, which has also contributed to the massive output of pirate product in China. Raiding levels have also decreased from the levels of previous years. In addition to what appears to be growing production levels in underground, unlicensed plants, it is estimated that at least 50% of the pirate optical media product trading in China is imported from other territories in Asia, including Hong Kong, Taiwan, Malaysia, Thailand and even Myanmar, and increasingly in CD-R format. All in all, even though the Chinese authorities, especially the Ministry of Culture, have indeed made valiant efforts, through raiding and administrative proceedings, to fight piracy within China, that fight has not significantly reduced the quantity of pirate product available in the marketplace; indeed, by all accounts that amount is increasing to satisfy the growing local demand.

Despite the severe problems affecting the domestic market, industry reports that there continue to be negligible exports from China. It was the export piracy that gave rise to the 1995-1996 crisis that almost resulted in U.S. trade retaliation. Unfortunately, that problem has moved to other countries in Asia, like Taiwan, Malaysia, Indonesia and other territories, particularly as the Asian criminal syndicates have widened and deepened their influence in the region.

The crisis in the local music industry is continuing for a third year in a row with revenues down due to continuing piracy. As we noted last year, Shanghai has attacked this problem directly. The rest of China has much to learn from how this city is dealing with piracy. Nevertheless, the recording industry believes that concerted actions by the authorities, especially by the Ministry of Culture, in the last quarter of 2001 are gradually showing some positive results nationwide.

Piracy of audiovisual product in digital format remains a serious problem, with continuing huge seizures, as noted above, of VCDs throughout China. In addition, many new DVD plants have come on line, with reports that a total of 18 exist. Piracy in DVD format is particularly damaging to U.S. companies given the vast global growth in this format for serving the home video business. Already close to 900 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. Pirate DVDs are selling for US\$1.02 to US\$2.50 and there are now over 5.3 million DVD players in China. VCDs, the format invented by the Chinese pirates, are selling for US\$0.76 to US\$1.92 per title in major cities, and VCD players can now be purchased for as little as US\$43. MPA estimates there are over 55 million VCD players in China.

While MPA reports some progress in fighting piracy, particularly in the major cities of Shanghai, Beijing and Guangzhou (the nationwide piracy rate has dropped slightly to 88% as a result), the scope of the problem remains immense, with losses increasing from US\$120 million to US\$160 million for 2001. Part of this increase is due to the new CD-R piracy beginning to infect all of Asia.

As a way of getting control of the audiovisual market and to help control piracy, the Ministry of Culture (MOC) issued an administrative order in early 2001 centralizing the wholesale and retail sale of AV product. As a consequence, 232 markets were closed in 2001, a pattern that will definitely assist in controlling piracy as smaller pirate markets are shut down in favor of national, tightly controlled chains.

While corporate end-user piracy is the major problem for the business software industry in China, counterfeiting of enterprise software and hard disk loading are also major problems. China's software counterfeiting problem is again on the increase and exports are a major concern. Some of the most sophisticated counterfeits of software anywhere in the world are produced in southern China. To help assist in both these areas, some local 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, which now are far too low to act as an effective deterrent. The growing trend reported on last year on the part of computer manufacturers, distributors and retailers, of loading illegal software onto computers before they are sold has received some assistance from Microsoft's recently announced venture with Legend Computer, the largest computer manufacturer in China, to load only legitimate operating system software onto new computers. It is expected that this historical arrangement will be duplicated with other manufacturers. In order to deal with the counterfeit and hard disk loading problem, the Chinese government must 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 AICs and PSB, to the increased production and availability of high-quality counterfeit software products in the marketplace.

Unfortunately, we must report again that the government has made no concerted effort to address videogame piracy in China, which remains at among the highest levels of all copyright industry products. It is estimated that PC-based videogame piracy stands at 99% of that market in China, with console-based games not far behind at 90%. Although pirated products are still being imported from Hong Kong and Taiwan, it is estimated that about 70% of this product is now domestically produced, with about 5% resulting from the burning of CD-Rs.

Internet piracy of videogames is a growing phenomenon and IIPA hopes that the Chinese government will begin to recognize the problem. With over 33.7 million Internet users and over 277,100⁴ Websites (as noted above, representing 3.5% of all Websites), China's response will be all important. The videogame industry estimates that 25% of the piracy occurring now in China results from the downloading of videogames off the Internet. 4.5 million of these Internet users are dependent on Internet cafés, where a large number of pirated games are downloaded. But the government is principally concerned with these Internet cafés installing blocking software; it shut

⁴ Source: CNNIC Internet Report 2002/01.

down 17,000 such cafes that refused to do so and ordered another 28,000 to install such software. None of this activity, however, was directed at the vast download piracy occurring in these cafés. The Chinese government must bring the same pressure to bear on the problem of Internet piracy occurring in Internet cafés as they do in seeking to block subversive and pornographic material.

The recording industry is also plagued by Internet piracy in China. There have been an increasing number of sites hosted on Chinese servers containing infringing MP3 files. The increasing volume of these infringing song files and the number of sites hosting them give rise to grave concern. Some of these sites make available 20 to 30 song files from albums of popular artists for download. File-sharing services based in neighboring Asian territories have also established a number of mirror sites 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 taken the positive step of issuing their "interpretation" which follows, indeed expands upon, liability for infringements decided in individual cases. As discussed below, these "interpretations" are mirrored in the new Copyright Law amendments, making even clearer the treatment of most Internet infringements in Chinese law (though some ambiguities must be clarified in upcoming regulations). What is now needed is for Chinese administrative enforcement officials to take meaningful action against Internet piracy when requested to do so. Results to date have not been encouraging.

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

As in other countries, unauthorized use of software in enterprises in China causes the great majority of piracy losses faced by the business 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 undertook other such sessions in 2001 in Qingdao and Suzhou.

Following up on these actions, on August 28, 2001, the National Copyright Administration (NCA), Ministry of Finance, Ministry of Information Industry (MII) and State Development and Planning Committee co-issued a decree, titled "Notice on Governmental Organizations as Role Models by Using Legal Software." The decree was approved by the State Council and distributed to all provincial governments and ministry-level agencies in the central government. The decree takes a firm position on IPR protection by ordering governmental organizations at all levels to use only legal software and, most importantly, it provides that the Ministry of Finance will itemize a budget for software, to ensure that government agencies have money to buy as well as include software purchases in their own purchasing plan. In addition, the NCA and the MII shall give necessary

training on software copyright protection and software asset management. The supervision of software usage in government organizations, at all levels, is to be conducted by the NCA and its local branches.

In order to assist, BSA will continue to conduct software asset management training seminars, in partnership with NCA, MII and the Chinese Software Alliance in four major cities in 2002 targeting government end users.

While these actions signal that the government recognizes the problem, far more needs to be done to make the orders contained in these decrees a reality, including programs initiated by the central government. The most urgent needs are to continue the programs for detailed software management guidelines governing the procurement and use of software; to ensure that government entities actually have the funding to comply with these guidelines; and to ensure that government officials continue to receive adequate training on the management of software assets.

While legalizing software use by the government is moving forward, end-user piracy in the private sector remains the greatest barrier to the development of the software industry in China, for domestic and foreign companies alike. It is here where aggressive steps must be taken to establish an effective administrative and judicial enforcement regime against this type of piracy. The key to addressing software piracy and other forms of infringement is to change the way end users think about intellectual property in these products. A massive public education campaign would therefore be of critical importance to addressing piracy in the PRC. Otherwise, it will continue to retard the growth of this critical industry. As noted below, enforcement in this area has been very difficult.

Piracy of Journals and Books

At the beginning of 2001, AAP had again, as in 2000, found no noticeable improvement in the market for books and journals in China, with piracy still hampering development of the legitimate market. Though there were some licenses in China, and though some illegal reprints of legitimate editions resulted in administrative actions and small fines, on the whole piracy of U.S. works continued unabated. In last year's submission, IIPA noted that it was estimated that pirated journals made up between 50% and 90% of the journal holdings of nearly all of China's approximately 1,000 universities. We 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"!

AAP, in partnership with the International and British Publishers Associations, undertook considerable research into the issue of massive journal piracy, which resulted in a letter of August 14 from AAP President Patricia Schroeder to Vice Premier Li Lanqing, calling attention to the journal piracy problem which AAP estimated cost publishers upward of \$100 million annually. Other letters came from the IPA and PA. Virtually all journals were being pirated throughout the Chinese educational and scientific community. These industry actions resulted in a directive/statement by the Vice Premier that journal piracy was wrong and must be stopped and within a short time — in October 2001 — the major journal pirate, Guanghai, informed their customers that they would thereafter be unable to supply pirate journals to their customers.

Following this, the General Administration of Press and Publications (GAPP, formerly the Press and Publications Administration, PPA) sent a directive to all libraries advising that “with immediate effect, circulation of unauthorized journal copies is prohibited.” NCAC also issued a directive to universities and research institutions instructing them not to subscribe to pirate journals. AAP has received reports that Guanghai was closed down in December 2001, but that subscriptions to pirate journals already paid will still be honored for next year.

By mid-January 2002, local representatives of U.S. publishers were reporting considerable interest, heretofore virtually nonexistent, by libraries in China in licensing journals and many had halted their prior subscriptions to pirate journals. However, the key will be the budgeting process and, despite all this welcome news about a change in attitude, it does not appear that real funding will be available for purchasing legitimate journal subscriptions until 2003. The larger institutions have, however, been able to subscribe with existing funding. The direction is quite positive.

IIPA and AAP commend the Chinese government for taking these firm actions and we hope that they continue to result in substantial increases in legitimate journal subscriptions. Unfortunately, however, traditional reprint piracy continues to remain a problem in China. We noted in last year’s submission that China Daily had 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. We reported last year that the 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 continue at an estimated US\$130 million in 2001, but it is hoped that this number will decrease as journal piracy is reduced.

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, as noted above, growing at an alarming rate.

The unauthorized public performance of U.S. motion picture product continues mostly unchecked in hotels, clubs, mini-theaters and even government facilities. These public performances compete directly with plans to release popular titles in Chinese theaters and threaten 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. It is hoped that the new film and audiovisual regulations recently issued by the State Council will result in the closure of many of these sites and a significant reduction in the problem.

As noted above, software counterfeiting is on the rise in China. Some of the most sophisticated counterfeits of software anywhere in the world are produced in Southern China. BSA

urges enforcement action by a body such as the PSB at the central level to control this illegal activity.

Television piracy continues to be a concern in 2001. There are 38 provincial broadcast television stations and 368 local stations, all run by the government, which reach over 318 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 a purported "fair use" exception, broadcasting heavily edited versions of MPA member company films under the guise of "introduction to film."

There are approximately 1500 registered cable systems in China, serving 90 million cable households, all of which routinely include pirated product in their programs. In 2001, actions against An Hui Cable TV (April 2001), Hunan Zhuzhou Cable TV (May 2001) and Chengdu Cable TV (June 2001) have been taken. Unfortunately, these cable operators were given a warning only by the local Radio, Film & Television Bureau; no fine was imposed nor were their licenses revoked as a result.

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. Nintendo has taken a number of actions, and so far the authorities have been cooperative, which has resulted in the seizure and destruction of the pirate products, as well as the imposition of administrative penalties and fines.

COPYRIGHT ENFORCEMENT

There is little question that the biggest challenge facing China, now that it is a WTO member, is to bring its enforcement system into compliance with, in particular, TRIPS Articles 41, 50 and 61. To do this will require the authorities to (a) cooperate more closely with affected industries; (b) make the system far more transparent than it now is; (c) make fighting piracy a national priority articulated at the State Council level on a regular basis; (d) significantly increase administrative penalties and actually impose them at deterrent levels; and (e) increase criminal penalties, lower the criminal thresholds and actually criminally prosecute, convict and impose deterrent fines and prison sentences on pirates.

Administrative and Criminal Enforcement

In 2001, the enforcement problems that have plagued China continued, despite significant raiding activities in a number of cities, including against optical media factories. MPA reported, for example, that the Chinese authorities detained around 5,000 people, but it is unclear what type of punishment, if any, was received by these infringers. Historically, punishments have been administrative, and these fines have been insignificant. Any criminal prosecutions were not for the offense of piracy but for other offenses, like pornography or operating an illegal business.

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 imposed for piracy of a U.S. work. (IIPA suspects that these so-called “jail terms” involve convictions for pornography, not copyright infringement.) However, as we noted in our 2000 submission, 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 US\$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 look forward to more such convictions, particularly for serious infringements.

Most enforcement is done through an administrative system in China which regularly proves to be insufficient to deter further piracy as required by TRIPS Article 41. There are myriad deficiencies in the administrative enforcement system in China, as discussed below:

- The NCAC appears to have continued to require clearance in Beijing of copyright enforcement actions taken locally by copyright bureaus involving foreign right holders, in accordance with Article 52 of the Copyright Law Implementing Regulations promulgated in 1991. This risks slowing down and bureaucratizing enforcement at the local level and in many cases could effectively stop any action from taking place. Requiring this procedure only of foreign right holders (the procedure is enshrined in the copyright law regulations) is a clear violation of the “national treatment” principle in TRIPS. In the IPR portion of the Working Party protocol agreed to between the U.S. and China in connection with WTO accession, China promised to eliminate this practice before adherence. This will need to be done in the new copyright law implementing regulations that we understand are currently being drafted.
- 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. In the WTO Working Party Protocol, the State Council formally committed to recommend to the Supreme People’s Court the lowering of the RMB50,000 (over US\$6000) threshold for sustaining a criminal prosecution. We have seen no action yet to redeem this commitment. China has indicated that administrative fines will be increased, but no specific actions have yet been taken. As noted below, however, China has, in a welcome development, instituted a new system of civil statutory damages, which is discussed below in the section on the new copyright law amendments.
- IIPA reported above that many markets are being closed pursuant to plans instituted by the Ministry of Culture to regularize the audio and audiovisual marketplace. The new audiovisual regulations also contain a closure remedy for licensing and related violations. However, markets and retail shops selling pirate CDs, VCDs, DVDs, CD-

ROMs and other pirate products are not being closed even after subsequent administrative “convictions” for copyright piracy or trademark violations. The IPR Working Party protocol promises that this will change, but the copyright law amendments do not include such an important and deterrent remedy.

- The system is almost entirely nontransparent; it is often impossible to ascertain what penalties are imposed in particular cases. Right holders 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 right holders 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 a resulting failure to deter pirates. However, in another welcome development, the new copyright law amendments require the court in civil cases to execute an *ex parte* search within 48 hours of the request by the right holder.
- There is still “local protectionism” by administrative agencies involving politically or financially powerful people engaged in pirate activities.
- As discussed in the section on the new software regulations, it continues to be unclear what authority and powers officials have to address the problem of rampant corporate end-user piracy. Even if they did have this authority, they have few resources to tackle this problem without the regular use of the AICs and PSB. This problem must be addressed if meaningful administrative enforcement is to be taken against this type of 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 2001, a total of 7,122 title verification requests have been submitted to NCAC by MPA, and 2,763 titles have been challenged as unauthorized.

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	MOTION PICTURES
Number of raids/searches conducted	983
Number of administrative cases brought by agency	769
Number of defendants found liable (including admissions/pleas of guilt)	769
Ratio of convictions to the number of raids conducted	78%
Ratio of convictions to the number of cases brought	78%
Number of cases resulting in administrative fines	501
Total amount of fines levied	
US\$0-\$1,000	493
\$1,001-\$5,000	4
\$5,001-\$10,000	4
\$10,000 and above	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	

Over the last few years, it has become clearer that the Chinese enforcement authorities have not sought to prosecute piracy under China's criminal law provisions. While criminal enforcement does occur under other laws such as those dealing with pornography or running an illegal business, it will be difficult for China to convince its people that piracy is an economic crime that damages the Chinese economy and Chinese culture until it is made specifically subject to criminal prosecution. As discussed in detail below, the piracy provisions in Article 217 and 218 of China's criminal law have not been used because of the high thresholds established by the People's Supreme Court in its "interpretations" of these provisions. These thresholds must be substantially lowered and the "interpretations" otherwise amended to permit effective criminal prosecutions.

We urge the U.S.G. to press the State Council 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.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	MOTION PICTURES
Number of Raids conducted	N/A
Number of cases commenced	N/A
Number of defendants convicted (including guilty pleas)	N/A
Acquittals and Dismissals	N/A
Number of Cases Pending	N/A
Total number of cases resulting in jail time	N/A
Suspended Prison Terms	
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Suspended Prison Terms	
Prison Terms Served (not suspended)	
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Prison Terms Served (not suspended)	N/A
Number of cases resulting in criminal fines	N/A
Up to \$1,000	
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied	N/A

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, for example, has increasingly turned to civil remedies, including in the Internet piracy area, since criminal enforcement is simply unavailable as a practical matter. In 2001, the recording industry brought over 40 cases against suspected infringers in the courts (out of 100 potential cases that were prepared for court submission, but many of which cases were settled). 26 of these cases resulted in judgments for the copyright owners and involved factories, music

distribution companies and retailers. Also included were further cases involving illegal distribution of MP3 files on the Internet.

As discussed below, the new copyright law amendments made certain positive changes which should assist in bringing successful civil cases against infringers.

- Provisional remedies were added in Articles 49 and 50 and, as we understand it, it is intended that these operate on an *ex parte* basis.
- Court-determined “pre-established” damages can now be awarded up to a maximum of RMB500,000 (US\$60,000) where the “actual losses suffered by the holder of the right or the profit earned by the infringing party cannot be determined.”

While these changes are significant improvements, U.S. right holders have continued to have problems in successfully bringing civil cases in China. These and certain other provisions must be further clarified in implementing regulations to be issued in the next few months.

The recording industry had been successfully establishing the subsistence and ownership of its members’ rights in sound recordings found to have been pirated by providing an IFPI “certification” attesting to these facts. This had worked successfully until, in December 2001, NCAC issued a letter relating to some questions propounded to the courts by certain CD factory defendants. This letter has created grave doubts in the minds of judges and threatens to undermine the gains achieved in civil litigation to date.

This letter stated that the owner of a sound recording must submit to the court copies of contracts it has signed with the performers and composers to prove that it is properly authorized by these right owners. This should be wholly unnecessary, since the record producer has a separate right in its sound recording, not deriving from any rights that exist in the performer or the composer’s work. The letter also stated that the right holder was required to provide notarized carriers (such as a CD) and inlay cards from the original titles carrying the copyright notices, logos and trademarks. Finally, NCAC required that a technical test be conducted (only test results from state-run laboratories are accepted) to remove any doubts whether the sound recording in dispute is the same as the recording owned by the record producer. This will result in significant delays and costs when even street hawkers demand complex and expensive “technical tests” when it is clear that the recording in question is pirated. By putting these unnecessary obstacles in the path of right owners, the NCAC is sending precisely the wrong signals to the pirates, in effect urging them to raise these trivial technical arguments and therefore inhibit the fight against piracy.

The business software industry also commenced two civil cases in 2001 relying on advice that the civil procedure code provided a ready *ex parte* remedy against corporate end users of unauthorized software and in consideration of NCAC’s Document 01 issued in March 2001 directing local copyright authorities to take action against corporate end user piracy. Unfortunately, the results have been less than encouraging. In May 2001, three BSA members tried to file civil actions against four target companies for end user infringements. There was a total of 11 separate actions. The right holders applied for evidence preservation (*ex parte*) orders from two courts in which the actions were filed – in Shanghai and Pudong. From this point on, through the passage of the copyright amendments in October, 2001 and the issuance of the new software regulations in December, until January 4, 2002, the two courts still have not issued orders to run the raids against

the target companies. The new copyright amendments require the execution of such orders within 48 hours of the application!

Two BSA members also sought to commence civil cases against two corporate end-users in the Shenzhen IP Court. While the court first agreed to accept the cases (*ex parte* search orders were also requested), a month and a half passed when a court official was sick and, when the official returned, the court demanded that the four actions be refiled as 37 separate actions, or one separate action for each work. Discussion and argument ensued, following which the right holders sought to withdraw the cases altogether. The court then decided that it would accept the original four cases, but in the end BSA felt that it was not in its best interest to continue these cases.

Until the Chinese courts are willing to take swift and definitive action against end-user piracy, U.S. and Chinese software companies will continue to suffer. Despite these sad results, in April 2001, Microsoft won a civil lawsuit in Shanghai against a Chinese computer company involved in hard disk loading of its software. The court awarded damages of RMB280,000 (US\$33,735) and ordered the company to publish a written apology in the local paper. The company had earlier been fined RMB10,000 for the same conduct in a previous administrative case.

In December 2000, a civil suit was filed by the Educational Testing Service (ETS) seeking damages against the Beijing New Oriental School, which had for years administered the TOEFL and GRE tests to Chinese students seeking entrance into U.S. universities. ETS alleged 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 claimed 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. This case is still pending in the Beijing People's Court, but there is some hope that it may go to trial this spring. The progress of the case has been hindered by inadequacies in Chinese procedural law, including lack of meaningful discovery and serious difficulties in preventing relevant evidence from being destroyed without actually seizing it through a court order after posting money as security (bonds are not used).

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	MOTION PICTURES
Number of civil raids conducted	0
Post Search Action	0
Cases Pending	0
Cases Dropped	0
Cases Settled or Adjudicated	0
Value of loss as determined by right holder (\$USD)	0
Settlement/Judgment Amount (\$USD)	0

STATUTORY LAW AND REGULATIONS

The New Copyright Law Amendments

Draft legislation amending China's 1990 copyright law has been pending before the Standing Committee of the National People's Congress since 1998. On October 27, 2001, following review of many variant drafts, the Standing Committee adopted the "Decision to Amend Copyright Law of the People's Republic of China," thereby amending that law.⁵ The new amendments to the copyright law ("2001 Copyright Law") makes a number of very significant and welcome changes to the 1990 law and attempts to bring that law into compliance with TRIPS. Importantly, the amendments also attempt to implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) to ensure that the law keeps up with technological developments, particularly protection of copyrighted material on the Internet and other advanced information networks. Below is a brief summary of the positive changes made, followed by a summary of some of the problems and weakness, most of which IIPA hopes can be repaired in the regulations to the 2001 copyright law, now being drafted and due to be promulgated, IIPA understands, in the next few months. The regulations governing computer software were issued in December 2001. Following is a preliminary discussion of the most important changes of the 2001 Copyright Law.

1. The new amendments, in Article 10, spell out in detail the various exclusive rights which authors enjoy under the law and in Article 2 extend those rights and all provisions of the law to other nations that are WTO members or otherwise members of bilateral "copyright agreement" or multilateral "treaty" to which the two states are parties. Among the positive changes made are to
 - Extend TRIPS-compatible rental rights to computer programs and cinematographic works;
 - Add a right of distribution as required by the WIPO treaties;
 - Add a TRIPS rental right for computer programs (Article 10(7)) and sound recordings (Article 41), adding also cinematographic works and video recordings
 - Add various rights of broadcasting, exhibition, display, and public performance;
 - Add a WIPO treaties-compatible exclusive right of "transmission via information network"⁶ (Article 10(12)) for works, as well as WIPO treaties-compatible exclusive rights for a producer or performer to "transmit [to] the public via information network" a sound recording, video recording (Article 41) or performance (art. 37(6));
2. Add a TRIPS-compatible protection for compilations of data (Article 14);

⁵ Copyright Law of the People's Republic of China, Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, Amended in Accordance with "Decision to Amend Copyright Law of the People's Republic of China," Adopted at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001 (translation on file at IIPA).

⁶ The final formulation is an improvement on the previous draft, which used the term "Internet" instead of the broader term "information network." The term "transmission" may mean something closer to "dissemination," and in another unofficial translation we have seen, the term was translated as "communication."

3. Narrow the exceptions to exclusive rights by adding the Berne Article 9(2)/TRIPS Article 13 “tripartite” test language in the chapeau; and narrows other limitations to bring them closer to compliance with Berne/TRIPS [(Article 22(3), (4), (7) and (9))]. However, the implementing regulations must further narrow these exceptions following the three-step test, particularly Article 22(6), which would appear to permit the creation of compilation coursepacks under certain circumstances.
4. Make clear in Article 15 that the producer of a film holds the economic rights in that work;
5. Add provisions on collecting societies, making clear that they can sue in their own name for copyright owners that have authorized the society to deal in their work (but see discussion below);
6. Repeal the provision that limited publishing contracts to 10 years;
7. Provide TRIPS-compatible anti-bootlegging provisions (Article 37);
8. Add provisions on technological protection measures (TPMs) and rights management information (RMI) Articles 47(6) and 47(7) (but see discussion below);
9. Add a “publishers right” in the format or graphic design in the law (Article 35) with a term of 10 years.

In the area of enforcement, certain positive amendments were made, including

1. Eliminating the “commercial purpose” criteria for certain civil liability;
2. Ensuring civil liability for all new or amended rights including rental, transmission over information networks, and for violating the TPMs and RMI provisions;
3. Clarifying that the NCAC can confiscate illegal income and infringing material, but limits confiscation of equipment to that “primarily” used in the infringements and only “where the circumstances are serious;”
4. Adding a provision on damages which allows profits of the infringer to be taken into account and allows compensation for expenses incurred by the right holder in its effort to stop the infringing act;
5. Providing for the first time in the copyright law for “property preservation measures (Article 49), and court-ordered measure “to secure evidence, even prior to the filing of a complaint” (Article 50). Such order must be executed in 48 hours. We understand that this is meant to provide a full *ex parte* remedy, in compliance with TRIPS Article 50, even though the latter is not expressly stated;
6. Providing for a form of “pre-established” damages (up to RMB 500,000 or US\$60,000) where actual damages are difficult to determine (Article 48). These latter two amendments are particularly welcome.

7. Adding a provision that the court has the power to confiscate “unlawful profits, infringing copies and properties used in unlawful activities” (Article 51). Confiscation of implements is not limited to those “primarily” used in the infringing activities – a welcome provision.
8. Appearing to shift the burden of proof to the alleged infringer in certain cases (Article 52), a provision that, if properly applied, will have a major impact in civil cases.

While these changes are positive, there are deficiencies which should be remedied in the regulations to follow. One most notable deficiency is that criminal liability is not affected and there are apparently no plans to amend the criminal code. Some of these other deficiencies include:

1. While the Law [Article 47(6)] provides anti-circumvention protection, it may not fully implement the WIPO treaties obligation, in that it: 1) does not expressly prohibit the manufacture or trade in circumvention devices, components, services, etc.; 2) does not define “technical protection measures” to clearly cover both “copy-controls” and “access controls”; 3) does not make clear that copyright exceptions are not available as defenses to circumvention violations; 4) does not expressly include component parts of circumvention technologies (assuming devices are covered); 5) imposes an “intent” requirement as to acts (and business/trade if such activities are covered), which might make proving a violation difficult; 6) does not provide for criminal penalties for circumvention violations (since the copyright law only deals with civil and administrative remedies). Many of these points can be clarified, if not entirely fixed, in implementing regulations.
2. While the law protects against “intentionally deleting or altering the electronic rights management system of the rights to a work, sound recording or video recording” without consent of the right holder [Article 47(7)], this protection may not fully satisfy WIPO treaties requirements and requires further elaboration in the implementation process. For example, the Law does not expressly cover “distribution, importation for distribution, broadcast or communication to the public” of works or other subject matter knowing that RMI has been removed or altered without authority, as required by the WIPO treaties, nor does it define “electronic rights management system” in a broad, technology-neutral manner.
3. Temporary copies are not expressly protected as required by the WIPO Treaties. As with the Copyright Law prior to amendment, protection of temporary copies of works and other subject matter under the 2001 copyright law remains unclear. According to an earlier (February 2001) draft amendment of Article 10, “reproduction” as applied to works was to include copying “by digital or non-digital means.” The phrase “by digital or non-digital means” was removed from the final version of Article 10(5) prior to passage. Article 10(5) also fails (as did the definition of “reproduction” in Article 52 of the old Law, which was deleted, and Article 5(1) of the 1991 Implementing Regulations) to specify that reproductions of works “in any manner or form” are protected. Addition of either of these phrases might have indicated China’s intent to broadly cover all reproductions, including temporary reproductions, in line with the Berne Convention and the Agreed Statement of the WIPO Copyright Treaty.⁷ As it stands, the current Article 10(5) description of the

⁷ The agreed statement to Article 1 of the WIPO Copyright Treaty provides,

reproduction right includes “one or more copies of a work by printing, photocopying, copying, lithographing, sound recording, video recording with or without sound, duplicating a photographic work, etc.” Objects of neighboring rights (arts. 37, 41 and 44) mention “reproduction” (e.g., Article 41 provides sound recording and video recording producers a “reproduction” right), but the Article 10(5) description is not expressly applied *mutatis mutandis* (it should also be noted that the Article 41 reproduction right for sound recording producers does not expressly extend to indirect reproductions, as required by TRIPS (Article 14.2) and the WPPT (Article 11). This deficiency should be fixed in the implementing regulations;

4. A new compulsory license (Article 23) permits the compilation of “[p]ortions of a published work, a short work in words or music, or a single piece of artwork or photographic work” into elementary and high school (so-called “el-hi”) textbooks, and “State Plan” textbooks (which we are still trying to determine would not include university textbooks, which would cause great concern for U.S. publishers); in addition, sound recordings, video recordings, performances, and broadcasts apparently are subject to this compulsory license. IIPA hopes that the Chinese government will confirm that this compulsory license provision will not be read to apply to foreign works and other subject matter since it would violate the Berne Convention and TRIPS if it did. If it is interpreted to apply to foreign works, then it would violate the Berne Convention, TRIPS and the International Treaty regulations referenced above [(which implemented the 1992 U.S.-China Memorandum of Understanding (MOU)], even if it were further confirmed that it only applies to foreign printed materials used in elementary or high school “textbooks” (hard copies). The damage to publishers would be particularly significant if “State Plan” were to encompass university textbooks and/or if “textbook” includes forms other than “printed” forms (e.g., digital forms or multimedia). The regulations must be framed to exclude foreign works or limit their scope in a manner consistent with the Berne Appendix.
5. The provisions on collecting societies leave 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 right holders, and other laws or regulations which inhibit the formation of such organizations should also be amended or repealed. Regulations should clarify these points and ensure effective and fair treatment of foreign right holders.
6. The treatment of works and sound recordings used in broadcasting continues to remain woefully deficient and out of date. While Article 46 spells out that broadcasters must obtain permission to broadcast “unpublished” works (e.g., an exclusive right), Article 47

[t]he reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

Dr. Mihaly Ficsor, who was Secretary of the WIPO Diplomatic Conference in December 1996, has stated that the term “storage” naturally encompasses temporary and transient reproductions. Ficsor notes that “the concept of reproduction under Article 9(1) of the Convention, which extends to reproduction ‘in any manner or form,’ must not be restricted just because a reproduction is in digital form, through storage in electronic memory, and just because a reproduction is of a temporary nature.” Mihaly Ficsor, Copyright for the Digital Era: The WIPO “Internet” Treaties, Colum.-VLA J.L. & Arts (1998), at 8.

provides a mere “right of remuneration” for the broadcast of all other works, with the sole exception of cinematographic and “videographic” works. Such a broad compulsory license (not even limited to noncommercial broadcasting) is not found in any other law, to IIPA’s knowledge. Furthermore, the broadcast of sound recordings is not even subject to a right of remuneration by virtue of Article 41 and Article 43. Record producers should enjoy full exclusive rights for both performances and broadcasts in line with modern trends. 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.

7. The draft does not take advantage of the opportunity to extend terms of protection to life plus 70 years and 95 years from publication. This is the modern trend.
8. A full right of importation applicable to both piratical and parallel imports should have been included.

Deficiencies also occur in the enforcement area:

1. Administrative fines have not been increased. This must be done in the implementing regulations, both for NCAC and in other regulations, as appropriate for other administrative agencies like the SAICs.
2. As noted above, criminal remedies are not dealt with at all. Criminal remedies must be extended to include violations of the TPMs and RMI provisions in order to comply with the WIPO treaties obligations.

The New Computer Software Regulations

The new regulations governing computer software were issued on December 28, 2001 and became effective, replacing the 1991 regulations, as of January 1, 2002. Following are some of the problems and deficiencies in these regulations:

1. The regulations fail to clarify whether temporary copies are protected.
2. As noted above in the discussion of the TPMs and RMI provisions of the 2001 copyright law amendments, these regulations do not fix any of the deficiencies in the Amendments provisions but merely repeat the statutory language. This should be remedied when the copyright law regulations are published and, with respect to these issues, those regulations should extend to computer programs as well as all other works.
3. Article 17 of the regulations establishes a potentially huge and TRIPS-incompatible exception to protection for software. To the extent this provision allows any use (including reproduction, etc.) of software for learning and to study the design of the software, it goes well beyond what is permitted under Berne 9(2) and TRIPS Article 13. To be compatible with TRIPS this provision must be revised and implemented so that (a) it applies only to software within the lawful possession of the person engaged in the activity; (b) it may be carried out only if the information is not otherwise available, such as by licensing

arrangement; (c) it only applies to information or design related to the interoperability of the program with hardware or a noncompeting program; (d) the information cannot be used to generate a competing program; and (e) it is subject to the three-part test in Berne 9(2) and TRIPS Article 13. Any such provisions on decompilation should follow, at a minimum, the standards in the EU Software Directive, from which these conditions are taken.

4. Article 30 of the regulations creates a huge loophole and will have significant adverse effects on enforcing the copyright law against corporate end-user pirates. It provides that the possessor of infringing software is relieved of liability if the possessor is ignorant, or reasonably ignorant, of the infringing nature of the software. This is inconsistent with Article 52 of the 2001 law itself, and with Article 28 of the regulations, which puts the burden of proof in such cases of infringement on the possessor. Even under the terms of regulation itself, it is not clear that liability will attach where the right holder or administrative authority can show that it would have been unreasonable to think that the software was legal. The provisions of Article 52 of the law and Article 28 of the regulations should govern. If Article 30 is abused, it would so weaken enforcement against corporate end-user piracy that it would amount to a violation of TRIPS Article 41. Article 30 of the regulations is also highly problematic when it provides that if discontinuation or destruction of the illegal use of software would bring great loss to the infringer, the right holder will be forced to license the software to the infringer at a "reasonable royalty." It is not clear what will meet the standard of "great loss" to the infringer or how a "reasonable royalty" should be calculated. This provision extends beyond the exceptions and limitations permitted by TRIPS Article 13 by establishing a compulsory license that directly conflicts with the normal exploitation of the work and the legitimate interests of right holders. The normal damages provision of the law should govern in these cases.
5. The regulations should make clear that the new provisional remedies provided for in Articles 49 and 50 of the 2001 copyright law should apply in the case of administrative enforcement, as well as before the courts.
6. The administrative penalties in the regulations (Article 24) are woefully inadequate and must be significantly increased to take into account the value of the software that is pirated. The vehicle of the copyright law regulations should be used to correct this grave deficiency.

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 right holders. 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. The U.S.G. should press the State Council to redeem this commitment.

In particular, the US\$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. 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 virtually impossible its ability to reduce piracy rates. These interpretations should be immediately amended.

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

The Supreme People’s Court issued its “Interpretations of Laws on Solving Online Copyright Disputes,” with effect from December 20, 2000. In general, these “interpretations” were incorporated into the new 2001 Copyright Law and need not be amended further except to incorporate the new terminology in the new Law, such as “transmission over information networks.” Article 3 of the “interpretations,” however, as discussed below, remains deficient. Indeed, the State Council has reserved to itself (Article 58) the task of issuing regulations governing “the right to transmit via information networks.” Again, IIPA will cover only the highlights of these interpretations which (except for Article 3) are generally very positive with respect to protecting the on-line environment from rampant piracy.

1. Basically, the “interpretations” applied the existing provisions of the 1990 copyright law (and are consistent for the most part with the 2001 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 right holder 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 right holder 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.⁸ 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 re-carries and extracts works beyond the scope as prescribed for

⁸ 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, or 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.

reprinting in newspaper and magazine articles shall be considered copyright infringement.” 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 right holder 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 right holder with “online registered data” about the infringer, or they violate Article 106 of the Civil Code (IIPA 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. Additionally, 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 1990 copyright law that apply to online infringements and includes reference to Clause 8 of Article 45 which refers to the catchall “other acts of infringement.” This should be conformed to the new law and 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.

2001 SARFT Satellite Management Regulations

In 2001, SARFT, in charge of regulating the radio, television and related business, issued new regulations governing foreign satellite broadcasts. They provided that foreign satellite

broadcasters beaming into China were required to start beaming from an encrypted government-owned satellite platform from January 1, 2002, although that date has slipped due to a delay by SARFT and the MII in finalizing details over who should have control over it. To get on to the platform, foreign channels are required to pay an annual carriage fee of \$100,000 per channel. These regulations are unclear, not transparent, and contradictory to the spirit of the WTO. This 1) makes future business planning by foreign operators difficult; 2) unnecessarily increases the cost of doing business; 3) creates a form of double censorship; and 4) excludes industry input in selecting the encryption system and technology that would provide the most confidence to content providers for the protection of their programs. The regulations also should have, but failed to, reinforce the importance of copyright protection.

Conclusion

More effective enforcement remains the key challenge to the Chinese government in a WTO world. On the legal issues mentioned above, the new copyright law regulations should be used to remedy the deficiencies noted in the copyright law and the software regulations. The State Council can also make appropriate and necessary changes and clarifications in new regulations that can be issued dealing with transmission over information networks. The USG should, before any of these new regulations are promulgated, engage the Chinese authorities on all the copyright-related issues mentioned here.

PRIORITY WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

ARGENTINA

EXECUTIVE SUMMARY

Growing problems with pirate optical media and the illegal use of CD-Rs and pirated cartridge-based software seriously undermine the ability of all the copyright industries to compete with legitimate product. Ineffective copyright enforcement remains at the top of the copyright industries' agenda in Argentina. In a year in which Argentina faced numerous political and economic crises, Argentine law enforcement agencies did support anti-piracy actions in 2001. While the results on criminal enforcement remain far from ideal, the willingness of these authorities to take initial actions was somewhat encouraging. However, raids and seizures did not translate into prosecutions and deterrent sentences, and the lack of efficient protection to the intellectual property right holders keeps the piracy levels in Argentina extremely high. Many elements of Argentina's enforcement regime violate its WTO TRIPS obligations, including non-deterrent 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, require immediate action. Outstanding customs duties issues must also be resolved. Argentina must also revise its draft legislation, which is aimed at revising the law to meet TRIPS as well as to implement the WIPO treaties. IIPA recommends that Argentina remain on the Priority Watch List.

ARGENTINA: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	45%	32.0	45%	32.0	45%	30.0	45%	30.0	43%	35.0	43%
Sound Recordings / Musical Compositions	78.2	47%	76.0	46%	50.0	33%	50.7	35%	25.0	35%	20.0	30%
Business Software Applications ¹	139.9	60%	92.9	58%	156.7	58%	100.8	62%	84.7	65%	107.9	73%
Entertainment Software	NA	95%	141.4	94%	90.3	92%	87.1	94%	83.4	90%	86.0	86%
Books	8.5	NA	8.5	NA	8.0	NA	7.5	NA	7.0	NA	7.0	NA
TOTALS	256.6		350.8		337.0		276.1		230.1		255.9	

¹ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$151.7 million at 60% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

COPYRIGHT PIRACY IN ARGENTINA

Optical Media Piracy, Including CD-R Production, Continues to Be a Threat to Legal Markets

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 shift in the business practices of pirates. In the recent past, piracy in Argentina was part of an 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 were 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; in fact, the business has shifted toward a CD-R duplication model whereby blank CD-Rs are legally or illegally imported into Argentina and then replicated using “serial burners” that altogether produce a significant amount of pirate product. These pirates operated individually or in small groups but are very well coordinated, as if they were one single organization with perfectly known roles.

Local videogame representatives estimate that there are more than 1,000 outlets which routinely burn CD-Rs to order. The recording industry has conducted raids against small labs that at first sight seem harmless but have the capacity to erase the legal CD market from the commercial map. It is very difficult to stop such unlawful reproductions without committed involvement of the customs offices, the tax authorities and of course, the police. Given the domestic scale of this problem and the facts and evidence found in many cases, 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 addressing this IPR problem and, considering the organized crime scheme, obtaining judicial sentences that contribute to deter the high crime rate. Some progress is reported regarding business software CDs within the provinces of Santa Fe and Entre Ríos, where CD-R piracy of software has decreased as a result of the intensive legalization campaign conducted by BSA and Software Legal (BSA’s local software association) during the last quarter of 2000.

Pirate CD duplication centers operate not only in major Argentine cities, but 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. In addition, some pirate organizations are now advertising through classified ads as well as the Internet, a home delivery service for custom pirate CDs.

With respect to industrial production, nine legitimate CD plants operate in Argentina. We are not aware of any underground plants at the moment.

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

Copyright Piracy Levels in Argentina Remain High

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. While some of these products reach Argentina from Asian ports, many of them are transshipped through other ports in Canada, Europe and Latin America. 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 unilateral power, the resources, or sometimes, even the technical skills 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 the Asian exporter. Again, customs officials blamed this procedure on their lack of authority to seize these products. On the other hand, there have been some customs seizures involving PlayStation products.

A second source of videogame piracy involves 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. There is some degree of sophistication in copying techniques. For example, Playstation® software is produced and distributed on black plastic CDs as a security measure. The black-colored plastic CDs were intended to make pirate copies, usually on silver or gold CDs, more apparent. However, it appears that this technique has already been copied by pirates, as indicated by a police investigation seeking the seizure of black-colored CDs. 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.

Information gathered by the IDSA shows that videogame piracy remains rampant, in reputable malls and supermarkets, as well as in flea market-type venues where the vendor sets up small unmarked stalls to peddle their wares (both PC- and console-based games). The number of these mobile venues has been steadily on the rise. One such venue is Rivadavia Park, located in a Buenos Aires business district. Much like the practice of shops located in malls, the flea market vendor displays a small assortment of titles (about 50-60 of the top-selling CDs on the market) for customers to browse through. Once a customer places an order, the legitimate product is taken out of boxes located behind the counter or the customer is asked to wait while the item requested is obtained. These products are clearly pirate as evidenced by the poor quality of the packaging (i.e., the box labels are handwritten, or have only photocopies of the graphics that appear on the original boxes; the boxes themselves are plain plastic boxes without seals or stickers that identify the product; and they do not come wrapped in the clear cellophane wrapping of the legitimate products). Also quite telling is the fact that the products sell well below the cost of legitimate goods. Quite significant is the fact that game titles just recently released in foreign markets are already made available in advance of the legitimate Argentine release of these titles. Upon inquiry,

customers will be told that the vendor acquires "new stuff" every two (2) weeks, clearly long before the product is made available through the proper distribution channels for the country.

Of concern is the fact that so-called "Mod-Chip" circumvention devices are also available for purchase at 120 pesos. These devices defeat the security system of Playstation® consoles, thus allowing the use of illegal copies of Playstation® games.

A third source of concern for the videogame industry in Argentina is Internet piracy. IDSA and Camara del Software Digital Interactivo (CASDI) are monitoring this situation closely. A survey of a Buenos Aires daily newspaper and its Website showed advertisements for the sale of pirate videogame software. The advertiser lists the titles available, as well as his contact information. Although there is, as of yet, no known direct downloading of pirate software from such sites, the listed "for sale" sites allow customers to order products, which is then delivered to the customer's physical location (collect on delivery). Estimated trade losses due to videogame piracy in Argentina are not available for 2001.

The recording and music industry reports that the shift from analog to optical media-based piracy represents a long-term, alarming trend in Argentina which has caused much harm. Argentine pirates have been 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 47% for 2001. The estimated losses due to audio piracy in Argentina for 2001 also rose to \$78 million; this increase is mostly due to the market shift from cassettes to CD-Rs.

Perhaps the most disturbing trend is CD-R technology. Small replicators have a considerable cumulative effect on piracy, with bigger replicators most likely funded by organized crime. In most of these cases, domestic pirates use the same source to obtain raw material (blank CD-Rs) as well as inlay cards. They also use the same distribution system. Organized crime groups coordinate to import (legally and illegally) thousands of blank CD-Rs and burners into the country to keep the cost of raw materials low. Organized crime coordination is also needed in order to avoid customs or "jump" controls and also to produce the inlay cards. The industry has initiated raids against domestic CD-R labs and found some 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 in the absence of a strong commitment from the government's law enforcement agencies. The federal or local governments are not committed to fighting piracy and the judiciary seems to regard it as an insignificant crime. Moreover, customs authorities have not given any attention to the Argentina-Paraguay border, through which a significant quantity of Paraguayan pirate products come in to flood northern Argentina.

In addition to music CD piracy, audiocassette piracy continues to be a problem in Argentina, although of a lesser scale due to the effect of high and cheap CD-R piracy. Thousands of pirate audiocassettes from Paraguay, coming mainly from Encarnacion-Posadas, Formosa and the Parana river, blanket the northern part of Argentina. Piracy in the border towns is high. The legitimate industry definitely 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.

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 led to an increase in the use of the Internet as a means of advertising illegal software to a large audience, and the unauthorized electronic distribution of illegal software. Over the past year, the piracy levels for business software increased from 58% in 2000 to 60% in 2001. Estimated losses also rose over the past year, to \$139.9 million in 2001. 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 2001.

Video piracy continues to seriously impact the audiovisual industry, despite consistent MPA and police activity in investigations and raids. While new forms of optical disc and television piracy are appearing, the Argentine video market is still under attack from pirate activity. Joint anti-piracy and commercial efforts in the home video market have been hampered by a lack of deterrent sentences and a lack of government attention to the damage piracy causes. As a result, video piracy in Argentina is becoming an integral and perhaps inextricable part of the audiovisual market. Nearly half, 45%, of the total home video market is pirate despite improved enforcement. Argentina's home video market is replete with back-to-back, low quality copies. It is common practice for video outlets to produce low quantity copies on premise, and it is now a pervasive custom in greater Buenos Aires. In fact, some small outlets have become totally dependent on illegal supply. The Argentina Video Union (UAV) confirms that the use of pirate copies has become a standard industry business practice.

MPA reports that optical disc piracy (CD-Rs) has grown to occupy an estimated 15% of the optical disc market for audiovisual materials. In addition, television signal theft piracy also is a growing trend. 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 Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) from the U.S. market. Losses to the U.S. motion picture industry due to audiovisual piracy in Argentina are estimated to be \$30 million in 2001.

The book publishing industry continues to report widespread photocopying of English language materials and computer books and texts in Argentina. Illegal photocopies make up the main losses, in copyshops located near the universities but mostly by the student unions and organizations in the universities. Most copying comprises collections of individual chapters of various texts, including, for example, reference books and chapters of English-language graduate titles. One local representative estimated that in 2001, some 35% to 40% of protected materials being used were illegal. There is much less copying in private universities (which has 20% of national enrollments). AAP has learned that some universities defray part of their financing through these photocopies, and that some departments have been trying to start a business copying entire books. This effort has been stopped, for now, due to firm representations by the local Book

Chamber, which has also managed to stop blatant photocopying in some copyshops outside universities.

There is some importation of pirated commercial books from Mexico, Bolivia and Paraguay (trade books and some texts). The overall market has diminished this year due to four years of recession. Piracy of American-produced CDs accompanying medical texts by private doctors has been reported, some involving door-to-door sales to hospitals and doctors. These CDs sell at \$35 compared to the \$300 price of the legitimate product. The situation is so extreme that the leading medical publisher in Argentina reports that all CDs accompanying medical treatises are pirated and he no longer publishes them. Estimated losses due to book piracy in 2001 remain at approximately the same level as 2000; the losses would be greater, but the market has declined due to the Argentine recession. Estimated 2001 trade losses due to book piracy in Argentina are \$8.5 million.

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 contributing to Argentina's failure to provide adequate and effective protection to U.S. copyright holders.²

Criminal Raids Continue, But Piracy Has Not Declined

There is some support from law enforcement agencies for anti-piracy actions. While this is commendable in some respects, it is far from adequate and ideal. The support and joint actions with the Gendarmeria Nacional (National Border Police Force) and Prefectura Naval (Coast Guard) have improved enforcement efforts in a limited manner for most of the copyright industries. However, enforcement efforts at both the federal and state level still need improvement because they do not come close to reflecting the gravity of the piracy situation.

IDSA has teamed up with CASDI (Camara del Software Digital Interactivo), an association of software publishers in Buenos Aires, 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 activities, very little is done to penalize 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.

² Argentina participates in the Generalized System of Preferences (GSP) program in which "adequate and effective" protection of intellectual property rights is a discretionary criterion for eligibility. In 2000, \$218.4 million of goods from Argentina entered the U.S. under the GSP duty-free code, accounting for roughly 7% of its total imports to the U.S. For the first 11 months of 2001, \$108.8 million of Argentine goods (or 6.6% of Argentina's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 9.4% decrease 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.

In 2001, the IDSA, through CASDI, established a cooperative working arrangement with the customs authorities of Argentina. As part of the new procedures for inspections of goods entering the country, a representative from CASDI is summoned to view the inspection process as well as the goods under review. (It has been opined, though unofficially, by a customs official, that this has helped somewhat in decreasing the likelihood of illegal software entering the market.) While this is a significant improvement in the monitoring of border transactions, the current economic decline of Argentina may have adverse effects on the continuation of this project. It is essential that the Argentine government, particularly its customs officials, maintain their vigilance over the influx of pirate goods despite the economic setback.

According to IDSA information, an informal interview with a member of the Federal Police Force revealed the possibility that large organizations (perhaps related to organized crime) may be involved in the smuggling of significant amounts of illegal software products into Argentina. Although such an assertion has yet to be substantiated, the seizures of large amounts of illegal discs shows the large potential for market damage. Given that only a handful of CD replication plants exist in Argentina, it is quite likely that such an organization exists, particularly since these existing plants have not been suspect in any illegal copying. IDSA confirms that Paraguay continues to be the primary source of pirate items entering Argentina, particularly in the area known as the Tri-Frontera (Tri-International Border).

In 2001, BSA filed 14 private criminal suits against pirate software resellers. 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 (out of an annual total of 23), three case initiated in 2000 (out of an annual total of 22), and seven cases initiated in 2001 (out of an annual total of 14) came to trial. These unacceptable delays in criminal process are caused by lack of resources, the large number of pending cases, 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 Secretariat (Secretaría de Turismo), the Radio-Broadcast Commission (Comité Federal de Radiodifusión-COMFER), and the Pension and Retirement Control Office (Superintendencia de AFJP), for alleged use of illegal software. The courts are still reviewing the inspection reports in the cases filed against COMFER and Superintendencia de AFJP, and jurisdiction matters are being decided by the court of appeals in the case involving the Tourism Secretariat. These cases are still in a very preliminary stage of the process, even though more than a year has elapsed since the raids were conducted, demonstrating the unacceptable delays in criminal cases. 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. In 2001, MPA and the local anti-piracy association UAV initiated 220 investigations against video stores and labs, and conducted 221raids in addition to 2,173 inspections. Six reproduction laboratories with a total of 271 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. The trend continues with the growth of CD-R piracy and the lack of support by police agencies and the judicial system. In 2001, a total of 201 street operations were conducted and 59 replicating labs were dismantled, ranging in size from two burners to a large facility involved in organized crime. A total of 398, 000 CD-Rs and cassettes

were seized. These actions caused 406 persons to be arrested but only 34 were charged with copyright violations. Of these, only five proceeded to sentencing—all resulting in suspended sentences.

Argentine Courts Fail to Impose Deterrent Criminal Penalties

Unfortunately, the Argentine judicial system continues to be a weak point even within a law enforcement structure that is itself fraught with difficulties and inadequacies. The Argentine penal code permits a term of one month to six years in jail for commercial piracy; maximum penalties are not imposed. As a result, true enforcement and consequent deterrence continues to fall far short of required levels. In addition, judges prolong excessively the process to obtain search warrants, which prevents effective enforcement.

In 2001, MPA and the local anti-piracy association, UAV, coordinated 221 raids, which resulted in 38 prosecutions. In addition, there were 38 judicial resolutions in 2001 (from cases begun previously), 15 exculpatory and 23 condemnatory. Three people received jail terms of three 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. During 2001, only five recording industry cases reached final ruling stages, this despite almost daily raids conducted against record pirates. The recording industry must be selective in its prosecution of cases in order to concentrate the efforts of the prosecutors and the courts on the most important ones. In these five cases, the pirates were condemned to insignificant prison terms of six months, all of which were suspended. These few results can hardly be considered a deterrent to piracy.

For the business software industry, BSA reports that seven of the 14 cases filed in 2001 have come to trial (compared to only two of 23 private criminal cases initiated by its members in 1999, and three of 22 filed in 2000). 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. In a criminal action against the software reseller Cibersoft, the owner pleaded guilty to the software copyright violation charge and was sentenced to the minimum penalty of three months' imprisonment plus a \$500 fine, but the prison sentence was commuted and the defendant never served time.³ Cases brought by the entertainment software industry are also moving slowly through the courts.

³ Under Argentine criminal law, sentences of up to three years of imprisonment can be commuted, and the defendants never have to serve time.

COPYRIGHT ENFORCEMENT STATISTICS: ARGENTINA 2001

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted		14	355
Number of cases commenced		14	150
Number of defendants convicted (including guilty pleas)		1	8
Acquittals and Dismissals		2	62
Number of Cases Pending		43	112
Total number of cases resulting in jail time		0	3
Suspended Prison Terms		1	7
Maximum 6 months		1	1
Over 6 months		0	0
Over 1 year		0	0
Total Suspended Prison Terms		1	0
Prison Terms Served (not suspended)		0	0
Maximum 6 months		0	0
Over 6 months		0	0
Over 1 year		0	0
Total Prison Terms Served (not suspended)		0	0
Number of cases resulting in criminal fines	1	0	0
Up to \$1,000	0	0	0
\$1,000 to \$5,000	0	0	0
Over \$5,000	0	0	0
Total amount of fines levied		0	0

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	39
Post Search Action	0
Cases Pending	48
Cases Dropped	58
Cases Settled or Adjudicated	24 (Settled)
Value of loss as determined by Rightholder (\$USD)	
Settlement/Judgment Amount (\$USD)	\$541,823 only damages

Border Controls Remain Weak

Argentine border controls are weak and ineffective. There has been cooperation between Argentine customs and 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. The recording industry has evidence of either contraband, or under-declared (in value or tariff) imports, from Uruguay, Chile, or Paraguay coming into Argentina, or directly into Argentina using major airports.

Long 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 cases; 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.

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. BSA reported that in 2000 there was a serious lack of qualified software experts in the civil system, which led to delays and errors. At the end of 2000, the Argentine Supreme Court created a specialized software expert office, which is not yet operational. Software experts are still selected from general lists of experts kept by the court of appeals in every jurisdiction, and often these experts are not familiar with software copyright crimes.

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 eight years; arrest warrants were issued, but most of the defendants were never located. In 2001, Nintendo moved to close those cases in 2001 because there were no additional developments. With regard to Nintendo's activities in September 2000, complaints were filed and served upon the defendants. In one case, the defendant failed to answer the complaint and the case is currently pending the judge's consideration to hold defendant in contempt. In the other case, the defendant was served and the case is pending. Nintendo 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 either 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 (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), accomplishing such on November 19, 1999. IIPA applauds Argentina for taking this action, which will raise the minimum standards of copyright protection, particularly

with respect to the network-based delivery of copyrighted materials. Implementation of the appropriate laws will protect against Internet and other forms of digital piracy, and encourage e-commerce, so these efforts are strongly encouraged by IIPA and its members. The WCT will enter into effect on March 6, 2002, and we hope the WPPT will enter into force shortly thereafter. Under the Argentine constitution, international treaties are self-executing into national law. Nevertheless, we believe many of the WIPO treaties' obligations should be implemented in national legislation (see discussion below).

The 1933 Copyright Act (as amended in 1998)

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 have 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 in 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. IIPA also recommends that protection against parallel imports of copyrighted materials be provided in Argentina.

2001 Project to Amend the Copyright Law

Since 1998, 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 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 were deeply 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) required further amendment and/or clarification. That draft legislation did not correct the many enforcement obstacles, including ineffective border measures, nondeterrent criminal penalties, and lengthy delays in bringing and completing infringement actions.

In July 2001, the Argentine Copyright Office (DNDA) circulated to some industry representatives a revised set of legislation to amend the 1933 Copyright Act.⁴ The DNDA will be reviewing these comments and then submit its own proposal to the Ministry of Justice for its further consideration. The expected timeframe for such consideration is not known, but such processes are usually lengthy in the Argentine system, and since the drafting of this proposal, the Argentine government has changed leadership several times. Further revisions likely will be made to the July

⁴ DNDA extended its informal deadline for comments from August 30, 2001 to October 31, 2001. However, not all the local copyright industries were informed of this process. IIPA has obtained a copy of the legislation but a translation is not available in which to provide comprehensive comments at this time.

2001 proposal. Suffice it to say, separate comments filed by the motion picture, recording and business software industries identified numerous provisions (including the scope of exclusive rights, narrowing exceptions to protection, defining the ownership of copyrighted materials, contractual matters, extending the term of protection, including effective provisions on technological measures of protection, injunctive relief, seizure authority, the scope and level of criminal penalties, *ex officio* authority at the border, and onerous deposit requirements), all of which must be revised and refined if Argentina is to have a modern copyright law which promotes e-commerce and investment.

Bill on Statutory Damages and Seizures of Infringing Equipment

IIPA has learned that there is a bill which would amend Article 82 of the Copyright Act to support the introduction of statutory damages, among other measures.⁵ Bill No. 3205-D-01 was introduced by Representative Eduardo Román Di Cola and was approved by the Chamber of Representatives. The bill will be considered by the Senate, when it begins its ordinary sessions (March 2002). Reportedly the bill allows the courts to impose compulsory and progressive damages in copyright infringement cases and also the destruction of infringing material and reproduction equipment. It also foresees that the plaintiff in a copyright infringement case can be compensated for damages assessed as (a) the real damage suffered by the plaintiff or (b) a judicial assessment within a minimum of \$1,000 and a maximum of \$1,000,000 (punitive damages) for each infringement, whichever is higher. This bill promises to add much needed weaponry in the fight against piracy.

Bill on Illegal Broadcasting and Satellite Theft

In June 2001, a bill (Bill 3670-D-01) was presented to Congress which establishes penalties for those persons who broadcast without authorization, or obstruct or interfere with authorized radio, TV, cable TV and satellite TV broadcasting.⁶ The Telecommunication Commission approved the bill, and it is currently in the Penal Legislation Commission.

The Performers' Rights Bill

In 2001, the Bill on Performers' Rights (S-1206/99), introduced by the Association of Argentine Performers (AADI) in 1999, was withdrawn and a new version was introduced and will be reviewed by the General Legislation and the Culture and Communications Commissions. This bill (0355-D-01) is virtually identical to the old one (S-1206/99), and would partially amend the current Argentine copyright law by granting economic and moral rights to audiovisual performers and recognize AADI as the sole and mandatory collection society for performers in Argentina. This bill was introduced by a representative who has since left the Chamber of Deputies, and the likelihood of any forward progress is uncertain. However, if passed in its current form, the bill would be detrimental to the distribution operations of U.S. audiovisual producers because:

⁵ IIPA does not have the text of this bill; this summary is based on industry reports.

⁶ IIPA does not have the text of this bill.

- 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 the 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.

Government Software Management and Related Legislation

Progress of Government Legalization of Software: Some progress in 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 unattainable in 2001. All BSA negotiations with the government regarding this matter failed in 2000, and in fact, 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. Unfortunately, no progress was made on this matter during 2001. BSA expects that none of the Federal, provincial or municipal governments will issue a legalization decree in the near future, in light of the present economic crisis. The cases filed in 2000 against federal government agencies are still pending, and are only in their preliminary procedural stages.

Preference for Open Source Code Use: BSA is concerned about the potential harm of a bill introduced into the Argentine Chamber of Deputies in September 2000, which would give preference to the use of open source software in the federal government. This bill, No. 5613-D-00, was proposed by national deputy Carlos Dragan, and would require that the federal government, autonomous federal agencies, and government-owned enterprises use and acquire only free open source software, excluding proprietary software. This bill is still pending in the Public Works and Communications and Technology committees of the Chamber of Deputies. BSA has information that a similar bill named “Proyecto de ley para la utilización de software libre en la provincia de Córdoba”, No. 10,506, was introduced to the State Congress in the Province of Córdoba on May 23, 2001. This bill would require the use of open source technology at the provincial level

Bill to Suspend Penalties for Copyright Infringement Withdrawn: During the second half of November 2001, the Secretariat for the Production and Promotion of the Midsize and Small Companies (“Secretaría de Producción y Promoción para las Pymes”) promoted and tried to pass a

harmful bill that would have suspended for a period of six months the application of penalties for copyright infringement, such as software piracy, as set forth in the Argentine Intellectual Property Law. This bill constituted a strong message against software legalization, and harmed BSA's software legalization in the province of Santa Fe (truce campaign). Fortunately, at the end of December, the federal government withdrew the bill. The Argentine government should avoid these types of initiatives in the future, which instead of promoting compliance with the local intellectual property legislation, seriously damage local and foreign copyright holders.

Digital Signature Act: BSA applauds the Argentine Congress for having passed "The Digital Signature Act." This Act, No. 25,506, was promulgated on December 11, 2001, and authorizes the use of electronic signature in all cases where handwritten signatures are required, with only limited exceptions. This Act also applies to digital signatures used for the Federal Government's internal purposes and the services the Government provides to the public. BSA believes that this Act is a major step toward the complete digitalization of the Government, and encourages the Government to take the next logical step and legalize its software.

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 favored, international practice of valuing intangible intellectual property of this kind solely on the value of the underlying media.⁷ 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 serve as a form of double taxation because royalties are generally subject to withholding, income and/or remittance taxes. Such duties are a significant barrier to furthering the growth of the

⁷ 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.

audiovisual market in Argentina. To this end, MPA and RIAA seek a modification of the Argentine Customs Valuation Code and/or an exemption 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. With respect to non-software 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 where 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. 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 similar 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

2002 SPECIAL 301 REPORT

BRAZIL

EXECUTIVE SUMMARY

The Brazilian government has made numerous commitments to U.S. government officials over the years – most recently in March 2001 – 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. A year has passed since the U.S. government commenced its GSP review against Brazil in January 2001. The Interministerial Committee to Fight Piracy (IMC), which was created as a response to the GSP petition, has taken no tangible action. Meanwhile, copyright piracy in Brazil worsens.

Increasingly, Brazilian pirates have turned to domestic production of pirate materials, and much of the importing activity now relates to the smuggling of blank CD-Rs, onto which the content is burned locally in Brazil. Organized crime elements, from within and outside Brazil, exercise control over the production and distribution of infringing copyrighted products. Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, still crosses Brazilian borders and harms the local markets. While a few Brazilian police units have conducted a substantial number of raids (an exception rather than the rule), these raids have resulted in only a very few criminal prosecutions, and in those few cases, the judgments have not been deterrent. To make matters worse, legislative efforts to improve processing of criminal cases have resulted in more defendants in copyright infringement cases being released (via suspended sentences) instead of serving jail time. In civil infringement cases where the business software industry has achieved some success, Brazilian courts require extremely high expert fees and bond requirements.

Brazil is simultaneously one of the largest markets in the world for legitimate copyrighted materials, and home to one of the globe's largest pirate markets. The cultural dimensions of piracy in Brazil are perhaps unequalled given the tremendous stake of Brazilian creators, and would-be creators. 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 Brazilian 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. 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. Estimated trade losses due to copyright piracy of U.S. products in Brazil escalated to at least \$739 million in 2001.

In summary, there has been no tangible progress in reducing piracy in Brazil. Brazilian government promises to take coordinated action at the national level have not been implemented. IIPA therefore requests that the U.S. government determine that Brazil fails to afford "adequate and effective" protection to U.S. copyright owners, and take the next steps to suspend Brazil's GSP benefits and/or eligibility as a beneficiary country under the GSP trade program, unless Brazil takes immediate steps to address this problem and successfully reduces current piracy levels. IIPA also requests that Brazil be placed on the Special 301 Priority Watch List this year.

BRAZIL: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	33%	120.0	33%	120.0	35%	125.0	40%	110.0	30%	100.0	35%
Sound Recordings / Musical Compositions ¹	302.0	55% MC99% CD47%	300.0	53% MC98% CD35%	300.0	MC95% CD35%	290.0	MC95% CD30%	110.0	MC60% CD 3%	80.0	MC50% CD 3%
Business Software Applications ²	303.1	58%	264.1	58%	319.3	58%	298.8	61%	315.7	62%	366.7	70%
Entertainment Software	NA	99%	248.2	94%	116.2	90%	103.2	89%	99.1	87%	92.5	82%
Books	14.0	NA	18.0	NA	18.0	NA	20.0	NA	26.0	NA	27.0	NA
TOTALS	739.1		950.3		873.5		837.0		660.8		666.2	

BILATERAL ENGAGEMENT ON COPYRIGHT ISSUES

Brazilian Commitments in the Mid-1990s

During the early and mid-1990s, Brazil received a significant degree of attention from the U.S. government under the Special 301 bilateral trade tool.³ On April 30, 1993,

¹ RIAA reports that the recording industry's 55% piracy level estimate for 2001 reflects an amalgamated rate of a 99% audiocassette piracy level and a 47% music CD piracy level in Brazil. Similarly, the 2000 rate of 53% factors in both the CD and audiocassette levels for that year.

² BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$269.8 million at 57% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

³ For more details on Brazil's Special 301 history, see appendices D and E of this filing.

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.

As piracy grew in the late 1990's, USTR outlined several concerns and issued requests for improvement, all to no avail. 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."⁴

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, USTR kept Brazil on the Watch List that year, 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."⁵ [Note that the interministerial task force promised in 2000 is not the same one as that established in 2001.]

In April 2001, USTR noted that "[t]he serious copyright piracy problem shows little sign of abatement and no significant enforcement actions were taken in the past year to combat this alarming problem. We are, however, pleased to see the establishment of an Inter-Ministerial Committee to Fight Piracy pursuant to the Presidential Decree of March 2001. We look to the Government of Brazil to develop and implement an effective

⁴ Press Release, Office of the U.S. Trade Representative, April 30, 1999.

⁵ Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000.

action plan to allow this Committee to take concrete, significant action to reduce and deter piracy in Brazil."⁶ Brazil currently is on the Special 301 Watch List.

The 2001 GSP IPR Review on Copyright

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. 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."⁷ 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.⁸

The U.S. government commenced its GSP IPR review against Brazil on January 10, 2001. On March 9, 2001, IIPA was joined by two of its member associations to testify at the GSP hearing on Brazil's copyright practices. We all described the lack of Brazilian government participation in anti-piracy action, compared with other Latin American governments, and requested improved industry-government coordination. By Presidential Decree, on March 13, 2001, Brazil established an Interministerial Committee to coordinate copyright enforcement efforts with private sector organizations that have anti-piracy experience. This GSP review is ongoing.

THE BRAZILIAN GOVERNMENT'S ORGANIZATIONAL EFFORTS AGAINST PIRACY IN 2001

At the Federal Level, the Inter-Ministerial Committee has Failed to Produce and Implement Any Coordinated National Anti-Piracy Plan

⁶ Press Release 01-25, Office of the United States Trade Representative, "USTR Releases Reports Emphasizing Enforcement Priorities," April 30, 2001.

⁷ 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)].

⁸ In 2000, \$2.1 billion of goods from Brazil entered the United States under the duty-free GSP code, accounting for 15% of its total imports to the U.S. For the first 11 months of 2001, \$1.8 billion of Brazilian goods (or 13.6% of Brazil's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 6.9% decrease over the same time period last year.

The copyright industries were initially heartened by the increased attention the Brazilian government gave to the problem of copyright piracy, especially after IIPA's GSP petition was filed in August 2000. The most tangible step taken by Brazil was the March 13, 2001, publication of the decree implementing the Inter-Ministerial Committee to Fight Piracy (IMC).⁹

Establishing the IMC: IIPA and its members noted (at the March GSP hearing and in our April post-hearing brief) that it was imperative that inter-agency coordination be established immediately in order to take swift action to combat widespread copyright piracy and improve enforcement across the responsible Brazilian agencies. We urged that the IMC should establish itself quickly and begin its work. On April 23, 2001, the IMC coordinator was identified.

Regrettably, the IMC has not produced any document, has not taken any action, nor has it manifested any indication that it intends to take any action. Indeed, the only thing that we have heard from the commission is that it needs considerably more time to develop its ideas. This lackadaisical attitude in the face of debilitating piracy is simply not tolerable, and should not be countenanced. The private sector has plenty of ideas about actions that the government could take that would begin to address the piracy situation. The IMC cannot be permitted to ruminate indefinitely.

If the IMC is to proceed with any degree of effectiveness, the Ministry of Justice needs to be given a stronger leadership role in the IMC, including the ability to make decisions if other agencies do not actively participate. In the alternative, the number of agencies in the IMC should be drastically reduced so that it can move forward more effectively. Above all, the IMC coordinator needs to be a full-time executive with authority to coordinate raids and prosecute cases. The IMC itself has no power to decide on any important matter, but only to recommend to public agencies on piracy issues. Merely changing the formation of the IMC will not be sufficient to make it produce concrete results.

Action Is Key: IIPA and its member associations note that such interagency coordination would be a major, laudable achievement for the Brazilian government. Members of the GSP Subcommittee stated at the GSP hearing that Brazil's creation of such a coordinating body, in and of itself, does not solve the existing problem of piracy. In fact, the GSP Subcommittee Chairman indicated at the hearing that the ultimate question is whether this Committee will be "effective." To date, its level of effectiveness – especially in producing a coordinated national anti-piracy plan and implementing such – has been nonexistent. Important elements of the ongoing review include the IMC's development and implementation of a government strategy to fight piracy and

⁹ The Inter-Ministerial Committee is led by the Ministry of Justice, and is composed of three representatives from the Ministry of Justice, two from the Ministry of Science and Technology, two from the Ministry of Culture, two from the Ministry of Development, Industry and Foreign Trade, two from the Ministry of Treasury, and two from the Ministry of Foreign Affairs.

the need for immediate actions to be taken by existing enforcement authorities (police, customs, courts) to fight piracy.

To assist the government of Brazil in developing a comprehensive and effective anti-piracy operation, several of the IIPA member associations that are actively engaged in on-the-ground enforcement around the world compiled a list of action-oriented recommendations which we included in our public April 2001 GSP post-hearing comments.¹⁰ IIPA believed, and continues to believe, that those recommendations would be useful to the Government of Brazil, and we outlined an initial blueprint of actions which the Inter-Ministerial Committee and/or its participating agencies could take in the immediate future. Unfortunately, our detailed suggestions have not been implemented in practice.

IMC to Work with Private Industry: Also at the March GSP hearing, the GSP Subcommittee Chairman asked the Brazilian representative to address how the IMC will work with, or involve, the private sector.¹¹ Brazil's public post-hearing brief did not respond to this inquiry.

Several IIPA members have met individually and in small groups with the IMC chairman, as well as other senior Brazilian officials, including the Minister of Justice. A list of suggested actions was presented to the IMC chairman; however, the IMC never implemented these suggestions. The industry has never met with all members of the IMC. The industry has never received any official communication from the IMC regarding any of its decisions or actions, although informally, the copyright industries were advised that no decisions were made and nothing was planned. In sum, the IMC has not shown any willingness to work with the private sector or the U.S. government. Furthermore, the IMC chairman promised enforcement actions in October and November 2001, but nothing was done. The IMC has no agenda for 2002, as far as the industries are aware.

Industry Efforts: Our industries have not stood idly by during this GSP review. Here are a few salient examples of involvement and advocacy. First, several of the IIPA member associations compiled a list of action-oriented recommendations which was appended to our GSP post-hearing brief (as mentioned above) with the objective of assisting the Brazilian government and the IMC in developing a comprehensive and effective anti-piracy operation. The proposals covered four areas: general objectives of the IMC, enforcement coordination, specific enforcement actions, and a legislative agenda.

¹⁰ The details of our proposed "action plan" are contained in Appendix B to IIPA's April 6, 2001 Post-GSP Hearing Brief, available in full on the IIPA website at http://www.iipa.com/gsp/2001_Apr6_GSP_Brazil.pdf.

¹¹ Article 4 of the decree states that the IMC may invite representatives from the private sectors to participate, as consultants, in order to contribute to the improvement of the performance of the IMC's activities.

Second, the copyright industries arranged for a public event to disseminate the news of the formation of the IMC. The local copyright industries¹² (which include many of the same companies represented by IIPA member associations) hosted an April 22 luncheon in honor of Brazil's Minister of Justice and "International Intellectual Property Day" (as declared by the World Intellectual Property Organization, WIPO).

Third, an IPR seminar in September 2001 was organized by the U.S. Consulate in São Paulo with the support of the copyright industries. Only the IMC chairman and one other IMC member agreed to attend this event. While the press from this conference helped make the Brazilian public aware of the existence of the IMC and its role, no actual operational actions were taken by IMC as a result of that seminar.

Unlike the Lack of Progress at the Federal Level, There Have Been Some Positive Efforts Taken at State and Local Levels, and in Particular, in the State of São Paulo and City of Rio de Janeiro.

The state government of São Paulo has created a specialized police unit for piracy cases, the DEIC, part of the Organized Crime Office. This allows industries to coordinate directly with specific police and prosecutors who will become familiar with the industry entities and intellectual property rights, instead of attempting to coordinate with the general police/prosecutor infrastructure. It is notable that this is a state (not federal) level effort, yet it is a groundbreaking move that provides a model for other states. The motion picture industry has reported good cooperation in its initial anti-piracy efforts with this police unit. Industry colleagues believe it is a bit too early to tell if this São Paulo force will be competent and effective in the long term. Unfortunately, this São Paulo unit has not yet received proper resources (economic/ personnel) to conduct a continuous anti-piracy effort in the state.

There is no relation between the IMC and the creation of the specialized police in São Paulo. Other Brazilian states and municipalities might consider looking at the initiative and action taken by the State of São Paulo in order to gear up their anti-piracy efforts across their respective investigative agencies. Adding specialized police resources to existing police units, in a nonexclusive manner, may help in bolstering anti-piracy efforts. For example, there could be value if other States' *Delegacias de Defraudações* were given responsibilities to combat piracy. Other states are encouraged to make similar, tangible progress in anti-piracy.

MPA also reports positive action from the Rio de Janeiro municipal authorities against street piracy. Municipal authorities have begun to take action against street

¹² The hosts for the April 23 event included: ABC (Associação Brasileira Cinematográfica, the Brazilian Film Distributor Association), UBV (União Brasileira de Vídeo, the Brazilian Video Union (MPA member companies), ABPD (Associação Brasileira de Produtores de Discos, the Brazilian Record Producer Association), ABDR (Associação Brasileira de Direitos Reprográficos, the Brazilian Book Publishers Association), ABEM (Associação Brasileira dos Editores de Música, the Brazilian Music Publishers Association), ABPDEA (Associação Brasileira para Proteção dos Direitos Editoriais e Autorais, the Brazilian Book and Publishers Association) and BSA (the Business Software Alliance).

pirates, especially in the Camelodromo market, by closing booths and fining owners for violating municipal ordinances against the unlicensed sale of unauthorized product and the failure to pay proper taxes in the original purchase of the unauthorized goods.

Last year, the copyright industries worked closely with the U.S. Consulate in São Paulo to support and participate in a consulate-sponsored event on intellectual property, as mentioned above. This two-day event, held on September 19-20, 2001, contributed positively toward creating public awareness. However, the lack of active participation of the IMC and the lack of interest and attention by the rest of the Brazilian government was evident.

It is worth noting that some of the improvement from local and federal enforcement authorities is due to the importance that the U.S. Consulate in São Paulo has given IPR issues. The Consulate has organized seminars and social interaction events for enforcement authorities and industry, as well as proactively seeking meetings with government officials to explore improvements in enforcement and coordination with industry. The Consulate should be commended for its effective effort.

COPYRIGHT PIRACY IN BRAZIL

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).

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

Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, continues to cross the porous Brazilian borders, devastating the local markets. There is also rapidly escalating, 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.

Music CD piracy exploded in Brazil in 1998, leading to dramatic increases in losses for U.S. and Brazilian recording companies, music publishers, film companies, book publishers, and publishers of entertainment software and business software. Over the past three years, the CD piracy problem has continued to grow, greatly undermining the economic viability of the entire industry. Unlike the situation a few years ago, most of pirate product today is manufactured in Brazil. Countries in Asia (primarily Taiwan) and Paraguay continue to be significant sources of pirate product, duplication equipment and smuggled blank CD-Rs, but most of the reproduction

facilities are within Brazilian frontiers. (See further discussion in the next piracy section, below.)

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

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 discs find their way to Brazilian street markets. MPA has noted the beginnings of optical disc piracy, previously not present in Brazil. The legitimate DVD market is growing rapidly 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.

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 remains overwhelmed by worsening levels of music piracy in CD format; the audiocassette market was lost to pirates years ago.

During 2001, recording piracy has further deteriorated. RIAA reports that pirate products are increasingly manufactured locally on CD-Rs rather than imported from Asia, shortening the window in which legitimate CDs can be sold prior to the market being flooded by pirate copies.¹³ In 2001, the overall music market decreased by 25 percent in units, mostly due to the increase in CD-R piracy. The level of music CD piracy rose to 47% last year, meaning that almost half the market had become pirate. The cassette market in Brazil remains entirely dominated by piracy, as it has been for the past several years. The situation with pirate CDs is growing bleaker. Piracy has changed from an international industrial profile to a domestic semiprofessional effort — the distribution of product, however, remains highly organized. Record stores all over

¹³ Tom Gomez, "Brazilian Music Market Sees Sales Drop 40%," *Billboard*, Sept. 15, 2001.

Brazil are closing down due to piracy. Record companies have fired personnel in order to cut costs, and are limiting the number of releases and artists on their labels. Companies have only a few weeks to sell their products, because once the market is filled with piracy, sales fall to zero. Records that sell 500,000 units in the first month sell only 5,000 in the second. All the major labels have released very inexpensive CDs in an attempt to fight piracy, but these efforts have not been successful. The sales picture is devastating. Estimated losses due to piracy of sound recordings and music, in both compact disc and audiotape format, amounted to an alarming \$302 million in 2001.

The chief reasons for the rapid increase in music CD piracy are: (1) 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; (2) the regional CD and CD-R problem, caused mainly by neighboring Paraguay, and unrestricted imports via airports and seaports in Brazil and its links to Southeast Asia; (3) the lack of proper legislation and judicial guidelines to allow the judiciary to proceed definitively against the suspect infringers; (4) the lack of convictions and judicial sentences which deter piracy; and (5) the emergence of local illegal replication through the use of CD burners. The CD and CD-R 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 but it was short lived, since the market in 2001 decreased by 25 percent.

In addition to the growing presence of locally replicated illegal CD-Rs, pirate and bootleg music cassettes and CDs enter Brazil mainly from Paraguay via Foz de Iguazu, Corumba, Uruguaiana, Salto de Guairá and Ponta Pora, and also through the ports of Santos, Paranaguá, 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 emerging CD plants in Paraguay and elsewhere. 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. In

addition, Paraguay reports that 104 million blank CD-R's were imported in 2001 which more than likely will be used for piracy purposes.

For the last five years, Brazil's audiocassette market has been completely lost to pirates. For 2001, cassette piracy accounts for 99% 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 is gradually switching toward selling pirate CD-Rs, 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 should be even more concerned in addressing the piracy problem.

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. In a separate legal action, the recording industry (ABPD) also filed suit against the Receita Federal in order to avoid the use of this stamp. 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 growing threats of VCD and DVD piracy.

According to the Motion Picture Association (MPA), annual losses to the U.S. motion picture industry due to audiovisual piracy in Brazil are estimated to be \$120 million in 2001. Video piracy in Brazil remains MPA's primary concern. Such piracy has reached a high degree of integration into the video market. Although the overall percentage is lower than other Latin American countries (approximately 33% of all video product distributed in Brazil is pirate), the overall volume is much higher because of the size of the market. The piracy rate in some areas in São Paulo is low, given that MPA has devoted significant time and resources to these areas. However, there

continues to be substantial piracy in the peripheral urban areas, such as the east zone of São Paulo, as well as in the smaller population centers such as São Paulo state, Rio de Janeiro, Minas Gerais and the many centers spread throughout southern Brazil.

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 an increase over the past year, with losses rising to \$303.1 million in 2001. The estimated level of business software piracy remained constant, at 58% in 2001. Brazil has a very large informatics/software development and distribution industry which contributes positively to the Brazilian economy.

During 2001, the business software industry continued to engage in civil judicial actions (search and seizure) and criminal police actions orchestrated by the industry association, ABES. BSA focuses its anti-piracy activities in the following states: Minas Gerais, Paraná, Rio de Janeiro, Rio Grande do Sul, Santa Catarina, São Paulo, Goiás 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, particularly 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.

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. According to the Interactive Digital Software Association (IDSA), videogame piracy overwhelmed the Brazilian market last year. The estimated level of piracy of entertainment software (including videogame CDs and cartridges, personal

computer CDs and multimedia products) in Brazil jumped from 94% in 2000 to 99% in 2001. Pirate game products are available in Brazil for as low as US\$ \$4.00. Estimated losses due to piracy in 2001 are not presently available.

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 products for Sony PlayStation is 100% because Sony is not in the market. All of this material is industrially produced (silver discs) and imported from the Far East; very little is coming in from Paraguay now. 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.

A variety of pirate fronts require attention. One is the sale of pirate game software through advertisements offering games, placed in newspapers and other sources. The customer calls and 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), and 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 is 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 is 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).

Books remain vulnerable to widespread unauthorized photocopying.

The publishing industry reports that unauthorized 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. Imported educational materials are commonly photocopied, due in part to their high price. Some of the largest universities are discussing legitimizing the photocopying that goes on in their libraries; there are, however, only a few contracts signed between the universities and the ABDR (Associação Brasileira de Direitos Reprograficos). More unauthorized photocopying occurs in the northeastern states of Brazil, compared to São Paulo, Rio de Janeiro, Minas Gerais and Porto Alegre.

There is, however, an increasing public awareness in Brazil that photocopying is illegal, thanks to the work of the Brazilian Book Chamber and universities' staff. 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 book piracy in Brazil dropped to \$14 million in 2001. This decline is due primarily to the fact the all Brazilian universities were on strike for half of 2001, thus reducing unauthorized photocopying, as well as a shrinking in the market for the sale of legitimate products. Losses would have been higher if the universities had been operating on a normal schedule.

COPYRIGHT ENFORCEMENT IN BRAZIL

In general, the glaring problem with Brazilian enforcement efforts has not been the ability to achieve police raids and actions (and of course much more can be done in that regard), but the failure of Brazilian enforcement authorities to emphasize serious prosecution and deterrent sentencing. There is a general lack of interest, and delays hamper effective enforcement of the copyright law throughout the criminal enforcement system, especially with judges and prosecutors. Police activity has been moderately successful at the raiding level, but the actions rarely reach conclusion in the courts. The business software industry -- the only industry to use civil litigation in Brazil -- has experienced better results on the civil enforcement side.

The Brazilian Criminal Justice System Is Ineffective and Fails to Deter Piracy

Brazil continues to exhibit a general lack of interest and unacceptable delays hamper effective enforcement of the copyright law throughout its criminal system. 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 Militar, Policia Fazendaria, Alfandega) to act against instances of copyright infringement.

Police raiding activities against piracy are inconsistent, good in some cities and nonresponsive 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. Right holders 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.

Several industry groups believe 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 five years, working primarily in the states of São Paulo, Paraná, Minas Gerais, Goiás, Bahia and Rio de Janeiro. In 2001, for the second year in a row, the number of actions decreased. For the year, the recording industry brought 577 actions (versus 724 actions in 2000 and 777 for 1999), which resulted in the seizure of 2.6 million CDs and 422,000 cassettes, as well as 312,000 blank CD-Rs. These statistics reflect only a very small portion of the entire pirate market. The number of CDs and CD-Rs seized is low, compared to a market of some 78 million legal units versus 96 million pirate units (69 million illegal CDs and 27 million pirate cassettes).

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 *delegacias*. 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, Riberão Preto, Porto Alegre, as well as throughout the cities of Brasília, Florianópolis, Curitiba, Goiânia, Cuiabá, Feira de Santana, Vitória de Conquista, Teresina, Natal, Caruaru. These are just a few examples of the locations where piracy exists with impunity. As 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.

MPA has been successful in obtaining police raids (over 7,500 in the last three years) and in initiating criminal cases (over 5,000 cases pending). Improvement has also been seen with arrests (33 arrests in 2001, compared with 16 in 2000 and only four in 1999) and sentencing (13 convictions, including four of over two years' imprisonment, suspended for probation, in 2001, compared with only four in 2000 and none prior to that). Nevertheless, MPA has been frustrated in its effort to develop a deterrent impact because there is no focus on key cases of organized reproduction and distribution; there are 327 recidivists among the pending cases.

MPA reports an increase in the number of training seminars given to police and prosecutors in an attempt to increase understanding and priority for IPR enforcement and reports consequent good results from them. MPA, in coordination with other institutions, including the Brazilian Magistrates Association and the U.S. Consulate, organized seventeen such training sessions in 2001, compared with nine in 2000 and only one in 1999. MPA encourages more federal involvement in organizing such events.

The business software industry, BSA, in collaboration with the ABES (Associação Brasileira das Empresas de Software (ABES--the local software association), was successful in getting the police to bring 273 criminal actions against resellers in Brazil in 2001. Of these actions, 11 were against small stores where 122,569 CDs were seized, 262 actions were brought against street resellers where 229,375 CDs were seized, and one action was brought against an individual offering pirate software for sale in newspapers, where 1,643 CDs were seized. A total of 351,944 illegal CDs have been seized as a result of these actions (an increase from 2000 criminal reseller actions of 139,046). 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 2001.

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 Brasília 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. This is still the case, and has been since 1999.

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, nondeterrent sentences are issued.

Prosecutions are ineffective; few cases reach the courts, and those few that do fail to impose deterrent penalties. Unfortunately, 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.

One advance was made in 2001 by the federal prosecutors in the state of Rio de Janeiro. They created a specialized unit for prosecuting criminal copyright infringements. This unit coordinates directly with the head of the IMC.

In 2001, the recording industry promoted actions against 577 targets. Of these 577 cases, more than 70 percent were suspended and only 19 people from the 1,187 arrested were indicted. Of those indicted, seven persons have been in jail for over 30 days, only because of immigration irregularities.

With respect to audiovisual cases, MPA reports that the pattern of no deterrence at the prosecutorial and judicial levels continues, despite some increase in arrests and sentencing. MPA reports thirteen convictions for copyright violations in 2001, including four of over two years' imprisonment, suspended for probation, compared with only four in 2000 and none prior to that. Despite the increased number of convictions, most are for 3-4 months and all are immediately suspended with probation.

As for business software actions, BSA's criminal campaign against resellers is focused on seizures and publicity, conducting actions with the state police. In 2001 there were 273 criminal complaints filed in Brazil relating to the piracy of business software (these actions were brought in collaboration with ABES). No criminal verdicts have been issued in any of these actions.

**CRIMINAL COPYRIGHT ENFORCEMENT
STATISTICS IN BRAZIL for 1998, 1999, 2000 and 2001**

ACTIONS	Recording Industry 1998 (1999) [2000] {2001}	Motion Picture Industry 1998 (1999) [2000] {2001}	Business Software Industry 1998 (1999) [2000] {2001}	Totals 1998 (1999) [2000] {2001}
Number of complaints filed with police	530 (409) [724] {577}	1,320 (832) [1,957] {1,750}	34 (118) [134] {273}	1,884 (1,359) [2,815] {2,600}
Number of raids conducted	680 (777) [724] {577}	2,381 (1,671) [1,535] {1,354}	34 (118) [134] {273}	3,095 (2,566) [2,393] {2,204}
Number of pirate copies seized	2.85 million (2.86 million) [4.63 million] {3.4 million}	243,581 (212,063) [220,878] {225,785}	NA (NA) [212,898] {351,944}	+3.09 million (+3.07 million) [5.06 million] {3.97 million}
Number of cases suspended or dismissed	NA (18) [131] {NA}	148 (235) [146] {87}	(0) (0) [0] {0}	+148 (253) [277] --
Number of defendants convicted (including guilty pleas)	5 (3) [9] {NA}	1 (0) [2] {13}	0 (1) [0] {0}	6 (4) [11] --
Criminal sentence issued	Minimal fines (1-year jail term, commuted to small minimal fines) [sentences commuted to small fines - \$260] {NA}	Community service (None) [Community service] {up to 2 years, all given probation}	None (2 years' probation plus fine <\$600) [None] {None}	Minimal (Minimal) [Minimal] {Minimal}
Ratio of convictions to the number of raids conducted	0.7% (0.8%) [1.2%] {NA}	0.04% (0%) [0.09%] {--}	0% (0.8%) [0%] {0%}	0.19% (0.16%) [0.46%] {--}

Notes

- Statistics in this chart are provided by IFPI Latin America (IFPI), the Motion Picture Association (MPA), and the Business Software Alliance (BSA).
- The suspensions or dismissals cited above are the result of judicial decisions under Law 9099-95, which permits judges to sentence first-time offenders with up to two years' probation and monetary damages.

NA = Not available.

Delays by Police, Prosecutors and Judges, are Unwarranted

For those rare criminal cases that do make their way to court, the time to complete a case is very long. 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. One solution often proposed to address the problem of delays has been the creation of a specialized court for copyright matters (see discussion, below).

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.

IDSA reports one case in which a large container full of counterfeit Nintendo videogame products was stopped by Santos Port Customs in Brazil; the authorities seized over 13,000 counterfeit Game Boy cartridges. The investigation remains underway.

BSA reports one case in which large containers full of counterfeit business software and videogames were stopped by agents of the Treasury Department at the

Paranaguá Port; the authorities sized over 550,000 counterfeit CDs and the investigation remains underway.

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 18 months to four 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, in addition to criminal enforcement. BSA continues to bring civil search and seizure actions, followed up in most part (unless the defendant settles within 30 days of the search and seizure) with the filing of civil damages suits. In 2001, BSA members acting through BSA brought 59 civil actions against software pirates (compared with 53 civil actions in 2000), and the business anti-piracy hotline received 30,626 calls in 2001 (compared with 23,624 in 2000), which produced 1,834 leads of suspected piracy (compared with 1,337 in 2000).

Nonetheless, in two civil cases in the State of São Paulo, BSA has received two very favorable judgments for multimillion-dollar sums. The judges in these cases applied Article 103 of the Copyright Act of 1998 (Law No. 9.610/98) ordering the defendants to pay damages of 3,000 times the retail value of the illegal software seized. Most recently, in October 2001, a multimillion-dollar judgment against a São Paulo-based company represented the fifth such judgment awarded in a BSA case applying the 1998 copyright law. 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.

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.

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 proposes changes to Article 530 of the Criminal Procedures Code to assure that copyright violation is a matter of public criminal action, allowing actions *ex officio*, allows seizure of all offending product as well as supporting material (reproduction machinery, coversheets, etc.), and allows the representatives of the titleholders to actively participate in the prosecution of the case. It would also amend Article 184 of the penal code to include unauthorized rental of a work or sound recording for profit. 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.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Law and the Software Law (as Amended in 1998)

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 Considered

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. 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. We would welcome consideration of this remedy as one that might help ameliorate the sorry state of anti-piracy enforcement in Brazil.

Government Software Management

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. BSA remains concerned that little progress on this issue may be made in 2002 because it is an election year in Brazil.

At the March 2001 GSP hearing, the GSP Subcommittee Chairman asked the Brazilian representative to address the report of the business software industry that Brazilian ministries and agencies are engaged in the use of unauthorized copies of business applications programs. The Brazilian government did not respond publicly to this request of the committee.

NON-TARIFF BARRIERS

Temporary Measure No. 2,228-1/01 for the Development of the National Film Industry

Established by Presidential decree in September 2000, the Executive Group for the Development of the Film Industry (GEDIC) was charged with presenting proposals for the development of the Brazilian film industry. Of particular concern to the MPA was the lack of transparency and secretive nature of the GEDIC process.

On September 10, 2001, the Brazilian Government issued Temporary Measure 2,228-1/01, which established a number of provisions aimed at bolstering the local film industry, including tax and non-tax components impacting on theatrical, home video, broadcast and pay-TV channel divisions sectors. The Temporary Measure has the immediate effect of law upon publication, although it must eventually be approved by Congress, a process which is still pending.. The most onerous provisions of the Temporary Measure are listed below:

- Establishment of a fixed and percentage CONDECINE levies (Art. 32). The fixed CONDECINE is due per title and for each market segment. The 11% CONDECINE applies to the credit, remittance and payment to producers or distributors derived from the commercialization of films and TV works. However, Article 49 establishes that when Article 3 of the Law No. 8,685/93 is used, the payment of the 11% CONDECINE is not required;
- The existing theatrical screen quota was extended for 20 years;
- The existing home entertainment title quota was also extended for 20 years;
- Existing local printing obligations on theatrical prints were continued and local printing obligations were extended for home video entertainment. There are only two printing laboratories in Brazil for theatrical prints, which cannot supply the growing demand for prints in Brazil due to the increasing construction of multiplex theaters. 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.
- A burdensome system of information and monitoring of the film and video industries was established, including mandatory reports for exhibitors, home entertainment distributors and outlet; obligatory indelible identification mark; and mandatory contract registration;

The Impact of the Temporary Measure:

- In the **theatrical sector**, the 11% CONDECINE on distribution tends to reduce diversity in the supply of films.
- For the **home entertainment segment**, the fixed CONDECINE paid per title, independent of turn-over, signifies a reduction in the supply of films in video outlets.
- The **Pay-TV sector** – including programmers and content distributors – is most affected by the Temporary Measure. The impact of both CONDECINES on the

Pay-TV sector, based on initial estimates using approximately 2/3 of simulations of channels, would reduce more than 50% of the revenues, and of half of these, the total taxation would exceed the channels' revenues. Preliminary estimates show that only the fixed per title payment would generate potentially more than R\$ 170 million (US\$71.73 million) in revenues. Thus, the tax burden on this sector would provoke the closure of at least 2/3 of channels, and sales in the sector would fall by about 1/3. For those channels that could manage to survive in this environment of narrow margins, the CONDECINE would be passed on to cable operators, who would pass it along to final consumers.

- The **Broadcast TV sector** was also affected by the Temporary Measure, especially the fixed CONDECINE levies on films and series. Series will be assessed on a per title and episode basis.

Remittances and Computer Software and Tax Barriers

Pursuant to the last modification of the Central Bank's regulation on overseas remittances relating to software purchases/licenses, per Circular No. 2682 of September 1996, the financial institution conducting the currency exchange operation still requires all documentation listed in Circular No. 2682 of May 1996, which includes: (1) the agreement signed with the exporter of the software (import license); (2) 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; (3) copies of the invoices reflecting the sale of software; and (4) a declaration of liability.

Brazil has eliminated most of the non-tariff 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.

Recently, Law 10.332 has imposed an additional 10% tax called "CIDE" (*Contribuição de Intervenção no Domínio Econômico*) to be applied to international payments for technology and royalties of any nature. BSA indicates that the application of this tax is still unclear, but it could push taxes on foreign remittances of royalties, etc., to 25%, as there is currently a withholding tax of 15% on the remittance of payments related to software licenses.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

COSTA RICA

EXECUTIVE SUMMARY

Costa Rica finally has begun to take certain steps long sought by the copyright industries to resolve the very difficult enforcement and legislative difficulties faced by such industries in 2001 and prior years. Delays in judicial proceedings, lack of an administrative office or official program to protect intellectual property rights, lack of official investigators and public prosecutors specialized in intellectual property crimes, as well as budget restrictions on the judiciary caused serious enforcement problems in 2001.

In 2000, Costa Rica enacted a very harmful intellectual property law, "*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*", which diverges substantially from TRIPS requirements. Despite the copyright industry's recommendations, this law was not amended to adapt it to TRIPS in 2001. Although the IIPA and its members are encouraged by the improvements announced by the Costa Rican government this month, particularly the IPR training of additional prosecutors and official experts, many of the commitments made by the government (Ministry of Foreign Trade) to the U.S. Ambassador have not yet been implemented. IIPA recommends that Costa Rica remain on the Priority Watch List until concrete, sustainable results are obtained.

COSTA RICA: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1999 - 2001

INDUSTRY	2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level
Business Applications Software ¹	15.6	69%	14.9	68%	9.4	71%
Sound Recordings / Musical Compositions	4.8	40%	3.0	40%	3.0	40%
Motion Pictures	2.0	40%	2.0	40%	2.0	95%
Entertainment Software	NA	NA	0.2	%	NA	NA
Books	NA	NA	NA	NA	NA	NA
TOTALS	22.4		20.1		14.4	

¹ BSA statistics for 2002 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$9.0 million at 68% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and the revised piracy loss estimate is reflected above.

COPYRIGHT PIRACY IN COSTA RICA

The lack of effective copyright legislation and judicial protection of intellectual property rights in Costa Rica caused the number of pirate resellers and end users to remain very high during 2001. The government has not taken the lead by legalizing its own software. The business software piracy rate was 69% in 2001, and represented estimated losses to U.S. publishers of approximately \$15.6 million during that year. This means that almost seven in 10 software programs installed in Costa Rica in 2001 were illegal. The recording industry estimates \$4.8 million in trade losses during 2001, and a piracy rate of 40%. The increase in the losses amount from prior years is due to the shift from cassette to CD-R piracy.

COPYRIGHT ENFORCEMENT

IIPA and its members have made several recommendations to improve copyright enforcement in prior 301 submissions,² 2000 GSP/CBERA petitions, and in the latest Costa Rican Special 301 out-of-cycle review.³

Also, IIPA members have individually extended additional recommendations to the Costa Rican government over two years; the first concrete results were announced this month. Some of the most important recommendations are:

(1) Appoint specialized IPR prosecutors. The Costa Rican government just announced that at a meeting held on February 7, 2002, the Attorney General of the Republic officially announced that the Public Ministry has appointed 12 specialized “link” prosecutors, one for each public prosecutor’s office in the country, to handle “with priority” intellectual property complaints. While

² For more details on the history of bilateral engagement on copyright issues with Costa Rica, see appendices D and E of this filing. In 2000, \$55.3 million of Costa Rican goods entered the U.S. under the GSP, accounting for 1.6% of its total imports to the U.S. Under the CBI, Costa Rica had \$601.4 million worth of goods enter the U.S. in 2000, accounting for 17% of its total imports to the U.S. In 2000, \$15.6 million of Costa Rican goods entered the U.S. under the CBTPA. For the first 11 months of 2001, \$388 million of Costa Rican goods entered the U.S. under the CBTPA. For the first 11 months of 2001, \$54.9 million of Costa Rican goods entered the U.S. under the duty-free GSP code, representing a 8.5% increase over the same time period last year. For the first 11 months of 2001, \$542.3 million of Costa Rican goods entered the U.S. under the CBI, representing a decrease of 1.9% from the same period last year.

³ In the April 30, 2001 Special 301 announcement in which Costa Rica was placed on the Priority Watch List, USTR noted that “there is growing concern regarding the lack of effective enforcement activity by the Government of Costa Rica.” The United States “urge[d] Costa Rica to improve coordination of enforcement activities between public prosecutors and investigators; appoint special prosecutors to take on intellectual property cases; create a coordinated nationwide plan for defending and enforcing IP rights; and improve enforcement-related training at all levels of government.” On October 31, 2001, USTR announced its decision regarding the out-of-cycle review. Because “little progress has been made on the four-point list of enforcement-related actions in USTR’s April 30 announcement,” Costa Rica remained on the Priority Watch List.

this development appears to be positive, it is premature to comment on whether it will solve the enforcement bottleneck faced by the copyright industries. However, newspaper reports have indicated that these are not new prosecutors, but merely prosecutors who will receive some special training. They are not limited to IPR, and indeed, nobody knows how they will handle IPR cases or what “priority” for IPR means. So it is premature to applaud the action.

(2) Create a coordinated national plan. An official agency, office or program entirely dedicated to the protection of intellectual property rights should be implemented in Costa Rica. With the exception of the copyright, patent and trademark registries, there is no such agency, office or program in Costa Rica. BSA has knowledge that the Costa Rican government is supporting the creation of an Inter-Ministerial Committee on Intellectual Property matters to ensure progress on intellectual property protection, but there is no confirmation that this committee has been formed so far.

(3) Improve intellectual property training. Training in intellectual property matters, in particular copyright, should be undertaken at all governmental levels of enforcement, police, customs, prosecutors, judges, and the Judicial Investigative Office. In June 2001, BSA conducted a training seminar for judges, public prosecutors, and OIJ at the Judicial School, where BSA local counsel and even a BSA software expert from Mexico participated as speakers. Unfortunately, no training seminars were undertaken by the government in 2001. The Ministry of Foreign Trade has just announced that the Judicial School will conduct training of the new link prosecutors and OIJ officials. We hope this does occur.

(4) Reduce delays and improve performance of prosecutors, judges and OIJ during the preraid procedural stage. Reducing delays and improving the performance of prosecutors, judges, and the OIJ could be accomplished by ordering raids based exclusively on sufficient evidence offered by private plaintiffs (*querellantes*), or by a resolution of the President of the Supreme Court, called a *directriz*, instructing lower court judges and prosecutors to accept private expert investigations if the OIJ experts are overwhelmed and unable to perform their duties within a reasonable time period.

Delays in criminal investigations and proceedings, limitation on private plaintiffs’ participation in criminal proceedings and lack of judicial resources remain some of the major enforcement difficulties encountered by the copyright industries in Costa Rica.

(1) Public Prosecutors

Public prosecutors usually request an investigation report from official experts from the Judicial Investigative Office (OIJ) before requesting a search and seizure order from a judge. The OIJ's reports normally do not add much substantive information to the information and evidence previously provided by BSA members when requesting the search and seizure order. OIJ's preliminary investigations cause significant delays during the pre-inspection procedural stages. The information and evidence provided by private plaintiffs, such as BSA's members, normally is legally sufficient for public prosecutors and judges to order the inspections (and is widely accepted throughout Latin America). The correct procedure to be followed in criminal copyright cases would be that public prosecutors request, and judges order, inspections in those cases where a claimant,

acting as private plaintiff (*querellante*), submits all the information and evidence necessary for prosecutors and judges legally to order such inspections. Unfortunately, this procedure has never been implemented in criminal cases filed by BSA members because public prosecutors have invariably requested the OIJ's investigation prior to requesting the search and seizure order from the judge. To the best of the BSA's knowledge, the public prosecutor's criteria is the result of instructions (*directriz*) issued by the Adjunct Public Prosecutor of the Common Crimes Division (*Fiscal Adjunto de la Sección de Delitos Varios*), who is in charge of anti-piracy activities at the Public Prosecutor's Office.

Public prosecutors and judges do not allow private plaintiffs (*querellantes*) to actively participate during software piracy inspections, even though such plaintiffs have standing and already constitute a party in these cases. This contradicts procedural due process rights accorded to private plaintiffs (*igualdad procesal del acusador particular*). Such procedural limitations imposed by public prosecutors are exacerbated when the private plaintiff is being assisted by a private technical expert during the inspection; the inspection might fail without such expert assistance.

Even though search and seizure orders in BSA criminal cases handled by the public prosecutors were obtained in less time in 2001 than in 2000, it still takes from four to six months to obtain such orders, which is excessive by any standard, and far longer than in most Latin American countries.

BSA has been informed that the Public Prosecutor's Office has ordered the training of 12 "link" prosecutors on intellectual property matters. Even though these prosecutors will not have exclusive jurisdiction on IP cases, this decision constitutes a significant step toward improving intellectual property protection in Costa Rica. BSA recommends that these prosecutors be intensively trained. BSA will gladly provide additional training seminars on software licensing and technical matters if the Public Prosecutor's Office instructs all its prosecutors to attend these seminars. However, the procedural problems listed above, which substantially delay and obstruct copyright enforcement in Costa Rica, need to be resolved before the appointment of additional prosecutors will make a material difference.

(2) The Judicial Investigative Office (OIJ)

The General Criminal Unit of the OIJ is in charge of investigating intellectual property crimes. As reported in previous Special 301 submissions, this unit's lack of specialized personnel prevented the unit from adequately performing its duties in 2001. For example, in 2001 there were four software investigators available to work on software piracy crimes in the whole country, and these experts could be assigned to investigate other types of crimes as a consequence of their multiple jurisdiction.

Most of the delays in criminal cases filed by BSA against software pirates in Costa Rica in 2000 and 2001 were caused by the excessive time spent by official experts (belonging to OIJ) in conducting the preliminary investigation requested by public prosecutors before the raid, preparing the investigation report and coordinating the inspection date with the prosecutors. For example, in the case initiated by BSA member companies against Grupo Inteka in June 2001, handled by the Public Prosecutor of San Jose, the raid was conducted in October of the same year, mostly due to delays in conducting the preliminary investigation. The inspection report still has not been rendered by the OIJ.

An alternative to resolve the difficulties caused by OIJ experts performance would be for the President of the Costa Rican Supreme Court to issue a resolution (*Directriz*) instructing lower court judges and prosecutors to accept private investigation reports, in the event existing official experts are overwhelmed with other responsibilities. It is clear that the delay in conducting the investigation puts the entire criminal case in jeopardy. A time limit for presenting the above mentioned investigation report should be established.

OIJ's experts do not have software licensing and legal knowledge, which has caused problems and delays during preliminary investigations and inspections.

Lack of resources and budget is still a problem for the OIJ, and the judicial branch in general, which makes it difficult for them to properly perform their duties.

BSA has just been informed that the OIJ's director has recently ordered the training of two official experts per each OIJ office in the country on intellectual property protection. BSA applauds this measure. However, the performance of these official experts should be evaluated within the next few months to determine whether they were able to reduce the long delays to an acceptable level, in light of the significant backlog of work caused by their multiple jurisdictions.

(3) Judges

Judges should accept the information and evidence offered by private plaintiffs (*querellantes*), and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the OIJ. This procedure is consistent with Costa Rican legislation.

Also, it is necessary that judges be trained in the application of local and international intellectual property legislation, as well as in technical and licensing issues relating to software piracy cases.

COPYRIGHT LAW AND RELATED LEGAL ISSUES

TRIPS-Compliant Legislation: *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*

In order to comply with TRIPS by January 2000, Costa Rica amended the copyright law and the patent law, and passed new trademark and trade secrets laws.

Before the above laws were enacted, all civil sanctions and criminal penalties and the procedural provisions for border controls were removed and inserted in a new bill called *Proyecto de Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual (Ley de Observancia)*. The purpose of the bill was to provide more adequate penalties and procedures in accordance with TRIPS.

Unfortunately, the Costa Rican Congress ignored the recommendations and warnings of local intellectual property associations regarding the harmful effects of certain the articles of this bill, and on October 2, 2000, passed the law known as *Ley de Procedimientos de Observancia de*

los Derechos de Propiedad Intelectual (Ley de Observancia (Compliance Law)), which differs greatly from the requirements to which Costa Rica must adhere under TRIPS and the Berne Convention.

Despite the concerns expressed by the U.S. copyright industry in previous Special 301 filings, in the out-of-cycle review, and directly with the Costa Rican government in 2001, the *Ley de Observancia* has not been amended to make it consistent with TRIPS. The Foreign Trade Ministry recently stated that a draft reform has been prepared to address some of the problems set forth below (specifically, to amend articles 43, 54 and 59, and remove Article 70). But preparing a draft does not solve the problem. We have no reassurance that it will ever be enacted.

Some of the most harmful provisions of the *Ley de Observancia* are:

Article 43: This article provides that the criminal actions for copyright violations will be "public," but can only be initiated by the injured parties (*acción pública de instancia privada*). This means that if a public officer detects a copyright violation, he or she will not be able to initiate legal action. With the elevated copyright piracy rates in Costa Rica (nearly 70% in the case of software piracy, for example), this restriction on public enforcement of copyright legislation may violate Article 41 of TRIPS (effective action against infringement). This lack of public action causes substantial losses to the copyright industries, in particular, to the recording industry.

Articles 54 and 59: These articles provide a maximum penalty of three years of imprisonment for copyright violations, and provide the same penalty for those who fix and reproduce a work without authorization and sell infringing materials. According to other provisions of Costa Rican penal legislation, sentences for crimes with maximum penalties of three years or less can be commuted and defendants do not have to serve time in prison. Penalties that allow criminal offenders to avoid prison time are not deterrent and thereby in conflict with articles 41 and 61 of TRIPS. The maximum penalties for copyright violations should be increased to at least four years of imprisonment. BSA would even accept a bill that at least elevates penalties to four years of imprisonment as the maximum penalty for "intentional" copyright crimes (committed with *dolo*, or intent), leaving three years of imprisonment as the maximum penalty for those copyright crimes committed without intent. A new criminal provision should be created to differentiate intentional from unintentional copyright crimes. Also, the inclusion of economic sanctions or fines on the *Ley de Observancia*, in addition to imprisonment penalties, would have a deterrent effect against copyright violations.⁴

Article 70: This is probably the most harmful provision of the *Ley de Observancia*. It establishes that those who commit any intellectual property crimes contemplated in Chapter V of such law, including copyright violations, will not be penalized if the crime was committed without profit-making intent and does not damage or affect, for being "insignificant," the interest of the authors, right holders or their authorized representatives. There is no definition of "insignificance" in the law. 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 by arguing that it

⁴ By comparison, Article 212 of the Costa Rican Criminal Code provides 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. This indicates an inconsistency between the norms of the *Ley de Observancia* and the rest of Costa Rican law.

does not "profit" by using the software, because it only provides banking and financial services, and that the number of pirated products are not sufficient to damage or affect the right holders' interests. It would 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 would 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.

Government Software Management

The Costa Rican government should legalize its own software and set an example for the public. BSA has been informed that the Costa Rica government has been working on a decree authorizing the acquisition and use of legal software by the federal government. However, no decree has been issued so far.

CHART OF ENFORCEMENT STATISTICS FOR COSTA RICA: 2001

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	4	N.A.
Number of cases commenced	4	N.A.
Number of defendants convicted (including guilty pleas)	N/A	N.A.
Acquittals and Dismissals	1	N.A.
Number of Cases Pending	17	N.A.
Total number of cases resulting in jail time	N/A	N.A.
Suspended Prison Terms	N/A	N.A.
Maximum 6 months	N/A	N.A.
Over 6 months	N/A	N.A.
Over 1 year	N/A	
Total Suspended Prison Terms	N/A	N.A.
Prison Terms Served (not suspended)	N/A	
Maximum 6 months	N/A	
Over 6 months	N/A	
Over 1 year	N/A	
Total Prison Terms Served (not suspended)	N/A	N.A.
Number of cases resulting in criminal fines	N/A	N.A.
Up to \$1,000	N/A	
\$1,000 to \$5,000	N/A	
Over \$5,000	N/A	
Total amount of fines levied	N/A	N.A.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of civil raids conducted	2	0
Post Search Action	N/A	N/A
Cases Pending	3	N/A
Cases Dropped	0	N/A
Cases Settled or Adjudicated	2	N/A
Value of loss as determined by Rightholder (\$USD)	N/A	N/A
Settlement/Judgment Amount (\$USD)	33,000	N/A

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

The effective implementation and enforcement of the 2000 copyright law is critical to the copyright industries, which have struggled against widespread copyright piracy in the Dominican Republic for more than a decade. The previous 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. The Dominican Republic adopted a new copyright law in October 2000, capping 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 government of the Dominican Republic has taken steps to address some of the issues and challenges it faces regarding copyright protection and enforcement, and this must be commended. Having ONDA (the National Copyright Office) in place has assisted several copyright owners in taking much needed enforcement action in the DR. The Government's continued funding and expansion of ONDA highlights its intention to try to address the many challenges copyright owners face in that country. ONDA is still far from effective and needs significantly more political support within the government in order to go beyond simple cases of IPR enforcement. In addition, the industries are worried about the provision stated in the amendments to the Criminal Procedure code that would eliminate ONDA's and the District Attorney's *ex officio* actions and invalidate the evidence collected by ONDA. Problems with the criminal justice system need to be addressed, and procedural codes must be amended to provide a more expeditious way to prosecute those who infringe on intellectual property rights. Levels of copyright piracy in the Dominican Republic remain quite high, well over 50% across almost all copyright sectors. In fact, television piracy worsened in 2001.

In order to support continued progress on effective implementation and enforcement of the copyright law, IIPA recommends that the Dominican Republic stay on the Priority Watch List and that the GSP/CBI review remain ongoing.

DOMINICAN REPUBLIC: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	60%	2.0	60%	2.0	80%	2.0	90%	2.0	100%	2.0	100%
Sound Recordings / Musical Compositions ¹	7.7	65%	2.0	80%	2.0	80%	2.0	80%	NA	NA	NA	NA
Business Software Applications ²	8.0	70%	6.7	68%	7.4	69%	7.3	73%	NA	NA	NA	NA
Entertainment Software	NA	NA	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	1.0	NA
TOTALS	18.7		17.7		17.5		12.4		3.0		3.0	

SUMMARY OF BILATERAL IPR ENGAGEMENT

The IIPA and its members 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. Currently, this review is ongoing.⁴

¹ RIAA reports that \$7.65 million (rounded to \$7.7 million, above) represents the estimated sales displacement to the legitimate industry. Actual revenue to music pirates is estimated at \$4.1 million. For the sake of comparison, the recording industry's loss estimate for 2000 of \$2 million was based on less complete information, and represented a projection of pirate revenue rather than industry losses.

² BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$12.3 million at 70% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

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 2002 Special 301 report.

⁴ In 2000, \$48.6 million of Dominican goods entered the U.S. under the duty-free GSP code, accounting for 1.1% of its total imports to the U.S. \$805.3 million entered under the CBI, accounting for 18.4% of its total imports to the U.S., and \$47 million of Dominican goods entered under the CBTPA. For the first 11 months of 2001, \$1.4 billion of Dominican goods entered under the CBTPA. For the first 11 months of 2001, \$33.6 million of Dominican goods (or 0.9% of the Dominican Republic's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 21% decrease over the same time period last year. For the first 11 months of 2001, \$747 million of Dominican goods entered under the CBI, representing a 1.2% increase over the same period last year.

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. Furthermore, as a WTO member, the Dominican Republic is obligated to meet its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement.

COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

Piracy of sound recordings and music in the Dominican Republic remains rampant, with the overall estimated piracy rate at 65%. Estimated trade losses due to music recording piracy are \$7.7 million in 2001. The increase in losses between 2000 and 2001 is due to improved information-gathering by the recording industry. The piracy rate, previously estimated at 80%, is down due to better information gathering, and ONDA's response to piracy in retail outlets. The estimated piracy rate for audiocassettes is at 95%. Audiocassette piracy, which used to dominate the market, has now been over-taken by the financial impact of CD piracy, which is estimated at 30% in commercial stores, with higher piracy rates reported in the tourist areas of Boca Chica, 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 blank CD-Rs imported from the United States. Audiocassettes have decreased in total numbers as a medium, because of the increase in CD player sales. However, audiocassettes are nearly all pirate or counterfeit. The medium of choice for street vendors is the CD-R. Presently, street vendors and kiosks set up in the many plazas and tourist areas retain inventories that are 100% pirate or counterfeit. It remains government policy that street vendor sweeps in Santo Domingo, Santiago, and Puerto Plata are a low priority. Although ONDA has conducted street sweeps on occasion, the fact that the product is seized but the vendors are not arrested creates no disincentive for the vendors. Usually, within hours of losing their inventories, vendors are restocked and in business. Pirate audiocassettes cost between US\$1.00-2.00 per unit and counterfeit CDs/CD-Rs can range in price from US\$3.00-6.00. With the exception of a few counterfeit CDs that have been traced to the Ukraine, the majority of the counterfeit and pirate CD-Rs are being recorded within the Dominican Republic.

MPA reports that in 2001 there was a dramatic increase in television piracy, the only country in all of Latin America to show such a negative change in this form of piracy. MPA notes that the entire audiovisual industry, from local theaters to local video stores, is suffering increasing damage from the cable and MMDS system operators and UHF television broadcasters who engage in signal theft by making unauthorized retransmissions of U.S. satellite-carried programming. Since the Dominican Republic is located within the footprint of most U.S. domestic satellites, cable operators throughout the territory are able to downlink, decode and retransmit these signals to their subscribers. This type of piracy has caused far-reaching market distortions. The simultaneous retransmission of U.S. pay channels, featuring motion pictures still in their theatrical release in the

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.

Dominican Republic, greatly reduces legitimate business opportunities in other media by disrupting the normal release sequence to theatrical exhibitors, retail video outlets and legal cable operators.

There are more than 90 cable television systems in the Dominican Republic, many of which illegally descramble and retransmit U.S. satellite signals. In addition, several large broadcast television stations periodically broadcast recent hit U.S. motion pictures without authorization. These transmissions are on VHF and UHF channels and use DVD or videocassettes as the source of the product. Signal theft piracy distorts the overall market. Thus, although a rate of video piracy of approximately 35% is not high compared to other countries in Latin America and although the overall rate of television piracy as a part of the total programming is not high, the systematic television broadcast of movies in current theatrical release pulls the rug out from under the entire audiovisual market by significantly reducing demand by potential consumers who have already seen new releases on television, albeit in unauthorized form. Annual losses to the U.S. motion picture industry due to audiovisual piracy in the Dominican Republic are estimated to be \$2 to 3 million in 2001.

Computer software piracy in the Dominican Republic comprises primarily 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 (BSA) have revealed some instances of counterfeiting in the Dominican Republic. Working with Dominican prosecutors in the *Fiscalía* offices, BSA has achieved six convictions of software piracy. 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 2001 are \$8.0 million, with a 70% piracy level.

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 2001.

IDSA reports that there is piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) occurring in the Dominican Republic. Estimated trade losses and piracy levels are not available for 2001.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

A Consistent, Comprehensive Response to Piracy Across Multiple Enforcement Agencies Is Needed

The good news continues to be that the 2000 copyright law now provides more tools for Dominican Republic agencies and rightholders to take more concrete action against piracy. Since the promulgation of the copyright law, a new interagency commission was formed in March 2001

to coordinate all the agencies dealing with intellectual property issues, including ONDA, foreign affairs, customs, public health and others. It is headed by the President of INDOTEL and has members from the Ministry of Industry and Commerce, Customs, the Health Ministry and the Culture Ministry. This commission, along with INDOTEL, has helped ONDA to obtain more funding for ONDA's activities. The commission also organized a seminar on intellectual property addressed to government officials on October 2001. While this interagency group is an important information-sharing forum for different government agencies, its primary focus should be to support the concrete enforcement efforts of ONDA, the *Fiscalía*, INDOTEL and other agencies.

The bad news is that the impact of the new copyright law has not been felt because of a lack of effective application and a lack of willingness to enforce the new measures. The Executive Branch has failed, for example, to fulfill its promise to coordinate action against piracy with the new measures by failing to develop a promised interagency effort to coordinate actual anti-piracy actions by the appropriate agencies, by failing to adequately support ONDA, by failing to encourage prosecutions under the new law and by failing to address television piracy by operators closely related to political elements within its own administration.

The key to real progress in the Dominican Republic is a serious commitment from the Executive to support and encourage effective action by ONDA, INDOTEL and criminal prosecutors in a consistent and comprehensive governmental response to piracy. 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, INDOTEL, the *Fiscalía*, and the police, and can make the fight against piracy a top public priority. 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.

In order to address some of the enforcement-related problems IIPA members identify below, we suggest that the government of the Dominican Republic consider the following:

1. Continue to fund and expand ONDA to include satellite offices in the North and the South.
2. Move toward changing the criminal procedural codes to (a) amend the provision that will eliminate ONDA's and *Fiscalía*'s powers to do *ex officio* actions; (b) amend the provision so that ONDA's evidence obtained through its inspections would be recognized according to the new intellectual property law; (c) permit a criminal case to be filed and heard without having to file a civil case; and (d) hear the criminal case expeditiously.
3. Ensure the addition of a prosecutor to assist the only prosecutor assigned to IPR cases in the DA's office.
4. Assign a squad of investigative law enforcement officers to follow-up on the cases after ONDA or INDOTEL has conducted a raid.
5. Direct political pressure, as well as enforcement resources, to halt the longstanding problem of television piracy.

And that ONDA:

1. Continue to conduct raids on behalf of all IPR organizations.

2. Begin to use the penalties under the new *Reglamento* (regulation/ordinance) to fine and close down retail outlets, including television stations, where infringing products have been identified and seized.
3. Continue to seek the assistance of copyright-based industry organizations.

ONDA's Administrative Actions in 2001 Reflect Much Improvement But Still Are Not Effective to Deter Piracy

The Structure of ONDA: ONDA is the primary success story of the Mejia government's response to piracy in the Dominican Republic. When the government took office in August 2000, President Mejia 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.

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. 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. In addition, a special intellectual property enforcement unit should be set up among local prosecutors and police.

In March 2001 a *Reglamento* was passed which empowered the Director of ONDA to, among other things, continue pursuing violators in IPR cases. It provides the following:

- The Director of ONDA has the authority to fine any establishment (individual) selling pirated/counterfeit products on the spot. The fines levied can range from 5 percent to 200 percent of the minimum salary.
- The Director can also close down any establishment for 30 days, indefinitely in repeat cases.
- Recidivists can be fined up to 400 percent of the minimum salary and the establishment closed down indefinitely.

These administrative penalties are in addition to criminal penalties. This is a positive move. Unfortunately, it has yet to be used by ONDA. In the early part of January 2002, INDOTEL funded the publishing of the *Reglamento*, which allegedly was the hold-up in actually applying its penalties. The *Reglamento* was finally published in the Official Gazette and made available to the public on January 2002, even though in the publication it states the date of March 14, 2001. Presently, there are no known obstacles to the use of this additional tool.

ONDA presently has a contingency of nine inspectors in the Santo Domingo main office. The inspector/attorney in the Santiago office was released because of funding. ONDA needs to maintain an office in the North, preferably Santiago. In addition, funding should be made for an additional satellite office in the South.

The Industries' Experience with ONDA: The industries generally report a positive, cooperative attitude with ONDA officials, with results in the form of inspections and raids. However, the industries have varying views and experiences regarding the deterrent effect of ONDA actions, especially in the overall picture of effective enforcement, from initiation of investigations to conclusions.

BSA reports it has been able to work very effectively with ONDA and the *Fiscalía* in this new enforcement regime. In cases where illegal software is found, ONDA refers this evidence to the *Fiscalía* for criminal prosecution. BSA expects to keep working closely with ONDA and *Fiscalía* and would like to see continuing increase in the amount of raids taken by these two agencies.

The recording industry also reports that the positive change in enforcement since the Mejia Administration took office is due to ONDA and its efforts. While the ONDA raids have led to some minor improvements in enforcement, they have had little deterrent effect. One of the limitations of having ONDA conduct enforcement actions, in lieu of a law enforcement agency, is that there is no follow-up conducted after the inspection or raid. Therefore, outside of the initial *denuncia* (complaint), there is no investigation that provides for the identification of the source and/or location of the individuals involved with the manufacturing/production of the illicit product. While ONDA is effective in entering retail locations to conduct inspections, it does not have the capacity to move beyond that layer of criminality through to the identification of those who are higher up in the manufacturing and distribution chain. As such, there is little, if any deterrence for pirates.

The motion picture industry reports that television piracy is getting steadily worse. The government authorities, ONDA and INDOTEL, received political reprimands for taking action in January 2001. Nevertheless, the increased incidence of television piracy, apparently due to the continued conduct of a major television station related to a member of the political party in power, threatens to dilute the new attitude of ONDA and INDOTEL toward compliance in the television industry, as television stations begin to see an uneven application of the law and a tolerated model of unlawful conduct. Broadcast piracy has been a major problem in the Dominican Republic for a decade, and it remains very discouraging that this problem has been ignored by the Executive, apparently for political consideration of important operators involved in such piracy.

Criminal Enforcement Results in 2001 Were Mixed

With the new copyright law, the levels of criminal penalties were increased to fines of 50 to 1,000 times the minimum wage, which at the current exchange rate is US\$8,200 to \$165,000. In July 1998, the government established a new Intellectual Property Department within the District Attorney's Office for Santo Domingo. However, when it comes to actual enforcement taken by the criminal authorities, the industries have mixed experiences.

No progress on audiovisual piracy cases: Interest in prosecuting audiovisual 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. Overall, there is a clear step backward 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. MPA is particularly concerned with the obvious lack of cooperation from police and prosecutors.

Recording industry reports minimal progress: The recording industry reports that there were a total of 180 raids/seizures in 2001, resulting in the confiscation of 29,616 pirate audiocassettes and 35,973 pirate CDs/CD-Rs. These actions included raids of 15 illegal manufacturing and distributing facilities of pirate CD-R operations. RIAA surveyed approximately 57 tourist locations in the DR throughout the last quarter of 2001 and found that the majority of the locations were saturated by vendors selling pirate CD-Rs and audiocassettes. Their entire inventories were made up of illicit product. In these same areas, retailers carried inventories of approximately 35% pirate music. There has been a change in the upper ranks of the National Police Department, which appear to favor ONDA working together with the department. Should this relationship materialize, it would create somewhat of a task-force element that should address some of the concerns related to the location of manufacturing and distribution facilities throughout the country.

Positive results with business software actions: During the first half of 2001, the District Attorney's Office had a very active participation during the BSA Truce Campaign held from March to April 2001. During this period alone, the District Attorney's office conducted eight raids. BSA has also worked with ONDA to provide their inspectors with leads on suspected pirates. After conducting their own investigations, ONDA carries out inspections where appropriate and if any pirated software is found, ONDA confiscates it and any computers loaded with the illegal software. ONDA then prepares a report and refers the evidence of piracy to the *Fiscalía* for prosecution. These referrals resulted in the *Fiscalía* filing between 50 and 60 cases against software pirates during 2001. The *Fiscalía* continues to be very cooperative with BSA in prosecuting these cases. 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 the ONDA inspections. BSA expects to keep working closely with ONDA and *Fiscalía* and would like to see more raids this year. It is clear to BSA that in order to achieve this expectation, it is imperative to adopt the amendments proposed to the Criminal Procedure Code that will allow ONDA and the *Fiscalía* to keep their powers to initiate *ex officio* actions. In addition, BSA worked with the National School of the Judiciary (*Escuela Nacional de la Judicatura*) and their judicial continuing legal educational program to develop curriculum for a judicial training course on the new copyright law. This initial course was held in October 2001. The curriculum was available to judges all over the Dominican Republic via a state-of-the-art distance learning program, which was a great success. During 2002, BSA is expecting to keep working with the National School of Judiciary in its continuing legal education program.

Judicial Action Has Been a Weak Element Historically, 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.

Criminal Cases: Some feel that the Dominican Republic's judicial system is so dysfunctional that, as a practical matter, it is necessary to add a civil claim to the criminal case to

inform the Court that there is a victim interested in pursuing the case. The adding of the civil component to the criminal case only serves the interest of individuals looking for a way to circumvent the criminal system by pleading to the civil case in exchange for no jail time.

The law does provide for relief in case of a defendant's inability to pay restitution. This is provided by adding one day of jail time for every "peso" the defendant is unable to pay. However, without an expeditious court system, the deterrent aspect of this initiative will not work. Few copyright infringement cases have made it through the Dominican judicial system. RIAA reports that the court system has proven to be entirely dysfunctional in terms of processing and sentencing criminal copyright offenders. For 2001, the RIAA had a total of 32 cases pending, 12 of which date back to 1999. As of December 2001, RIAA has had six prosecutions where the defendants received a prison sentence, court fine and restitution. However, no one has been jailed as a result of these prosecutions. They have all appealed their cases and have been set for re-trials. The appeals process provides for a drawn out review of the initial trial and each step of the appellate process can take upwards of 10 months to be heard. In contrast, BSA has obtained several positive results in 2001.

There is a bill on the Criminal Procedure Code that has passed the Senate and is in the House, that would create a change such that criminal cases would be heard much more quickly (see discussion, below). In other words, instead of having cases rescheduled in mid-trial for months at a time, the trial would be heard continuously during the course of several days. This new code would also allow for the negotiation of restitution amounts, something that is not presently available. One part of the bill, however, removes ONDA's ability to function in any pro-active capacity without first receiving a complaint or *denuncia*. This is something that we have been working on removing from the Bill. The Senate did pass it in its entirety.

Civil Cases: There appears to be more optimism in civil cases. During 2001, BSA has received favorable judgments in five cases against pirates that had been filed under the old copyright law. In April 2001, BSA received a major judgment against Vimenca, a conglomerate run by Victor Mendez Capellan, a member of one of the ruling families of the DR. Vimenca was one of BSA's first end-user actions in the DR in 1998. The power of this company made it even more impressive when the court found Mendez Capellan personally guilty of software piracy and awarded BSA US\$300,000 in damages, US\$650 in fines, and US\$96,000 in interest (1% of the damages per month since BSA's claim was filed in November 1998). Vimenca is appealing in hopes that they can get the judgment reduced, and they are avoiding collection of the judgment at this time. In May, BSA obtained a Court of Appeals judgment against Compurent, which was the first raid made by BSA in 1997. The Court of Appeals confirmed fines of US\$650, and damages of US\$17,000. In August, BSA obtained a judgment against a pirate reseller, Kentucky Trade Dominicana. The judge ordered as fine US\$300 and as damages US\$3,000.

In October 2001, BSA obtained (under the new copyright law) two judgments against Refrigeración Antillana and CT Computer. In Refrigeración Antillana, the judge ordered \$1,100 as a fine, \$14,500 in damages, plus 3 months of jail time. In the case of CT Computer, the judge ordered US\$5,200 as a fine and US\$17,500 as damages. In both cases the defendants appealed the judge's decisions. In January 2002, on an action filed in December 1998, BSA obtained a judgment against Robotics that ordered the largest jail time to date. This judgment is against a reseller that imported and sold counterfeited Office 97. The judge condemned Robotics to one year of prison and imposed US\$17,500 as damages and US\$650 as a fine.

**ENFORCEMENT STATISTICS
IN THE DOMINICAN REPUBLIC
From Selected Industry Sectors**

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	40 Video – ONDA	58	180
By Police			
By Customs			
Number of cases commenced		8	
Number of defendants convicted (including guilty pleas)		3	6
Acquittals and Dismissals			
Number of Cases Pending			32
Total number of cases resulting in jail time		2	6
Suspended Prison Terms		2	
Maximum 6 months		2	5
Over 6 months			1
Over 1 year			
Total Suspended Prison Terms		2	
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total Prison Terms Served (not suspended)			
Number of cases resulting in criminal fines			
Up to \$1,000		3	
\$1,000 to \$5,000		58	1
Over \$5,000			5
Total amount of fines levied			102,000

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	40 Video by ONDA, 3 TV by ONDA and INDOTEL	72	
By Police		62	
By Customs		10	
Number of cases commenced		5	
Number of defendants convicted (including guilty pleas)		5	
Acquittals and Dismissals		2	
Number of Cases Pending		2	
Total number of cases resulting in jail time		2	
Suspended Prison Terms			
Maximum 6 months		2	
Over 6 months			
Over 1 year			
Total Suspended Prison Terms			
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total Prison Terms Served (not suspended)			
Number of cases resulting in criminal fines			
Up to \$1,000			
\$1,000 to \$5,000			
Over \$5,000		72	
Total amount of fines levied		62	

Notes for 2000 and 2001

All of the actions reported by the RIAA have been raids/seizures conducted by ONDA.

Update on Civil *Ex Parte* Searches and the Imposition of Civil Damages

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. 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 to afford civil remedies, including damages, at levels "adequate to compensation for the injury the right holder has suffered," as required by TRIPS Article 45.1.

No Problems with Onerous and Discriminatory Bonds in 2001

The 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. The imposition of those 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.⁶ However, the new law has had the desired impact in this area, and has relieved foreign rights holders of this burden when protecting their rights in Dominican courts. BSA has successfully argued against the imposition of bonds in six cases since the copyright law was passed. This is a major improvement in the practical ability of copyright holders to defend their ownership rights in Dominican courts.

COPYRIGHT LAW AND RELATED ISSUES

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. 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, 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.

The law has many positive features which the IIPA has previously identified, and is a vast improvement over the 1986 copyright law. 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 was increased significantly, and are based 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\$8,200 to US\$175,000. 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. The law does not provide producers of sound recordings with broad exclusive rights over all forms of communication, and in recognition of the changes in technology which in turn are changing the way music consumers get access to recorded music, such a right should be provided in the law.

The copyright regulation which provides for administrative fines, mandatory registration for computer resellers, liquidated damages calculated on a per-copy basis and more specific rules for software protection, was signed by the President on March 14, 2001. ONDA has started the implementation of this regulation.

⁶ The magnitude and discriminatory nature of those bonds appeared to violate the Dominican Republic's TRIPS national treatment obligation (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...."). Such discriminatory treatment also 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."

Constitutional Challenge to the Copyright Law

BSA is currently defending against a constitutional challenge to the 2000 copyright law. A reseller defendant in a BSA case, Hard Soft, has filed a constitutional challenge in the Supreme Court of Justice in Santo Domingo, alleging that portions of the 2000 copyright law are unconstitutional. Among the challenged provisions are Article 37, which excludes software from the private copying safe harbor; Article 44, which exempts public communications; and Article 74, which explains uses authorized by a software producer. Hard Soft argues that the copyright law protects software more tightly than other media, and is thus unconstitutional because of unequal protection. Hard Soft also argues that because software is protected as a literary work, private copying should be permissible, as it is with other literary works; the exception for public communications should cover the public demonstration of computers for sale purposes. BSA has filed a brief refuting these arguments, and ONDA, CERLALC (UNESCO's organization) and copyright expert Ricardo Antequera of Venezuela have also filed a brief against this constitutional challenge.

Code of Criminal Procedures

The Dominican Congress is considering amendments to their Code of Criminal Procedure which would convert IPR cases, including copyright ones, to private criminal prosecutions, so that a *denuncia* (complaint) would be mandatory to initiate each case. This would take away current *ex officio* actions with ONDA and the *Fiscalía*. Industry *Fiscalía* counsel has testified against the bill, and stated that these amendments would be a step back from the new copyright law that the Congress passed in August 2000. Despite local industry efforts to improve the draft, the Senate passed the Criminal Procedure Code in December 2001 without considering the industries' suggestions.⁷ BSA is currently organizing a press conference along with other copyright industry colleagues to oppose the Senate approval with the hope that the House of Representatives will amend the provisions of the bill of the Criminal Procedure Code so that ONDA and the *Fiscalía* can continue to take *ex officio* actions and validate ONDA's evidence obtained from its inspections.

WIPO Treaties

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, especially because its 2000 copyright law already includes many of the treaties' obligations. In fact, the current ONDA administration supports ratification of these treaties. ONDA has filed a report with the Ministry of Culture, which is then to be sent to President Mejía.

⁷ IIPA does not have the text of this bill.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

EGYPT

EXECUTIVE SUMMARY¹

IIPA recommends that Egypt remain on the Priority Watch List.

The government of Egypt continues to engage in practices that keep legitimate foreign businesses out of Egypt. For example, Egypt's Ministry of Culture continues its practice of granting approvals to manufacture and distribute copyrighted works to known pirates and unauthorized distributors who have obtained "false licenses" from Taiwan, Indonesia, and elsewhere. Such government-sponsored piracy closes Egypt off as a legitimate market to the entertainment software, motion picture, and other copyright industries. Other market access barriers, such as unreasonably high customs valuations for the carriers of copyrighted goods, close the market of Egypt to legitimate copyright business. Piracy in Egypt continues to hurt U.S. copyrighted owners, but is devastating to the once-vibrant Egyptian creative community. Once one of the largest producers of movies and music in the Middle East and North Africa, Egypt's own creators have suffered from copyright piracy, losing millions of dollars in royalties every year due to piracy of their products.²

In 2002, the government of Egypt must discontinue the practice of issuing approvals to unauthorized distributors of all copyrighted goods (if necessary, by investigating and weeding out those in the Censorship Department who stubbornly continue to engage in this practice), and put into place an easy-to-use mechanism to ensure that unauthorized distributors no longer receive Ministry of Culture approvals. Second, while piracy persists, the Egyptian government's several responsible departments (the Ministry of Culture, Ministry of Interior, Ministry of Justice, Ministry of Supply and Trade, etc.) must find ways to work together to achieve deterrence in the market, through sustained raids and follow-up, including, where necessary, criminal actions against egregious pirates. The government must also deal adequately with market access barriers, including by lowering customs' import valuations of copyrighted goods in Egypt so they conform with generally regarded international practice. Finally, in 2002, Egypt must pass the new copyright law, if necessary, by severing it from the integrated IPR bill that now sits in limbo due to problems in other parts of the omnibus bill.

Estimated losses to most of the U.S. copyright industries in 2001 were \$64.7 million (without losses from the entertainment software industry, which were unavailable at the time of this report).

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

² See Francesco Guerrera, *Investors Rue Weak Patent Protection – Intellectual Property*, Financial Times, May 9, 2001 (stating that the government of Egypt is in favor of copyright protection in the entertainment and media sector, since Egypt's movie and music producers lose an estimated EP750 million, or approximately US\$161.3 million, a year in royalties for their products).

EGYPT: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	15.0	35%	15.0	35%	15.0	50%	11.0	50%	11.0	50%	11.0	25%
Sound Recordings / Musical Compositions ³	9.2	41%	12.0	48%	12.0	50%	12.0	50%	8.0	40%	5.0	25%
Business Software Applications ⁴	8.5	53%	10.0	56%	26.4	75%	8.7	85%	9.7	85%	16.9	89%
Entertainment Software ⁵	NA	90%	14.9	94%	6.2	65%	5.5	60%	5.1	55%	5.2	51%
Books ⁶	32.0	NA	30.0	NA	30.0	80%	26.0	80%	21.0	NA	20.0	NA
TOTALS ⁷	64.7		81.9		89.6		63.2		54.8		58.1	

COPYRIGHT PIRACY IN EGYPT

Problem of Government-Sponsored “False Licensees” Needs Resolution

The government of Egypt still needs to resolve the problem experienced by some copyright industries of the Ministry of Culture endorsing pirates through granting approvals to unauthorized manufacturers and distributors of pirated product. For example, while the entertainment software industry received assurances earlier this year that known pirate distributors, who had obtained approvals from the government to distribute pirated product, would have those approvals revoked,

³ The 2001 losses due to sound recording/music piracy are to U.S. repertoire only, while the level of piracy is that for all repertoire. Egypt’s market remains almost entirely pirate as to international repertoire; the level of piracy for international repertoire in 2001 continues to be a staggering 99%.

⁴ BSA estimates for 2001 are preliminary. In IIPA’s February 2001 Special 301 submission, BSA’s 2000 loss and level figures were not yet available. These numbers were finalized in mid-2001, and are reflected above.

⁵ IDSA loss estimates for 2001 are unavailable.

⁶ There were two devaluations of the Egyptian currency in 2001 (7% earlier in the year and 8% in December). Therefore, while estimated losses to U.S. publishers in Egypt increased to \$32 million in 2001, the loss number would have been higher had devaluation not occurred.

⁷ IIPA reported overall losses to the copyright industries at \$71.9 million in 2000. Since BSA finalized its numbers in mid-2001 (see footnote 5), the revised total loss number increases to \$81.9 million.

such assurances proved inadequate, as the same pirates continue in operation today in Egypt.⁸ Because the government of Egypt controls the approvals of production and distribution of these products, and is fully aware that the entertainment software companies involved are the true right holders (having been provided with ample evidence of the same), the government of Egypt can be considered a sponsor of this brand of piracy.

The solution to this problem is straightforward: decertify the licenses already granted to unauthorized producers/distributors of copyrighted goods in the many cases in which ample evidence has already been provided to the Ministry of Culture; and implement a system to check new applications with the relevant right holders. In cases in which right holders have informed the Ministry of Culture of the authorized distributors in Egypt, such notifications should be deemed conclusive as evidence that the material proposed to be distributed by that authorized distributor is legal, while absence of a license from the copyright owner (or submission of a license containing false or misleading information) should be sufficient to exclude that person from obtaining approval from the government.⁹ Part of the approval system put into place should provide for revocation of approvals issued by the Ministry of Culture if the applicant is found not to have the rights claimed in the application, if any false or misleading information is provided to the Ministry, etc.

Other Piracy Phenomena

Retail and other forms of piracy continue to hurt copyright owners in Egypt. Among the most serious piracy problems remaining in Egypt are the following:

- **Pirate Photocopying and “Reprint” Piracy.** Egypt is by far the worst pirate country in the Middle East for book publishers, as an estimated 60 to 75% of the Egyptian market for professional reference books (medical, engineering, etc.) is supplied with illegitimate product. In 2001, publishers again reported that piracy levels for English texts remained at a significantly high level and that the piracy of medical and scientific texts remained high.¹⁰ Although legitimate U.S. publishers continue to provide some of their books at deep discounts (sometimes as deep as 70-80%), their works continue to be pirated on a commercial scale in Egypt. Commercial “offset” and “reprint” piracy, illegal translations (local or imported), and plagiarism by some local academics (stealing whole sections of a book, including illustrations, and publishing them under their own names) are persistent pirate phenomena in Egypt. The quality of printing has improved dramatically in Egypt, and bound photocopies, pirates selling “illegal” subscriptions to new

⁸ Some companies have even been harassed by the pirates. One entertainment software right holder, after it realized that the Ministry of Culture would continue to condone the piracy of an egregious pirate videogame distributor (holding false licenses from abroad), sent a “cease and desist” notice to that unlawful distributor, only to be met with a harassment lawsuit for defamation.

⁹ IIPA notes that some pirates have figured out how to get “forged” licenses that appear to be from foreign right holders; the Ministry must be made accountable for ensuring that unauthorized sellers do not dupe them into issuing approvals, lest it allow for pirates to continue to dominate the markets in Egypt.

¹⁰ A recent anecdote involves a door-to-door salesman at hospitals, selling a medical reference book for EP60 (approximately US\$13), about 10% of the legitimate price (possibly with the support of the Medical Society).

reference books for professionals and students, and pirated “ESL” (English as a Second Language) materials can also readily be found.

- **Retail Piracy.** Rampant retail piracy of entertainment software (including by those who possess false licenses wrongly recognized by the Egyptian government), music, and motion pictures, in both analog and digital forms (including, more recently, on carriers like VCD and DVD) continues to cause great harm to U.S. (and Egyptian) copyright owners. Some console-based videogame platforms report 95% piracy in Egypt, while for the personal computer platform, the numbers are equally staggering, at 80%. Over 70% of the newest games are pirated. Most of the pirate games, 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 that are probably produced locally. Piracy of sound recordings and music, which has prevented the Egyptian market from developing over the years, is on the rise in Egypt. For the motion picture industry, pirate back-to-back videocassette copies, usually of poor quality, remain the chief form of piracy for that industry; such pirate copies 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. Pirate copies are made from original cassettes or from imported VCDs 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 and large companies.
- **Internet Piracy.** While not rampant, there is some piracy in Egypt occurring over digital networks, although most of it involves the distribution of “hard goods” pirated product (e.g., CDs and VCDs) as opposed to direct-download piracy on the Internet. One of the most notorious Internet pirates in Egypt today also happens to be the wrongful holder of many government approvals to manufacture/distribute in Egypt (even though he does not own the rights to do so). Internet piracy makes up about 2% of all game piracy in Egypt, including both CD “burning” and downloading of pirate “WAREZ” software from the Internet.
- **Business Software Piracy.** Continued unauthorized use of software in businesses (so-called corporate “end-user” piracy) and unauthorized loading of software onto a computer prior to sale (so-called “hard-disk loading”) hurts the business software industry in Egypt. Corporate end-user piracy occurs largely in small and medium-sized companies.

COPYRIGHT ENFORCEMENT IN EGYPT

SELECTED COPYRIGHT ENFORCEMENT STATISTICS 2000

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS	
ACTIONS	BUSINESS SOFTWARE APPLICATIONS
Number of Raids conducted	120 ¹¹
Number of cases commenced	NA
Number of defendants convicted (including guilty pleas)	7 (known) ¹²
Acquittals and Dismissals	NA
Number of Cases Pending	NA
Total number of cases resulting in jail time	3 ¹³
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

Enforcement Efforts Waned in 2001

In 2001, the government of Egypt took a much less proactive approach to enforcement against copyright piracy. The business software industry filed three cases, and after only nine months, a general manager of a company engaged in corporate end-user piracy was convicted, receiving a sentence of six months in prison; the case is currently on appeal. Two other cases are still pending (one with the prosecutor, the other awaiting a court ruling). Very few raids against pirate resellers or those engaged in “hard-disk loading” occurred in 2001, with a notable drop-off in effectiveness of Ministry of Culture

¹¹ Fifty of these criminal raids in 2000 were against pirate resellers, while 70 were against pirate end-users.

¹² Due to lack of transparency with respect to the end-user pirates, it is unknown how many cases of reseller piracy resulted in convictions, fines, or otherwise resulted in administrative remedies being meted out.

¹³ All three cases resulting in jail time in Egypt in 2000 are currently on appeal.

raids, except in Alexandria, where raiding has been quite effective.¹⁴ Educational campaigns by the Ministry have ceased, and the overall effect of raids is minimal because the Ministry of Culture in Cairo fails to take necessary legal steps against violators.

For the entertainment software industry, the police have refused to take raids against unauthorized distributors holding Ministry of Culture licenses, standing behind the government-sanctioned piracy. It is therefore all the more important that the government of Egypt take urgent steps to decertify the pirates holding false licenses (and the wrongly granted government approvals). For the motion picture industry, increased cooperation between industry, the Anti-Piracy Police and the Censorship Department under the Ministry of Culture has contributed to an increase in the number of raids against video piracy in recent years.

Cases actually brought to the courts move through at a snail's pace, leading to frustration for copyright owners who are unable effectively to enforce their rights, and making any result at the end of the process only a *de facto* cost of doing business for the pirates. For cases that have resulted in judgments being awarded to right holders, collections take an unreasonably long time in Egypt. Trainings conducted by the business software industry in 2000 with the Ministry of Justice have had little effect in improving efficiency in the courts with respect to copyright cases.

Government and Educational Software Management Successes in 2001 . . .

The Egyptian government (especially the Ministry of Communication and Information Technology) took some very positive steps in 2001 regarding protection of software. The government has worked with industry to legalize the usage of over 100,000 computers, and has brokered an agreement by college campuses to legalize the usage of 100,000 student computers. IIPA commends the government for having taken these initial positive steps with respect to governmental and educational software usage.

. . . But Small and Medium-Sized Corporate End-Users Still Use Illegal Software

Unfortunately, such successes were not achieved in fighting corporate end-user piracy by small and medium-sized businesses, as well as in private schools. Although the one successful conviction against an end-user in 2001 was a positive development (albeit the case is now on appeal), such successes are few and far between, and this does not amount to a coordinated concern over corporate end-user piracy in Egypt. For example, the Anti-Piracy Police continue to ignore end-user piracy as an enforcement concern. The Ministry of Culture in Cairo has taken to settling for legalization (or partial legalization) of raided entities, and refuses to take legal action against violators.

¹⁴ IIPA understands that there is a new IPR division in the Ministry of Economic and Foreign Trade, which will provide another avenue for copyright owners to lodge complaints about piracy. We are quite concerned that the leadership at the MOEFT is ill-equipped or ill-inclined to take the kinds of action necessary to defeat piracy in Egypt.

MARKET ACCESS ISSUES

***Ad Valorem* Import Duties Run Counter to International Practice**

The copyright industries regularly face discriminatory *ad valorem* duties upon import into Egypt, namely, Egypt bases the import customs' valuation of CD-based goods 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 can represent approximately 70-87% of the value of a film print, whether duties are computed using the invoice value of the film or a specific duty of 120 Egyptian pounds per kilogram plus 5% (Egyptian Customs authorities use whichever method of calculation results in the highest yield).¹⁵ An additional sales tax (i.e., a tax on goods imported for sale in Egypt) began being 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. Import costs are further increased by a release tax imposed on foreign films. Before a foreign film can clear Customs and be released in Egypt, it must obtain a censorship certificate from a Film Censorship Office within the Ministry of Culture. A release tax of 700 Egyptian pounds is levied upon issuance of the certificate. This discriminatory tax is not imposed on domestic films and should be removed. The U.S. recording industry similarly reports high import duties, significantly increasing the price of legitimate products and making it even more difficult to compete with pirates. The Egyptian government made no attempt to reduce these duties and taxes in 2001.

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.

Other Market Access Barriers

Certain other barriers effectively keep the U.S. recording industry (and other industries, as applicable) out of Egypt. First, there is the requirement that all song lyrics on locally-manufactured releases be translated into Arabic, significantly reducing the number of back-catalog items that

¹⁵ An example of a Customs duty calculation in Egypt for a typical print (20 kg weight) would reveal as follows:

Egyptian Pounds 120 per kilo:	LE2,400
Plus 5% tax (LE120):	LE2,520
Plus 10% value-added-tax (VAT) on the subtotal (LE252):	LE2,772
Total:	approximately US\$600

This calculation of LE2,772 represents 60% of a US\$1,000 print value.

companies can release in Egypt, and lengthening the “censorship approval” process (it should be noted that even in restrictive markets like Saudi Arabia, lyrics needn’t be translated into Arabic before release). Second, there is the requirement that a commercial entity be 100% Egyptian-owned in order to import products into Egypt – a practice that effectively holds U.S. companies hostage to the interests of Egyptian importers. All in all, it can be said that the barriers facing record companies doing business in Egypt are as bad as, or exceed, the barriers faced in any other single market.

COPYRIGHT LAW AND RELATED ISSUES

Comments on Draft IPR Law Pertaining to Copyright

On June 15, 2001, Egypt’s People’s Assembly (*Majlis al-Sha’b*) passed a first reading of the draft copyright law (as well as the integrated IPR code). From there the draft IPR code proceeded back to the Advisory Council (*Majlis al-Shura*) for a “final read-through” (since the Advisory Council only advises on and does not pass legislation), from where it would proceed to the People’s Assembly for a final vote. IIPA understands that the draft remains bottlenecked somewhere between the Advisory Council and the People’s Assembly, in part because of concerns of other constituencies with provisions relating to patents and other IP areas. There are also political divisions within the government of Egypt, for example, the Ministries of Culture and Health, who relied on expert opinions to achieve the current draft, versus the Ministry of Higher Education and Scientific Research, and the Ministry of Technology, Supply and Internal Trade (as well as the People’s Assembly Legislative and Scientific Committees) who wish to ensure that the draft complies with all relevant international treaties.

IIPA has now had a chance to review the translation by the Ministry of Higher Education & Scientific Research of the draft approved on first reading at the People’s Assembly, and believes that the draft is sound in principle, made numerous improvements over the old law and previous drafts,¹⁶ and should be passed immediately (even if that involves severing it from the IPR bill), with some key last-minute revisions to bring the draft law into compliance with TRIPS. Some additional changes would

¹⁶ There are many strengths to the June 2001 draft. For example, the draft provides for a term of protection of “life plus 70” years as to works having a natural author (Draft Articles 158 and 159), 70 years from first publication or first making available to the public, whichever comes later, as to works in which the copyright holder is a legal entity (Draft Article 160), and 70 years from the end of the year in which the recording was “made or made public” for producers of sound recordings (Draft Article 165). In addition, exceptions to protection pertaining to computer programs (Draft Article 169(3)) have been narrowed, compared with the Advisory Council draft (which contained numerous exceptions that were overly broad and are Berne- and TRIPS-incompatible), and now comes much closer to comporting with international treaties requirements. The revised Article 169(3) now provides that it is permissible, without the authorization of the author to make

a single copy or a quotation of a computer program, with the knowledge of the legal owner of the program, [not] exceeding to [sic] the extent necessary for the use of the program within the limits of the purpose for which authorization was initially granted, for archiving purposes, or to replace a lost, destroyed or invalid original copy; in both cases, the original or adapted copy shall be destroyed upon expiration of the property title.

IIPA assumes that the translation inadvertently left out the word “not.” IIPA is also pleased to see the reinsertion in Article 179 (deleted in the Advisory Council draft) of the possibility of closure of an establishment in case of a conviction, for a period of “not more than six months.” Closure can be an extremely important enforcement tool, and for recidivists it may be vital to have this remedy available to make the enforcement systems adequate and effective.

ensure that Egypt becomes the first country in the Middle East to fully implement the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and would ensure that Egypt has a law truly reflective of modern trends of protection.

Necessary Changes (TRIPS)

Most important, at least the following major changes are needed to conform with TRIPS:

- **Inadequate Criminal Remedies.** The draft contains non-deterrent criminal penalties that are even weaker than those in the antiquated 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 (US\$1,077 to \$2,154). 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. The proposed fines would not even amount to a cost of doing business for commercial pirates in Egypt. Fines should be increased at least ten-fold, to LE50,000 to 100,000 (approximately US\$10,770 to \$21,540), to be doubled for recidivists, and should be made “per copy” rather than per title. Imprisonment should be set at from three months to three years (with mandatory imprisonment for recidivists). Such penalties would be closer to TRIPS standards.
- **Insufficient Remedy as to “Materials and Implements,” in Violation of TRIPS Articles 46 and 61.** Draft Article 177(3) in the draft is TRIPS deficient, in that it only permits the seizure of “materials” that “could be used only for” infringement. On the other hand, 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. Draft Article 177(3) must be amended to comply with TRIPS.
- **Lack of Express Provision for *Ex Parte* Civil Searches.** Draft Article 177 or another article of the draft must be amended to give judicial authorities the authority to “adopt provisional measures *inaudita altera parte* [without notice to the defendant] where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed,” in line with Article 50 of TRIPS.
- **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 would violate 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.

- **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.¹⁷
- **Overly Broad Compulsory License** The draft law contains a TRIPS/Berne-incompatible compulsory license for copying and translating works (TRIPS Article 9.1). 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, or deleted altogether.¹⁸
- **Personal Use Exception Should Be Limited to Analog Copy.** Draft Article 169(2) should be limited to a single “analog” copy, since allowing even a single “digital” copy would conflict with a normal exploitation of the work and unreasonably prejudice the legitimate interests of the author (and thus violate TRIPS Articles 9 and 13).
- **Inadequate Term of Protection for “Anonymous” Works.** The term of protection for “anonymous” works is too short (TRIPS Article 9.1 and Berne Article 7(3)), since Draft Article 161 provides for a term of protection for “anonymous” works of “one year only.” This term is easily fixable.
- **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,”

¹⁷ 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.

¹⁸ The Egyptian government must confirm that, if it intended to avail itself of Articles II and III of the Berne Appendix, it has kept up its renewals of its declaration, under Article I of the Berne Appendix. Otherwise, Egypt is no longer entitled to avail itself of these provisions.

regardless of whether the author has transferred economic rights. In this form, this provision violates Berne Article 12, as it would undermine the exclusive adaptation right. The standard for rejection of a change must be objective, as set forth in the Berne Convention, not subjective, as set forth in the draft. 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.

Needed Clarifications (TRIPS)

Other clarifications are needed to ensure that the law complies with TRIPS, for example:

- **Failure to Provide Express Point of Attachment for Owners of Neighboring Rights.** Article 187 of the draft provides express point of attachment for works, but not for the objects of neighboring rights. While we understand that the government of Egypt takes the position that 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).¹⁹
- **Unclear Retroactive Protection.** There is no provision in the draft ensuring that pre-existing works and the objects of neighboring rights (including sound recordings) receive full retroactive protection as required under TRIPS Articles 9.1 and 14, and Berne Article 18. Even though we understand that the government of Egypt takes the position that TRIPS and Berne are self-executing in Egypt, 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.²⁰

¹⁹ The simplest way to fix Draft Article 187 would be to add the following phrase at the beginning:

The provisions in this Law shall apply to works, sound recordings, performers, producers of audiovisual works, and broadcasting organizations that are eligible for protection by virtue of and in accordance with any international treaty, convention or other international agreement to which Egypt is party.

²⁰ The simplest way to fix the retroactivity void in the Egypt draft would be to add a new article as follows:

The protection provided for under this Law applies also to a work, sound recording or performance in existence at the moment of the entry into force of this Law, and which are the subject of any international treaty, convention or other international agreement to which Egypt is party, provided that on such date the work, sound recording or performance has not yet fallen into the public domain in its country of origin and in Egypt through the expiry of the term of protection which was previously granted.

- **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.
- **Temporary Copy Exception.** Article 169(9) provides what IIPA hopes is a narrow exception for certain “ephemeral” copies, where such copy is made “during a digital transmission of a work,” or “in the course of a process of reception of a digitally stored work,” or “if the reproduction is made by a legal entitled person during the normal operation of the used hardware,” with the proviso that “such operation is made under a license granted by the copyright holder or by operation of the law.” While, like U.S. law, IIPA believes that Egypt should not provide an exception for temporary copies, if Egypt chooses to do so, the provision of Article 169(9) would be an acceptable approach, if the government of Egypt clarifies that the final clause, “provided that such operation is made under a license granted by the copyright holder or by operation of the law,” also covers the “transmission” and “reception” mentioned in the previous clauses. Otherwise, the net cast by this exception would be too broad and threaten to run afoul of Egypt’s international obligations.
- **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) and do not unreasonably prejudice the legitimate interests of the author (or right holder), in line with TRIPS Article 13.
- **Adequate Civil Damages.** Nowhere in the draft Egyptian law is there provision for adequate compensatory damages, as required by Article 45 of TRIPS. TRIPS requires the courts to have the authority to award “damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity,” and in appropriate cases, suggests the availability of “recovery of profits and/or payment of pre-established damages,” even where the infringer did not knowingly (or with reasonable grounds to know) engage in the infringing activity. Egypt’s law remains deficient on provision of adequate civil remedies.²¹

²¹ The following suggested text would provide a TRIPS-compliant framework for compensatory damages:

Where any of the rights conferred on the author in relation to his work under this Law has been infringed, the author shall be entitled to fair and adequate compensation. To qualify as adequate compensation, the infringer shall be liable for either of the following: (1) the actual damages suffered by him as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In determining the injury to the right holder, the Court shall look to the value of the infringed-upon item, according to the suggested retail price of the legitimate product or other equivalent measure established by the right holder for valuing authorized goods; (2) an award of statutory damages, if the copyright owner elects, at any time before final judgment is rendered, to recover these instead of actual damages and profits, for all infringements involved in the action with respect to any one work for which any one infringer is liable in a sum of not less than [X] and not more than [Y], as the court considers just. In a case where the court finds that the infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than [Z]. The amount of statutory damages awarded should be sufficiently high to deter future infringement and to compensate the copyright owner for the harm caused by the infringement.

Other Suggested Clarifications

- **Unreasonable Restrictions on the Ability to Freely Contract.** Draft Articles 148, 149 and 151 are restrictions on the ability to enter into freely-negotiated contracts, and should be deleted. Specifically, Draft Articles 148 and 149 contain transfer provisions that impose undue burdens on the freedom to contract, while Draft Article 151 is an unreasonable restriction on the ability for an author to enter into arrangements that might include future works under a private contractual agreement.
- **Inflexible Approach as to Performers' Moral Rights.** In Draft Article 153(1), the performer's right of attribution should permit the omission of the performer's name, if such is dictated by the manner of the use of the performance, and Draft Article 153(2) should qualify the kinds of changes made by a right holder that would be objectionable (i.e., changes that would be prejudicial to the performers' reputation), and provide that it is not prejudicial to the performer for right holders to make modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer.
- **No Compulsory License for Broadcasts.** Draft Article 167 permits broadcasting organizations to use works without seeking authorization. This amounts to a compulsory license and should be deleted.
- **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. Also, 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.²² The producer of an audiovisual work should have the ability to exercise all the economic rights in that work without the further consent of the authors.
- **Misplaced Right of Publicity in Copyright Law.** 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 Implementation

²² The simplest formulation of the producer's rights would be as follows: "Unless otherwise agreed upon in writing, the producer shall be entitled to exercise all the economic rights in relation to the work and copies thereof."

IIPA is pleased to see that the draft copyright law attempts to implement key provisions of the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).²³ In particular, IIPA makes note of the following points with respect to Egypt's attempt in the June 2001 draft to implement the WCT and WPPT:

- The definition of "reproduction" in the draft means "making [one or more copies] of a work or a sound recording, in any manner or form, including permanent or temporary storage of the work or sound recording in an electronic form" (draft Article 138(9)), which implements Article 1(4) and the Agreed Statement to Article 1(4) of the WCT.
- The economic rights as to works (Article 146, clause 1 provides that authors have the "exclusive right to authorize or prevent any form of exploitation of the work"), and as to performers and producers of sound recordings (Article 155(1) provides that producers of sound recordings have the exclusive right to "prevent any exploitation of their recordings in any manner"), are broad enough that they may fully satisfy the WCT and WPPT.²⁴
- The attempted implementation of the requirement to prohibit circumvention of technological protection measures is commendable. Draft Article 179(5) may fall short of its mark with respect to prohibiting the trafficking in devices that circumvent technological protection measures used by copyright owners to protect their works in networked environments, but Draft Article 179(6) comes close to complying with the treaties with respect to acts of circumvention.²⁵

²³ Egypt's consideration of the treaties goes back at least to October 14, 1999, when 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.

²⁴ Specific enumeration, in Draft Articles 146, 154 and 155, is missing with regard to a "distribution" right (WCT Article 6, WPPT Articles 8 and 12) (although the term "making available" may encompass distribution); an importation right; and a retransmission right. With respect to compliance with WCT Article 8, while the draft broadly defines "communication to the public" (except for the use of the non-technology-neutral term "computer"), works are only given the right to control the "making the work available to the public in any manner, including through computers, internet, information networks, communication networks and other means of technology," while the term "communication to the public" is never mentioned. With respect to compliance with WPPT Article 14, Draft Article 155 gives producers of sound recordings a broad exploitation right, including the specifically enumerated right to make "a sound recording available to the public by wire or wireless means or through computers or any other means of technology." Thus, while the draft copyright law implements the different treaty rights in varying ways, the end result appears to be treaties-compatible as to both works and sound recordings with respect to transmissions over digital networks.

²⁵ In particular, in addition to prohibiting the manufacture and importation of circumvention devices, it should be prohibited to sell, offer to the public, otherwise traffic or provide a service in circumvention/circumvention devices. Second, coverage of devices should not be limited to those "specially designed or made" but rather should take into account other indicia of a circumvention purpose, such as whether the device, etc. is promoted, advertised or marketed to circumvent, or whether the device etc. has only a limited commercially significant purpose other than to circumvent, etc. Also, the definition of technological protection measure (left undefined in the draft law) should be broad enough to encompass both controls on access to a protected work as well as controls on the exercise of copyright or neighboring rights. It is also extremely important

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.” In 2000, \$26.3 million of Egyptian goods were imported into the U.S. duty-free, accounting for 2.8% of its total imports to the U.S. For the first 11 months of 2001, \$20.6 million of Egyptian goods entered the U.S. duty-free under the GSP program, accounting for 2.5% of its total imports into the U.S. Egypt should not continue to expect such favorable treatment at this level if it fails to meet the discretionary criteria in this U.S. law.

that a violation of Draft Article 179(5) or (6) is deemed independent of any other infringement that might occur under the law, and that all civil and administrative remedies available for copyright infringements also apply to violations of Draft Article 179(5) and (6).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

INDIA

EXECUTIVE SUMMARY¹

IIPA recommends that India be retained on the Priority Watch List.

While India has a large, significant indigenous copyright industry, across all of the artistic, literary and computer fields,² these industries are severely stunted due to high levels of piracy. The primary obstacles to reducing piracy rates in India are police corruption (larger pirates are often protected by the police), lack of resources, and an overcrowded and ineffective court system that prevents conclusion of even the simplest criminal cases. It has become commonplace for only smaller pirates to be raided.³ While India has made some progress in fighting software piracy, corporate end-user piracy (unauthorized use of software in a business setting), the availability of pirated software at the retail level remains at unacceptably high levels, thereby limiting the market in India for computer software; six out of ten business software programs in use in India are illegal. Meanwhile, the criminal system is slow, cumbersome, and fraught with delays and unnecessary expenses.⁴ Surprisingly, the motion picture industry has had some success in obtaining countrywide civil 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 would take five years to adjudicate a contempt citation through to actual enforcement.

In 2002, IIPA hopes to see several key changes in India that would go a long way toward improving the situation there and bringing down piracy levels:

¹ For India's long involvement with the Special 301 process, see the History appendix.

² A study done in 1995 concluded that the copyright industries represented over 5% of GDP. More recent indicators suggest that the software industry will grow to a \$90 billion industry by 2008 (with predicted exports of \$50 billion, or 30% of all Indian exports), contributing 7.5% to GDP growth by this period. Indicators also suggest that the music and motion picture industries will become \$15 billion industries by 2005. Another study by the National Productivity Council in 1997 set the growth number at a low 1%, but the authors of that study freely admitted their estimate is too low due to the unavailability of adequate information to them.

³ Recently, however, book publishers have, with difficulty, been able to secure the arrest of three "fixers" in Delhi and Mumbai, seizing a printing press and 37 photocopiers, which remain in police custody. A "fixer" is a person who identifies a bestseller, estimates its demand, gets the copies printed and distributes to most State capitals, mostly simultaneously with the genuine publishers, e.g., the Harry Potter Series, Robin Cook "Abduction", John Grisham "The Painted House", Katherine Frank "Indira," Shiv Khera "You Can Win", etc. See *Times of India* dated July 13 2001 story titled "25,000 pirated books seized, five arrested,"

⁴ 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, respectively, 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.

- **Establish a Centralized Body Dedicated to IPR Enforcement.** There is currently no national coordination body devoted to enforcement in India, but instead, enforcement is left to each individual state. This leads to an inefficient system, with a wide variance in capabilities and results throughout India. Moreover, there is little expertise within the police and the court system for handling IPR cases. Police sometimes 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 made to locate the source of the pirated goods. The heavily burdened legal and judicial systems means that outstanding cases often take years to be resolved.
- **Adopt an Optical Media Law to Deal With Increasing Optical Media Piracy.** This has become a growing problem and like many other countries in Asia, India should also pass an effective law modeled on the ones already in place in Hong Kong, Malaysia and elsewhere. Initial discussions with the Indian government have been positive and IIPA and its members plan to provide assistance in the form of a model law to the Indian government.
- **Improve and Strengthen Existing State Level Intellectual Property Police Cells.** These IP cells, located either in the Office of the Director General of State Police or the Economic Offenses Wing of the State Police, must be given greater resources and more power to enforce the law. Training, sufficient manpower, machinery and office infrastructure must be provided to permit effective investigation, action and specialized prosecution to be done. Expert prosecutors need to be appointed to work closely with these cells in the states.
- **Introduce Court Reform to Decrease Burdens, Costs and Delays.** Examples abound of how the Indian court system fails to work properly. For example, our members report that criminal cases can take 12 years to complete. With such long delays, evidence is often tainted, missing or otherwise unusable. Corruption and leaks of information are also problematic. There is also nothing in the criminal procedure law to allow “compounding” criminal cases (a procedure by which both parties can come to a settlement privately, thereby ending the case in court with the courts permission), leading to overly costly judicial enforcement for right holders.
- **Add Needed Deterrence into the Criminal and Civil System.** While India’s law has a high minimum prison term (but generally low fines), this overall positive system has little opportunity to be tested due to the failure of the Indian enforcement machinery to conclude cases with convictions or deterrent civil damages. Until this changes and India accepts that its enforcement system is not TRIPS-compatible and takes action to fix it, progress against piracy is likely to continue only at the margins.

IIPA understands that the Indian Copyright Act is in the process of being reviewed for needed amendments, and a “core group” of academics and private sector representatives has been appointed by the Indian government to consider modifications that will bring India into compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). This group will need to consider issues critical to U.S. and Indian copyright holders, including: protection for temporary reproductions; defining the scope of the “communication to the public” right; presumptions to assist right holders in exercising and enforcing their rights; the protection of technological protection measures from unlawful circumvention and trafficking in circumvention devices; the protection of rights management information; and the application of limitations and exceptions to subject matter, including computer programs, and rights in the digital environment. IIPA urges the USG to engage with the government of India on these critical issues,

and urges the government of India to present a discussion draft early in the process so that it may profit from the experience of industry representatives that have been dealing with these issues for some time in other fora and countries.

INDIA ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	70.0	55%	47.0	60%	66.0	80%	66.0	80%	66.0	80%	66.0	85%
Sound Recordings / Musical Compositions	NA	40%	6.0	40%	8.0	40%	6.0	30%	6.0	40%	7.0	30%
Business Software Applications ⁵	238.4	69%	181.6	63%	160.2	61%	158.0	65%	148.7	69%	182.4	78%
Entertainment Software	NA	NA	NA	80%	42.8	86%	36.8	84%	35.9	82%	31.4	78%
Books	36.0	NA	36.0	NA	35.0	NA	30.0	NA	22.0	NA	25.0	NA
TOTALS ⁶	345.4		270.6		312.0		296.8		278.6		311.8	

COPYRIGHT PIRACY IN INDIA

Piracy in India continues to devastate the markets for copyrighted goods, wreaking particular havoc on the business software, publishing, and motion picture industries. The following are among the most serious piracy issues facing the government in India today:

Book Piracy. Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals decimates the legitimate publishers' market in India. At the many pirated retail establishments and outdoor markets, all varieties of pirate books, from poor quality (complete) photocopies and obviously pirated cheap reprints, to hardbound copies of medical reference volumes and high quality offsets, are readily available. Publishers estimate that any best seller suffers from 50 to 60% piracy. Major best sellers, college texts and reference works suffer even higher levels of piracy – up to 80%. Moreover, as a consequence of a successful anti-piracy campaign in North India, high quality pirated offset printed books are being exported from the south of India to countries like Sri Lanka, Bangladesh and the Maldives. Another recent phenomenon is that published materials in digitized form (including interactive published materials in CD-ROM) are now widely available in the pirate markets in India, mostly manufactured domestically.⁷

⁵ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss figure of \$195.2 million was also reported as preliminary. This number was finalized in mid-2001, and is reflected above.

⁶ In IIPA's February 2001 report, total losses to the U.S. copyright industries in India were estimated to be \$284.2 million. Due to BSA's adjustment of its loss estimate in mid-2001, the total estimated losses due to piracy in India in 2000 are adjusted to \$270.6 million.

⁷ In a recent raid in the Mumbai markets, the following titles were seized, which were being sold for US\$ 5 to 8. Bulk transactions of hundreds could be purchased overnight for as little as Rs.75 (US\$ 1.50).

- **Internet Piracy.** Large number of Websites continue to make use of Indian-origin repertoire in 2001, and one recent phenomenon involved the burning of MP3s onto discs for sale over Internet distribution networks in India.⁸
- **Retail Piracy (in Both Analog and Digital Forms).** Both analog and digital forms of pirated movies, music, entertainment software, business software, and published materials crowd out legitimate product in the market place. Increasing problems include production of pirate optical media for domestic consumption, as well as increasing CD-R “burning” in shops.
- **Piracy of Motion Pictures.** Pirate videos, VCDs, and DVDs cause severe damage in the markets in India. Most are available in major cities well before the local theatrical release of the title (so-called “pre-release” piracy), with a significant number of the pirated VCDs being manufactured locally by two factories located just at the border of New Delhi in the State of Harayana (Kundli) and the State of Rajasthan (Bhiwadi). These factories also manufacture a significant amount of the pirate music and computer software product. Effective enforcement efforts appear to be problematic. In a recent MPA raid conducted in conjunction with Delhi police, the Harayana police detained the Delhi police officials and the investigators after they gained entry into one of the factories. The incident resulted in significant press coverage and was even raised briefly in the Indian National Parliament. In addition to the pirate production coming from the above two factories, pirate optical discs are also imported from Malaysia, and now Pakistan.
- **Pirate Entertainment Software.** Pirates sell the most popular games for R175-250 (approximately US\$3.50 to 5.00). Much of the product is now believed to be produced in India with production quantities increasing daily. The piracy level is as high as 90% for all products, with CD-R burning occurring in areas with higher PC penetration.
- **Pirate Business Software.** Corporate end-user piracy (unauthorized use of business software in a business setting) is endemic in major Indian companies, while piracy at the retail and wholesale level is also prevalent.
- **Pirate Music.** The legitimate music business is decimated by counterfeits (in which the inlay cards differ in quality, color of printing, do not contain the name of the company on the leader tape or embossed on the cassette), pirated copies (name and contact of company manufacturing

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- a. THE OXFORD BUSINESS SHELF, Instant Access to Oxford Reference
 - b. OXFORD, Talking Dictionary
 - c. RANDOM HOUSE, Webster's
 - d. Eyewitness Encyclopedia of Science, by Dorling Kindersley
 - e. BBC, English Dictionary
 - f. Peter Collin, Dictionary of Medicine
 - g. MOSBY, Medical Encyclopedia
 - h. CAMPBELLS, Operative Orthopedics
 - i. MOSBY, Clinical Medicine by Forbes and Jackson
 - j. MOSBY, Pathology by Steven and Lowe
 - k. MOSBY, Clinical neurology
 - l. A.D.A.M Benjamin Cummings, Interactive Physiology Respiratory System
 - m. A.D.A.M Benjamin Cummings, Interactive Physiology Urinary System

⁸ See Manohar Sharma, “Music Industry Battles MP3 Piracy,” *Times of India*, January 31, 2002.

the cassette is missing, name and contact of the copyright owner and year of publication are missing, inlay card shows poor quality printing and/or unknown brand name, compilations of "hit songs" from different albums under names such as "Top Ten" or "Bollywood Hits" etc.), and pirated CDs (which include the same indicia of illegality as pirated cassettes, but in addition, source identification (SID) code is missing). Most of the audiocassette piracy is not in the retail shops, but limited to street vendors. Many shops in major cities now use CD-R burners and are able to make compilations of music at the request of a customer – an increasing problem.

- **Cable Piracy.** Unauthorized cable television transmission remains the predominant form of piracy of motion pictures in India. As many as 40,000 cable systems exist in India, and these systems continue to frequently transmit MPA member company product without authorization, often using pirated videos or video CDs (VCDs) for their transmissions. These cable systems seriously affect all member company business, including theatrical, home video and legitimate television. Since 1999, MPA has brought civil actions against the major cable television networks in an attempt to limit cable television piracy. The restraining orders passed by the civil court (Delhi High Court) against the entire network (including all franchisees, distributors and cable operators forming part of the network) have been a big deterrent. Under the auspices of the Ministry of Information and Broadcasting, the representatives of the film industry and the cable service providers have signed a joint memorandum whereby the latter have agreed not to make unauthorized cable telecasts on their networks and to cancel licenses of their franchisees should they be found making unauthorized telecasts. A similar memorandum has also been signed by the cable industry with the IMPPA (Indian Motion Pictures and Producer's Association), a local association of the film industry. It is hoped that these memoranda will lead to more restraint being exercised by the cable networks, though for now many such networks are known to be in contravention of the law, as well as of specific orders of the court. Such court actions require constant monitoring and initiation of fresh criminal prosecutions for copyright violation; a contempt of court proceeding is a costly and time-consuming process.

COPYRIGHT ENFORCEMENT IN INDIA

The copyright industries face various hurdles to effective enforcement in India. While it is quite commonplace for small-scale pirates to be raided, and all the industries continue to report cooperation among the police in such endeavors, larger pirates often go untouched, either because of official protection, or because, due to the wily ways of these large-scale pirates, their operations allow them to set up "fall guys," letting them escape punishment every time. Even when a criminal raid is successfully carried out, the system often falters from there, with slow, cumbersome, and costly criminal procedures that are weighted against the legitimate copyright owners at each step. Mainly for this reason, the motion picture industry has resorted to civil procedures which, somewhat surprisingly (since civil cases take even longer to get to judgment than criminal cases), have led to some successes, particularly in terms of obtaining nationwide injunctive relief. Contempt citations for violations of these injunctions have actually brought some deterrence. Nonetheless, better coordination of enforcement resources (e.g., in a national body dedicated to enforcement of IP), more focus on the deterrent aspect of damages, fines and penalties meted out, and greater focus on judicial reform (e.g., moving dockets quickly, dividing cases to speed up trials, training a cadre of specialized IP judges, etc.) would all be welcome steps by the government to assist in the struggle against piracy in India.

Criminal Enforcement: Numerous Raids . . .

The experience of the copyright industries using criminal procedures has been a mixed bag, since much raiding activity occurs, but follow-up from raids is made difficult by cumbersome, costly, and time-consuming procedures that lead to an overall lack of deterrence in the market.

For example, the music industry obtained 1,082 raids in 2001, carried out by the police, with seizures of almost 500,000 pirate audiocassettes, over 125,000 pirate audio CDs, a reported 383 cassette duplicating machines and 86 CD-R burners.⁹ An almost identical number of arrests were made in both 2000 and 2001 (1,175 and 1,193, respectively). While there are certainly positive trends to note in these statistics, the fact that the raids yielded far more CDs in 2001 (compared with 2000) and far more CD-R burners indicates that enforcement efforts are not having a significant deterrent effect on music piracy in India.

The publishing industry has been increasingly active in addressing piracy of published materials (in analog and digital forms) and has had some impressive results in 2001. For example, the arrest of the first fixer in New Delhi yielded 25,000 pirated copies of trade fiction and nonfiction titles on the first day of the raid. Further raids revealed the large-scale nature of the fixers network. In another raid in September 2001, a large-scale printing and distribution operation/network, complete with a printing press and thousands of pirate negatives of U.S. titles were seized in Delhi.¹⁰ In December 2001, the New Delhi police uncovered one of the largest habitual pirates of medical texts, raiding various locations, arresting four, seizing five copiers and 1,000 pirated copies of medical books. These copies were being made from originals books in the National Medical Library and the "All Indian Institute of Medical Sciences B.B.Dikshit Library."¹¹ The library books bearing all stamps were seized, but no action has been taken against the libraries or responsible persons. Finally, in January 2002, the police in Mumbai caught one of the largest known piracy rings in India, seizing and sealing over 34,000 book titles. All these raids indicate the increasing organization and sophistication with which the book pirates are operating in India, even though their business has become more risky purely because of increasingly effective anti-piracy activities of international book publishers.¹²

The MPA facilitated 108 police actions resulting in seizure of 126,782 pirate VCDs and 3,719 VHS tapes in 2001. November 2000 marked the first raid on an optical media facility

⁹ By contrast, in 2000, 1,054 raids were conducted, with seizures of over 750,000 pirate audiocassettes, over 75,000 pirate CDs, a reported 361 cassette duplicating machines, and 30 CD-R burners.

¹⁰ *Indian Express*, Delhi dated September 24, 2001 story titled "Racket in printing pirated novels busted, 5 held." *The Hindu*, September 25, 2001 story titled "Printing press raided for piracy."

¹¹ *The Hindustan Times*, Delhi dated December 13, 2001 story titled "Medical Books worth over Rs.25 Lakh seized, 5 held."

¹² In yet a further set of successful raids in November 2001 in Mumbai, Jai Ambe Copiers were caught conducting a large-scale photocopying of textbooks and academic book (mainly medical). Not only were these the same folks who had previously been arrested in Mumbai in January 2001, but their equipment was highly sophisticated, laser color copying, so that the medical texts, including diagrams, would look as clean as possible.

engaging in pirate production as a result of a complaint made by MPA investigators. The successful raid resulted in the seizure of 40,000 VCDs of pornography and “Bollywood” classics. The raid on that plant, located in Rajasthan, resulted in the illegal plant being closed and the replication equipment sealed. This raid reveals the increasingly damaging nature of optical media piracy in India, and suggests a growing domestic production that previously didn’t exist or went undetected. Unfortunately, however, the facilities have now re-opened and are back in operation. In January 2002, these facilities were raided once again.

A positive development in 2001 involved the local police initiating retail raids where pirated business software was sold, on an *ex officio* basis (i.e., without the copyright owner filing a complaint). Six retail operations (against 18 retail software pirates) were raided in 2001 in the cities of New Delhi, Mumbai, Pune, Kolkatta, and Bangalore with 1,647 CD-ROMs being seized in total, many of which contained compilations of software programs from many different U.S. software publishers. It is estimated that the street value from these discs alone was well over US\$1 million.

. . . But Little Deterrence

Again, the music industry had perhaps the strongest showing in 2001, as 55 defendants were convicted (an increase from the 30 convictions obtained in 2000), with nine defendants being sentenced from six to twelve months’ imprisonment. Fines were paltry, however, generally ranging from Rs.5,000 to Rs.50,000 (approximately US\$103 to \$1,030).¹³ In many of the cases decided in 2001, suspects had to remain in judicial custody for several days before they were freed on bail by the courts, a very positive development. Notwithstanding these positive results, piracy levels remained steady at 40% in the overall market, but much higher for international repertoire. Sorely needed are more convictions to provide a higher level of deterrence in the market. The publishing industry also achieved some positive results in the last six months of 2000 and in 2001, conducting 101 raids, seizing more than 110,000 pirated books, 37 copiers, one printing press, two computers containing book scans, and arresting 94 persons, all of whom stayed in pretrial interim detention for from 5 to 17 days. Despite these gains, however, it has been necessary to re-raid repeat offenders who have become more sophisticated and built police informer contacts after the first raid, making it extremely difficult to raid the second time. Two anti-piracy cases brought in 1987 and 1991 against four repeat pirates surprisingly ended in acquittal on the same day in November 2000.

For the motion picture industry, criminal cases brought since the early 1990s have resulted in a paltry four reported convictions (three of them coming pre-1995, before higher penalties for copyright infringement were established).¹⁴ Since then, not a single criminal case reached conclusion. By the end of 2001, the motion picture industry had 608 criminal cases pending in the courts. Meanwhile, for the business software industry, 81 criminal cases against pirate resellers of

¹³ In the other cases, defendants were generally subject to only small fines – reportedly a maximum of Rs. 25,000 (approximately US\$515), far below the minimum required in the law.

¹⁴ The first conviction came in January 1997 in a Bangalore court, in which a video pirate was sentenced to three years’ hard labor (in a case that dated from 1993); the second conviction came in May 1997, when a New Delhi magistrate sentenced a cable operator (the first conviction against cable piracy) to six months’ imprisonment, to be served in hard labor, and ordered a fine of Rs.5,000 (approximately US\$103); the third conviction came in early 1999 (involving a raid conducted in 1986), in which the sentence was one year in prison and a fine of approximately US\$118. 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 have since been reversed on appeal.

software dating back to 1996 are still unresolved. Many of the cases have not even reached court. In addition, there has not been a single conviction of such offenders to date. The potential deterrent effect of the many criminal raids noted above is completely lost by long and expensive court processes and the failure to ensure swift and deterrent punishment as a result.

Procedural Burdens, Hurdles, Costs and Delays

Exacerbating the overall nondeterrent effect of criminal actions taken in India are the many procedural barriers erected in the path of a legitimate right holder the most fundamental of which is the lack of national enforcement coordination (since enforcement in India is a “state” matter). For example, in some cities (such as Delhi, Mumbai and Chennai), specialized police units (IP cells) have been set up to combat piracy. However, these units lack the necessary resources in terms of manpower (making them incapable of raiding larger pirate distribution and production targets), training and funds. The local police do not provide the necessary support to these units, and in some instances have been known to confront and obstruct these raiding teams in an effort to protect pirates.¹⁵

Obstruction of the raiding process is all too common. For example, leaks (to the pirates) before raids occur often in India. Once the raid is run, police often only seize the specific pirate goods in respect of which the complaint has been filed, rather than seizing all suspected pirated goods, as well as tools and materials the predominant use of which is in the act of infringement (a TRIPS requirement). By virtue of this practice the majority of the pirate goods are not seized. Owing to the lack of pre-raid investigation, larger pirates often set up “decoy owners” who are arrested, while the real owners and pirates get away.

Once the raid has been completed, the process is often further hampered by lack of follow-up, excessive delays in case preparation, and delays in commencement of prosecution. For example, following a raid, police often take up to a year to prepare the charge sheet on a defendant. Instead of investigating the links to larger criminal organizations and pirates, investigations are often cursory, with no attempt, for example, to follow the source of supply through to the source of pirate production. Because criminal cases proceed so slowly, the investigative officers are often transferred to remote locations by the time of trial, which only further delays the trial. By the time of trial, evidence is often missing or unusable. In addition, cases are frequently continued at the request of the accused, and such requests are usually made on days when the prosecution evidence has been assembled.

There are other procedural hurdles at the police level which hamper enforcement. For example, even though police can act on their own to seize pirate product under the copyright laws, and in fact, are obliged to do so, under the Criminal Procedure Code, they invariably require a complaint from the rights holder. The police will then only seize the product of that rights holder, even though the presence of other pirate product is open and obvious, this is despite the specific observation of the Supreme Court of India that it is unnecessary for the prosecution to trace the owner of copyright to come and adduce evidence of infringement of copyright (see *State of Andhra Pradesh v. Nagoti Vekatatraman*, 1996(6) Supreme Court Cases 409). It is believed that because

¹⁵ See, e.g., Sonu Jain, “Video ‘Pirates’ in Lead Role, Cops Play Villains,” Indian Express, December 19, 2001, at <http://www.indian-express.com/ie20011220/top6.html>. At least two incidents of pirates causing serious injury to a raiding party have been reported from the Palika Bazar market of Delhi.

the enforcement agencies and courts insist that the copyright owner personally be present to give evidence, many rights owners are hesitant to come forward and make complaints to enforce their rights. Initiating a criminal prosecution on a complaint made by the rights owner often becomes a source of harassment for the rights owner for years to come.

Finally, criminal case proceedings do not lend themselves to satisfactory, mutually agreeable resolutions between the complainant and the defendant. For example, there is nothing in the law of criminal procedure that allows the complainant/aggrieved party to compound the offense (a procedure by which both parties can come to a settlement privately, thereby ending the case in court with the courts permission).

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS					
2001					
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	BOOKS	TOTALS
Number of Raids conducted	108	9	1082	101	1300
Number of cases commenced	103	3	0	94	197
Number of defendants convicted (including guilty pleas)	0	0	55	0	55
Acquittals and Dismissals	5	0	0	0	5
Number of Cases Pending	608	81	0	0	689
Total number of cases resulting in jail time	0	0	9	0	9
Suspended Prison Terms	0	0	0	0	0
Maximum 6 months	103	0	0	0	103
Over 6 months	0	0	0	0	0
Over 1 year	0	0	0	0	0
Total Suspended Prison Terms	0	0	0	0	0
Prison Terms Served (not suspended)	NA	0	0	0	0
Maximum 6 months	0	0	0	0	0
Over 6 months	0	0	0	0	0
Over 1 year	0	0	0	0	0
Total Prison Terms Served (not suspended)	0	0	0	0	0
Number of cases resulting in criminal fines	0	0	0	0	0
Up to \$1,000	0	0	0	0	0
\$1,000 to \$5,000	0	0	0	0	0
Over \$5,000	0	0	0	0	0
Total amount of fines levied	0	0	0	0	0

**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	30	30
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

In 1999, the motion picture industry moved to a civil litigation strategy, mainly in order to fight cable piracy. In doing so, they were no longer at the mercy of the police, public prosecutors and defense counsel who regularly continued proceedings, and they were able to obtain broad injunctive relief, backed by contempt powers (i.e., the threat of a contempt conviction if the orders are violated). These injunctions have proved to have some deterrent value, effective in limiting cable television piracy in India for U.S. films (while Indian films continue to suffer significant losses at the hands of pirate cable operators), although defendants regularly challenge these injunctions and it can take up to five years before a contempt citation is actually enforced.¹⁶ The passage of the amendments to the Cable Television Networks (Regulation) Act, 1995, discussed below in the legislation part of this survey, has reportedly also had some effect in deterring cable piracy in India, though no actions have yet been brought under it. To date, the motion picture industry has filed eight civil actions, five against some of the largest cable networks in the country and three against specific shops in some of the largest retail markets in the country. The injunctions cover these cable networks in over 45 cities consisting of in excess of 8 million cable homes. Following this example, almost every Hindi film released in India today is preceded by a civil injunction order. Such an order has almost become an industry norm. Three contempt proceedings have also been

¹⁶ In one of the injunction and contempt proceedings undertaken, the injunction was issued in August 1999 and the first hearing was not scheduled until August 2000.

initiated by MPA against these networks for violating court orders, but as noted above, these cases have been substantially delayed. Similar contempt proceedings have also been initiated by the local industry. These contempt petitions appear to have had a deterrent effect, as the motion picture industry's cable/satellite piracy levels have dropped for the third consecutive year, to 35% in 2001 (down from 40% in 2000).

The business software industry has similarly relied on civil enforcement, given the myriad difficulties facing the industry in trying to bring criminal cases. Civil cases have been especially useful against unauthorized use of business software in a business setting, so-called business end-user piracy of software. In 2001, the industry filed four civil actions and conducted civil raids with local commissioners appointed by the Delhi High Court.¹⁷ While it appears that only one of the cases will be contested, from past experience, the industry expects a long, drawn-out legal process due to the under-resourced and bureaucratic judicial system. Moreover, where civil remedies are concerned, there is no yardstick prescribed that would assist a court in quantifying damages, for example, that a defendant would have to pay "X" amount for every infringing copy dealt with by him.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS			
2001			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	Totals
Number of civil raids conducted	0	4	
Post Search Action		-	
Cases Pending	8	10	
Cases Dropped	0	0	
Cases Settled or Adjudicated	0	12	
Value of loss as determined by Rightholder (\$USD)		31250	
Settlement/Judgment Amount (\$USD)	0	3958	

¹⁷ There have been nine civil cases against pirate corporate end-users since 1998, and all but two have been settled. There are also 31 active civil cases against counterfeit resellers and computer resellers who load hard disks with pirated software prior to sale (so-called "hard-disk loaders").

**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 renders 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 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 now reported to be more readily available than as reported in IIPA's 2001 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 and 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, though the MPA has reported limited success with the Mumbai customs authorities.

DEFICIENCIES IN THE STATUTORY AND REGULATORY REGIME

Copyright Law and Enforcement Provisions: India's Copyright Law, TRIPS and WIPO Treaties 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 (US\$1,210) and a maximum of two lakh rupees (US\$4,840). The minimum jail term was doubled to one year and the minimum fine increased to one lakh rupee (US\$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 (US\$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 1994 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 ("the 2000 amendments").

While the term of protection for performers was lengthened as required by TRIPS, the 2000 amendments, as IIPA noted in its 2000 and 2001 submission, added a number of last-minute amendments dealing with the protection of computer programs which severely compromised the high level of protection that India has always afforded computer programs and, in doing so, caused the law to fall out of compliance with the TRIPS Agreement. 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 changes to India's 1994 regime for protection of computer programs violate TRIPS Article 13 establishing a tripartite test for measuring whether exceptions to protection are legitimate or not.

For the last two years, we understand that a "core group" of academics and private sector representatives appointed by the Indian government has been considering amending the law to

bring it into compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA urges the government of India to release a discussion draft of such amendments at the earliest possible time so that the government can have the benefit of the wide experience of U.S. right holders, the U.S. government, as well as other right holders and governments, that have been operating under new laws that have implemented these new treaties.

Cable Law Amendments

In an effort to reduce film piracy by cable networks in India, the government has adopted far-reaching amendments to the Cable Television Networks (Regulation) Act, 1995 which went into effect on September 9, 2000.

The rules now prohibit cable operators from carrying or including in their cable service any program without copyright authorization. Transmissions without authorization, 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 Program Code. If any of these "Authorized Officers" has reason to believe that the Program 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. However, there is a gap in the law in that Section 18 provides that no court can take cognizance of any offense under the act except upon a complaint in writing made by the authorized officer. Since criminal procedure requires the personal presence of the complainant, the authorized officers are reluctant to become complainants. To date there have been no cases of seizure of the equipment by authorized officers under the act, despite it having been in operation for over a year (since September 1, 2000). The amendments are, however, welcomed in that there was previously no specific prohibition from exhibiting pirated films on cable networks.

Generalized System of Preferences

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provides "adequate and effective protection of intellectual property rights." In the first 11 months of 2001, \$1.2 billion of Indian goods (or 13.4% of India's total imports to the U.S. in that time period) entered the U.S. under the duty-free GSP Program. As India caused losses to the U.S. due to piracy of \$345.4 million in 2001, India 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

2002 SPECIAL 301 REPORT

INDONESIA

EXECUTIVE SUMMARY¹

IIPA recommends that Indonesia remain on the Priority Watch List.

Recent raids run against dozens of enterprises in West Java, Indonesia, reveal an optical media piracy problem, involving CD and other media capable of being read by an optical device such as a laser, that is nothing short of astonishing. Business records seized during the raids carried out in January 2002 reveal the distribution of 280,000 pirate optical discs a week (15 million discs per year).² Those initial raids led to a further raid on an underground optical media plant near the Jakarta airport, at which two optical disc production lines, recently used to produce pirate copies of an album by a local Indonesian singer, were found and dismantled, whereupon the facility was sealed. These recent anecdotes amply demonstrate that Indonesia's huge market remains dominated by piracy, and that massive optical media pirate production has arrived in Indonesia. If the pirate syndicates, fleeing markets like Taiwan, Malaysia, and Thailand, continue to establish their criminal enterprises freely in Indonesia, the country is bound to become a center in Asia for optical media piracy being uprooted elsewhere within the next couple of years.³

Enforcement continues to present unusual challenges in Indonesia, given pervasive civil unrest and political upheavals, heavily fortified loci of pirate production (often including huge concrete walls, and in one instance, even poisonous snakes) and, in one instance in 2001, armed conflict among governmental authorities (i.e., the well-intentioned national police and local military units). The government is quite simply overwhelmed with problems. Notwithstanding these challenges, some raiding occurred in Indonesia, mainly with the assistance of police units, and many cases were brought to the courts by prosecutors. Unfortunately, some major barriers to effective criminal enforcement still exist, including poor investigative techniques and poor handling of evidence by authorities. Even when cases reach the prosecution stage, seemingly straightforward matters such as seeking destruction of equipment used to pirate often fall by the wayside. One positive highlight during 2001 involved several court decisions for a major business software company, resulting in compensation awards (due to damage caused by the loading of pirated software on computers prior to their sale by pirate computer retailers) of over US\$9 million.

Losses to the U.S. copyright industries due to piracy in Indonesia reached US\$174.6 million in 2001.

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

² These actions had to be carried out by extra police units due to riots that broke out during the first round of investigations. Of the 1 million pirate compact discs seized, 80% were international and local music, and 20% were movies. Documentary records covering sales and deliveries revealed that on average the 28 retailers raided sold over 280,000 pirate optical discs per week to East and West Java, Timor, Sulawesi, Kalimantan, Irian Jaya and Lombok.

³ IIPA understands that one pirate syndicate owns a 45-foot ferry from Singapore that transports pirate product.

In 2002, the government of Indonesia needs to take several steps to address growing piracy:

- Promptly pass and implement a comprehensive regulatory and reporting regime for production equipment, raw materials and facilities in the field of optical media.
- Establish a national coordinating body for intellectual property rights enforcement, under high level government leadership (direct authority from the Office of the President), which is made up of various agencies with responsibility for IPR protection and enforcement.⁴
- Crack down on pirate production facilities (especially optical media plants), pirate retail outlets, unauthorized end-users, and book piracy, through sustained raids by enforcement authorities (including surprise inspections), followed up by swift police investigations, efficient handling by prosecutors,⁵ imposition of deterrent penalties, and destruction of all infringing articles as well as materials and implements used in the piratical activities.
- Enhance border enforcement, especially including seizures of imports and exports of pirated VCDs, DVDs, audio CDs and CD-ROMs, and the tracking of machinery and parts (including masters and stampers) used to produce such pirated goods, including optical media production equipment.
- Effectively combat end-user piracy, including unauthorized use of software in a business setting, by the establishment of a requirement to audit software usage, with mandatory fines and penalties for non-compliance, and as appropriate, cooperatively working with industry for all future acquisition of software by government agencies.
- Promulgate sentencing guidelines for the courts that provide deterrent criminal penalties, including the imposition of jail time and deterrent fines,⁶ and eventual establishment of a specialized IPR court with adequate resources to handle civil and criminal IPR cases, putting in place special procedures and a “fast track” so that IPR cases can be decided quickly and efficiently.
- Promptly ratify and implement the WIPO Phonograms and Performers Treaty.
- Reform Indonesia’s copyright law to achieve full compliance with the TRIPS Agreement.

⁴ The recording industry has lobbied for the revival of a special dedicated IPR enforcement unit (previously called *Tim Kepres 34*), and although high-level Indonesian officials have signaled commitment to this proposal, this has not resulted in concrete progress on this front.

⁵ The national coordinating body should ensure more effective seizure and safeguarding of evidence collected from raids so it can be used in legal proceedings against pirates, by requiring police and prosecutors to preserve and provide evidence for prosecutors, the courts and right holders. The courts should supervise prosecutors and police to ensure that evidence is preserved, and that cases are properly prepared and passed to prosecutors by the police.

⁶ Sentencing guidelines should set out a system for evaluating the seriousness of the crime, depending on factors such as: the quantity of pirated goods found in the defendant’s possession, their value, any evidence of past infringement (such as documents), a presumption that past profit has been made in the case of those caught in possession of pirated goods. In the most serious cases, including repeat offenders, participants in organized criminal piracy enterprises, etc., jail sentences are necessary to provide deterrence.

INDONESIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	27.5	90%	25.0	90%	25.0	90%	25.0	90%	19.0	85%	19.0	85%
Sound Recordings / Musical Compositions ⁷	67.9	87%	21.6	56%	3.0	20%	3.0	12%	9.0	12%	12.0	15%
Business Software Applications ⁸	49.2	87%	55.7	89%	33.2	85%	47.3	92%	139.6	93%	170.3	98%
Entertainment Software ⁹	NA	NA	NA	99%	80.4	92%	81.7	95%	87.2	89%	86.0	82%
Books ¹⁰	30.0	NA	32.0	NA	32.0	NA	30.0	NA	47.0	NA	47.0	NA
TOTALS ¹¹	174.6		134.3		173.6		187.0		301.8		334.3	

COPYRIGHT PIRACY IN INDONESIA

Optical Media Piracy Runs Rampant in Indonesia, Including Mass Domestic Production

Indonesia remains awash in copyright piracy, with reported piracy levels for nearly all sectors among the highest of any major market in the world. Today, that market is dominated almost completely by pirate optical media products: audio CDs, video CDs (VCDs), DVDs, and CD-ROMs containing business software applications and/or entertainment software. Piracy of audiovisual works offers an instructive example. The pirate video compact disc (VCD) and digital versatile disc (DVD) are now firmly entrenched in Indonesia, and over nine-tenths of the market consists of pirate product. Last year the recording industry noted the emergence of very high-quality counterfeits, sold at the same price as legitimate albums, indicating that pirates are becoming increasingly sophisticated and well-funded. At the same time, price competition among pirates has driven prices down some 20-30% from the very low levels reported in early 2000. By

⁷ Losses to copyright owners in U.S. sound recordings are represented by pirate sales value, i.e., pirate units multiplied by the pirate unit price. Estimated displaced sales in 2001 are \$410.5 million. The piracy loss and level numbers for 2000 were adjusted to \$21.6 million and 87%, respectively, in May 2001.

⁸ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 figures of US\$32.9 million in losses and an 87% piracy level were also reported as preliminary. These figures were finalized in mid-2001, and are reflected above.

⁹ IDSA estimates for 2001 were not available at the time of this report. IDSA loss figures for 2000 remain unavailable. However, losses due to piracy of entertainment software in 2000 were comparable to those for 1999.

¹⁰ A 20% loss in value of the currency in Indonesia leads to a slightly lower estimate of trade losses to U.S. publishers due to piracy of published materials, even though the sheer amount of pirated product increased in 2001.

¹¹ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Indonesia were \$109.5 million. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 8), and the adjustment upward in the losses due to sound recording piracy, estimated total losses to the U.S. copyright-based industries in Indonesia in 2000 are increased to \$134.3 million (not including losses due to piracy of entertainment software, which remain unavailable).

the end of 2001, pirate VCDs were selling for as little as Rp10,000, or approximately US\$0.96 (cf. Rp50,000 for legitimate VCDs). Pirate DVDs entered the market in mid-2001, with initial prices beginning at Rp100,000 (approximately US\$9.60), whereas by the end of 2001, competition had seen pirate DVD prices drop as low as Rp25,000, or approximately US\$2.40 (cf. Rp199,000 for legitimate DVDs). Wholesalers of pirate CDs openly advertise them in newspapers for prices as low as Rp5,000 (approximately US\$0.48) apiece; even with a generous markup, the retail price of Rp7000-12,500 (US\$0.67-1.20) is a small fraction of the price of a legitimate copy. Worse, pirate VCDs and DVDs 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 and DVD 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.

Worse yet, while until several years ago, the vast majority of pirate optical media product in Indonesia was imported or smuggled into the country from elsewhere, there is now clear evidence of widespread domestic production of pirate optical media products. Factories from Malaysia have begun to relocate to Indonesia, and current estimated optical media production capacity far exceeds the possible legitimate demands. The infiltration of organized criminal enterprises engaging in massive optical media production in Indonesia demands a swift response: Indonesia must promptly pass and implement a comprehensive regulatory and reporting regime for optical production, including controls on production equipment, raw materials and facilities.

Other Piracy Problems in Indonesia

Other piracy problems abound. One of the most serious involves widespread and worsening book piracy, especially of English-language textbooks, reference books, and computer-related volumes. Commercial pirates operate throughout the country, including some who produce and market unauthorized translations of U.S. books. Photocopy 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 militant groups. Systematic or proactive enforcement against book piracy has never been attempted in Indonesia, and should now be given higher priority.

Although Internet piracy levels remain low due to low Internet penetration rates, the few infringing sites identified to date give rise to great concern. Of the nine cease and desist letters sent by the recording industry to Indonesian sites hosting infringing MP3 files in 2001, the response rate was poor or non-existent. Of note is the fact that infringing MP3 song files are being hosted on servers linked to one educational institution in particular that had received at least three warning letters from the recording industry in 2001.

COPYRIGHT ENFORCEMENT IN INDONESIA

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	SOUND RECORDINGS
Number of Raids conducted	54
Number of cases commenced	208
Number of defendants convicted (including guilty pleas)	208
Acquittals and Dismissals	
Number of Cases Pending	206
Total number of cases resulting in jail time	2
Suspended Prison Terms	1
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Suspended Prison Terms	1
Prison Terms Served (not suspended)	1
Maximum 6 months	
Over 6 months	
Over 1 year	1
Total Prison Terms Served (not suspended)	1
Number of cases resulting in criminal fines	1
Up to \$1,000	
\$1,000 to \$5,000	1
Over \$5,000	
Total amount of fines levied	US\$2,000

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES	SOUND RECORDINGS
Number of Raids conducted	19	10
Number of cases commenced	6	25
Number of defendants convicted (including guilty pleas)	1	25
Acquittals and Dismissals		
Number of Cases Pending	5	
Total number of cases resulting in jail time	0	2
Suspended Prison Terms	4	0
Maximum 6 months	4	
Over 6 months	0	
Over 1 year	0	
Total Suspended Prison Terms	4	
Prison Terms Served (not suspended)	0	2
Maximum 6 months	0	
Over 6 months	0	
Over 1 year	0	2
Total Prison Terms Served (not suspended)	0	2
Number of cases resulting in criminal fines	1	0
Up to \$1,000	1	
\$1,000 to \$5,000	0	
Over \$5,000	0	
Total amount of fines levied	Rp10,000,000 (US\$960)	0

Some Enforcement Raids Continue, But Without Needed Coordination

Indonesia's efforts to enforce its copyright law against pirates during 2001 were laudable at times, but mostly sporadic. Several raids against optical media plants achieved results, including seizures of production lines, sealing or closure of the plants, and some arrests (leading to indictments and convictions). However, these raids were spotty and uncoordinated, making increasingly profitable and organized criminal activities attractive and hardly risky. Because of overall lack of coordination, IIPA recommends the establishment of a national coordinating body for intellectual property rights enforcement, under high level government leadership (direct authority from the Office of the President), and made up of various agencies with responsibility for IPR protection and enforcement.

The following are some anecdotes of raids and results, which demonstrate some government will on the part of the police in Indonesia to take initial raids, but also show how little is being done to follow up on initial raids.¹² Given the hundreds of optical media production lines employed in Indonesia today, and the lack of swift movement to impose deterrent fines or sentences, it is clear that large-scale, increasingly organized, and sometimes even militant, pirates face minimal risks:

- In February 2001, police in conjunction with industry assistance raided an underground optical media plant in Solo, Central Java, guarded by poisonous snakes (and a series of large concrete outer walls). By the time the team obtained entry, they found 10,000 destroyed optical discs, five production lines, and a large quantity of finished pirated optical discs, including infringing international music repertoire. The plant was initially shut down, and industry understood that the machinery would be dismantled and the owner of the factory prosecuted. However, by May 2001, it became clear that the factory was open and operating again, and that there would be no prosecution of the owner.
- In February 2001, police raided a heavily fortified factory containing four optical media production lines, three of which were in the process of manufacturing pirate music discs. Ten pirate stampers bearing music titles were found, while a significant quantity of finished product had already been destroyed prior to the search party's obtaining entry. Despite complaints including to the National Police, the police who undertook the raid refused to prosecute the owner, and the factory was allowed to remain open. The same plant was raided again in late 2001 following a raid (by a different police force than that which raided the plant initially) on a distributor supplied by this factory. The distributor was prosecuted and received a lengthy prison sentence out of this second set of raids.
- In March 2001, the Jakarta Police, with the assistance of industry, raided an optical media factory, discovering four optical media production lines, two printing machines, pirate stampers and silk screens for international music titles, and 32 sacks of polycarbonate (750 kilograms each), together with documentation showing extensive production activities of various music and movie titles. This plant is linked to well-known Malaysian piracy syndicates. The owner of the plant was arrested and the initially the factory sealed. The local video association was

¹² For the recording industry, a total of ten major raids were carried out from July to December 2001, six in Jakarta, two in Bandung, and one each in Padang and Surabaya. The raids resulted in the seizure of almost 600,000 pirate CDs, and in one raid on a pirate manufacturer, three CD production lines were found. In all of the cases, no fines or penalties have yet to be meted out to any of the 24 suspects implicated or apprehended.

reportedly pressing for a prosecution on the basis of their product being pirated, but IIPA has gained no further information regarding action taken against this plant, or whether the factory remains in business.

- In April 2001, the Jakarta police raided an underground optical media plant containing three production lines and up to 100 pirate stampers, many containing major motion pictures. The police were initially unable to proceed with a prosecution in this case, but the factory was raided again in early 2002, and police are now preparing new charges against the factory manager.
- In May 2001, the police, aided by industry, raided two illegal optical disc factories in Jakarta, seizing 23 pirate stampers (including *The Mummy Returns*, *Exit Wounds*, and *Crouching Tiger, Hidden Dragon*) at one plant, and two Discjet Netsal production lines, one graphic photo printer, one polycarbonate feeder and 18 bags of polycarbonate. The factory manager (not the owner) was charged in the offense. However, the police have since refused to accept that the pirate stampers evidenced pirate production, and instead claimed that they would only prosecute the manager for infringing distribution (a more difficult charge to prove, and with a less severe maximum punishment). The case is expected to be heard in early 2002.
- In November 2001, the police, in conjunction with industry representatives, raided a plant in Jakarta, seizing two replication lines, printing machines, silk screens, 6,000 suspected pirated discs of movies, BBC-TV series productions, PlayStation® games, and 20 pirate stampers, as well as production records. As of February 2002, the police were still preparing this case for prosecution.
- In January 2002, recording industry representatives raided the residence of a well-known distributor of infringing product in East Java, seizing a small quantity of infringing music albums. A search of related premises, however, led to the discovery of no fewer than 2.5 million infringing optical discs, comprising both international and Indonesian repertoire.

For other industry sectors, the level of enforcement has declined from the levels observed in 2000. For example, eight raids were carried out against business software pirates in 2000, with none being carried out since.

Some Impressive Court Judgments in 2001, But Non-Deterrent Results/ Sentences Remain the Norm

The Indonesian court system has long been a weak link in the nation's copyright enforcement chain. Weaknesses among the corps of prosecutors compound the problem, as most are unfamiliar with IPR matters, and their assignments are frequently rotated, virtually foreclosing the possibility of improving their base skills. Difficulties abound, including proper securing or presenting of evidence, and judicial orders to destroy seized pirate product or production equipment have often been ignored. Typically, courts either impose extremely light sentences, even on major commercial pirates, or else allow cases to languish.

Thus, the results in 2001, including five copyright cases involving the unauthorized loading of software onto computers prior to their sale ("hard-disk loading"), are particularly surprising and

atypical when compared with results in previous years.¹³ Also, in 2001, a new Supreme Court head was appointed, and there has been talk of dividing the Court into four chambers, so that the four-year bottleneck of intellectual property cases can be resolved. This would be a positive step. Other recent case results, however, are less impressive (and thus more aligned with the norm as the copyright community has known it).¹⁴

One abiding problem involves the strict adherence to the procedural rule that cases must be prosecuted in the *lex locus delicti* (the place of the harm), rather than other venues in which jurisdiction against the defendant lies. This strict adherence to this jurisdictional rule creates delays and added costs for the recording industry, which is forced to send its employees or legal representatives to the relevant city/province to monitor each step of the prosecution from commencement of the trial until the issuance of the verdict. Other court rules prove overly burdensome to right holders, for example, authentication of foreign documents must be done by court officials of the court where the prosecution takes place, rather than the foreign mission or place where the right holder is situated. These rules should be made more flexible to comport with international practice and to ensure that Indonesia's courts provide "effective" judicial recourse against piracy.

Other steps the courts could take immediately would be to appoint specialized teams of prosecutors, 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.¹⁵ 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.

MARKET ACCESS BARRIERS FOR U.S. COPYRIGHTED PRODUCTS

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:

¹³ In one of those cases, on September 24, 2001, the software firm Microsoft won a legal battle against a local computer dealer that was engaged in pirate hard-disk loading. The pirate dealer was ordered by the court to pay the plaintiff compensatory damages of US\$4.4 million, a previously unheard of judgment in Indonesia, and was further ordered to pay for a full-page apology in two newspapers and one magazine for one week. "Microsoft Wins Battle Against Software Piracy," Jakarta Post, Sept. 25, 2001.

¹⁴ For example, in May 2000, a pirate VCD factory owner from Batam, producing tens of thousands of VCDs per day, was sentenced to a six-month suspended sentence and a fine of a measly \$4,000. Nicholas Redfearn, *Indonesia's Progress in Enforcement*, Managing Intellectual Property, July/August 2001, at 29-32. Another case in April 2001 involving pirate VCD production resulted in the factory manager in Surabaya receiving a two-month sentence (which was suspended) and a \$960 fine, but most crucially, all the duplicating machines were returned to the factory manager's boss. See *id.*

¹⁵ As noted above, these sentencing guidelines should provide deterrent criminal penalties, including the imposition of jail time and deterrent fines.

the blanket prohibition on foreign company participation in, or even investment in, importation, distribution, exhibition, or retailing in Indonesia. This restriction is particularly onerous in its impact on the audiovisual 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. audiovisual products can reach Indonesian viewers only after passing through two separate, unnecessary bottlenecks.

The audiovisual 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 previous regime would moderate this approach. These hopes were dashed by issuance of two presidential decrees in July and August 2000,¹⁶ which continued to prohibit foreign investment in the broadcast and media sectors, including the film industry (film-making business, film technical service providers, film export and import businesses, film distributors and movie house operators and/or film showing service) as well as providing radio and television broadcasting services, radio and television broadcasting subscription services, and print media information services.

Indonesian officials point to provisions of the Film Law, adopted in 1992, as justification for maintaining the audiovisual 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 U.S. audiovisual 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 audiovisual product would be permitted as soon as the market was 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% 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 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 was 22.5% in 2001, averaging about Rp4 million (approximately US\$392) per print. 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

¹⁶ Presidential Decree No. 96 of July 2000, later ratified by Decree 118 of August 16, 2000.

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 AND RELATED ISSUES

Optical Media Legal Controls Needed

During 2001, the optical media piracy problem in Indonesia reached a critical and troubling tipping point. Indonesia has not only developed enough illegal production capacity within its borders to supply the domestic pirate market, but already has or soon will have enough capacity to export damaging optical media piracy to foreign markets. This unwelcomed 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, DVDs, and CD-ROMs. Regional conditions contribute to the growth of the problem in Indonesia, as criminal syndicates move plants from Malaysia and elsewhere in Asia to Indonesia.

In the face of this influx of pirate optical media production capacity, Indonesia must swiftly move 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 and other raw materials that can be used to manufacture optical media. 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, and the copyright industries continue to call for regulation now. The needed regime should: 1) provide for the licensing of all production facilities (including those producing finished optical media, as well as blank or recordable media, and including those facilities that engage in mastering or otherwise use stampers/masters), subject to spot inspections of their facilities and records, including production orders; 2) cover the importation of equipment and raw materials for the mastering and replication of all optical media products; and 3) require the use of the Source Identification (SID) codes 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 are useful precedents. 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.

Draft Copyright Law Amendment Still Violates TRIPS

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. It is regrettable that the January 1, 2000 deadline for full Indonesian compliance with its TRIPS obligations passed 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 only in 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 expressly provide for 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, and should be removed.
- 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.

Draft amendments to the Indonesian copyright law were 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 TRIPS Agreement. For instance, the draft amendment provides express protection for temporary copies, and 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 must also have the right to control rental of their products (TRIPS Article 14), 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. Compulsory Licenses: Article 16 contains some compulsory licenses that, without significant narrowing by implementing regulations, violate the Berne Convention and TRIPS.¹⁷

6. Impingement on the Exclusive Adaptation Right: The moral right contained in Article 25 impinges on the Berne-required exclusive adaptation right, and this Article 25 violates the Berne Convention and TRIPS, and must be amended.

7. Other Needed 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) providing at least TRIPS-compatible terms of protection for certain works (including computer programs, which under Article 30(1)(a) receive less than TRIPS-compatible terms); 2) definitions of the "publication right" and of "work"; 3) restrictions on licensing (these could be in part remedied through the addition of the phrase "unless otherwise agreed" at the beginning of Article 45(4); 4) point of attachment for protecting foreign phonograms and works; and 5) protection of pre-existing works and phonograms for a full term.

IIPA understands that the copyright amendment bill has been earmarked as a priority item for the Parliament to finalize before the end of 2002, under President Megawati. Apparently, in 2001, the bill underwent a detailed consultation period, with discussions between various government ministers, the Parliamentary commission, several working groups, and senior officials. It is hoped that over the next several months the chair of the relevant Parliamentary commission will deliver a report in the Plenary Session on the results of the consultation process (which will signal that the bill is ready to be approved by the Parliament).¹⁸ Thus, IIPA is pleased to weigh in at

¹⁷ To IIPA's knowledge, Indonesia has not made a declaration pursuant to Article 1 of the Berne Appendix, to avail itself of certain permissible compulsory licenses for developing countries. Even if it had, Article 16 compulsory licenses do not come close to meeting the many requirements of the Berne Convention in this regard.

¹⁸ After Parliamentary approval, in order to become formalized law, the bill will then be promulgated by the President.

this time, and looks forward to further opportunities to provide its advice on any further contemplated changes before Parliamentary approval.

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 2002 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.

Other Legislation/Regulations

In addition to TRIPS deficiencies in the copyright law, Indonesia's border control measures leave some gaps that must be filled to ensure that Indonesia is providing full TRIPS-compatible protection, and could be further strengthened.¹⁹ The 1995 Customs Law established a judicial seizure system and allowed for *ex officio* action, but no implementing regulations ever followed passage of the law. Seizures are occasionally made on basis of an incorrect declaration or "under" declaration. Draft regulations went out to industry for comment in early July 2001.

The Department of Posts and Telecommunications is working on a draft "cyber law" on Internet operations (there is currently a bill entitled the "Academic Script Bill on Information Technology," first published in December 2000, which we understand is the first attempt at a cyber law), and has said that the new law is expected to be implemented no later than 2004. As of December 2001, that draft was still in the process of internal consultation.²⁰

Generalized System of Preferences

Indonesia currently participates in the Generalized System of Preferences (GSP) Program, a U.S. trade program that allows duty-free imports of certain products into the U.S. from developing countries. For the first 11 months of 2001, \$1.2 billion of Indonesian goods (or 13.2% of Indonesia's total imports to the U.S.) entered the U.S. duty-free under the GSP Program.²¹ 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.

¹⁹ For example, Article 55(d) provides for the payment of a "guarantee" in order to suspend the release of suspected infringing goods into the channels of commerce; however, it is not made clear in the Customs Law or regulations (which have yet to be passed) that this amount cannot be so high as to make it burdensome for right holders.

²⁰ Reports in the Jakarta Post in December 2001 indicated the bill was still being worked on.

²¹ In 2000, \$1.4 billion worth of Indonesian goods entered the U.S. duty-free under the GSP Program, accounting for 13.3% of Indonesia's total imports to the U.S.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

ISRAEL

EXECUTIVE SUMMARY¹

IIPA recommends that USTR retain Israel on the Priority Watch List at this time.

Recognizing that the ongoing security problems and violence in 2001 have diverted resources away from enforcement against even the most serious crimes in Israel, four strong reasons predicate keeping Israel on the Priority Watch List this year. First, Israel has witnessed an increase in the scale of pirated CD-Rs and Internet piracy during 2001.² Second, the enforcement system in Israel – from initial raid to opening of a case to court judgment – remains very difficult to use, in large part because of procedural hurdles, and continued problems at the prosecutorial level. Third, the Israeli government continues to concoct legal roadblocks to the adequate protection of copyright, and most recently, has, to our astonishment, taken the position in an Israeli court against payment for the broadcasting and public performance of U.S. sound recordings, which conflicts with Israel's bilateral undertaking to accord national treatment to U.S. record producers in their sound recordings. Fourth, Israel's law is still TRIPS deficient in a number of crucial ways, including its failure to adequately address end-user piracy, in line with Article 61 of TRIPS.

While noting continuing problems, as identified in this report, the recording industry would like to note its appreciation for the efforts undertaken by the government of Israel over the course of the past year. The record industry in Israel has been rocked by piracy over recent years, and has been very dismayed by the lack of responsiveness of the part of Israeli authorities. 2001 was a year in which this situation has finally begun to turn around, and the recording industry thanks the government for its efforts, and calls upon the government to continue the good work commenced in 2001.

In 2002, IIPA looks to the Israeli government once again to clamp down on piracy. At least the chief IP Prosecutor, as well as other prosecutors assigned to assist him, can move the straightforward "test cases" that have been sitting dormant since 1999 to successful closure. The Ministry of Justice must engage in meaningful reform of procedures that make judicial enforcement nearly impossible for right holders. Further, resolution of the many remaining legal questions, including criminalization of unauthorized use of copyrighted goods (including software) in a business setting (end-user piracy), and affirming that Israel is bound by its bilateral agreements to uphold past practice with respect to payment

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

² Possible movement of optical media production from the Palestinian territories to Israel (although we understand that of the Israeli plants which we have commented on in prior years, only one remains of concern), lower prices of recordable CD-Rs manufactured in Israel, and some reports of increased import of some pirate optical media (not including music) from Asia are three contributing factors.

for broadcasting and public performance of U.S. sound recordings, will send positive signals to foreign right holders that Israel is open for legitimate business.

The Ministry of Justice proposal for a bill strengthening criminal penalties is commendable, and it hopefully ensures that Israel will meet its TRIPS obligations. IIPA is very pleased about recent reports that the draft of this law may have been approved by the Ministry of Justice, and that it may shortly be delivered to the Knesset. We hope that the Knesset moves quickly in adopting provisions that will greatly enhance the ability of Israel to combat copyright piracy.

Estimated trade losses to the U.S. copyright-based industries due to copyright piracy in Israel during 2001 were \$162.5 million.

ISRAEL ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	15.0	50%	15.0	50%	15.0	50%	11.0	40%	10.0	40%	10.0	30%
Sound Recordings / Musical Compositions ³	40.0	25%	45.0	30%	70.0	45%	60.0	40%	67.0	30%	92.0	15%
Business Software Applications ⁴	40.0	39%	51.3	41%	54.8	44%	47.8	48%	45.0	54%	58.0	71%
Entertainment Software	66.5	89%	52.0	NA	30.9	54%	28.5	55%	25.6	52%	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	0.7	NA	NA	NA	NA	NA
TOTALS⁵	162.5		164.3		171.7		148.0		147.6		160.0	

⁴ BSA piracy loss and level estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss and level figures for Israel were not available. Those numbers were made available in mid-2001, and are reflected above.

⁵ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Israel were \$113.0 million, not including losses due to the business software industry. Because BSA's numbers were made available in mid-2001 (see footnote 4), estimated total losses to the U.S. copyright-based industries in Israel in 2000 are increased to \$164.3 million.

COPYRIGHT PIRACY IN ISRAEL

Increased Retail Piracy Threatens Israel's Legitimate Market for Copyrighted Goods

The copyright situation in Israel continues to cause harm to U.S. right holders.⁶ Retail piracy waned with the onset of violence in the latter part of 2000, but once again caused steady losses in 2001, in part because of the onset of massive production of CD-Rs, as well as increased Internet piracy.

There remains a very short sales window (a few days sometimes) for most legitimate product, and on the day pirate product is launched, legitimate sales spike downward. The following piracy problems continue to hurt copyright owners in Israel:

- **CD-R Piracy of Software.** The method of burning music CDs using computers has taken over 95% of the pirate music market, while 5% of the pirate market remains manufactured CDs arriving from abroad, mainly Russia and Thailand.⁷ Stores in major marketplaces, including in Tel Aviv and Herzlia, engage in "in-store burning" of their own CD-R compilations of games and business software, putting possibly hundreds of software titles onto a single CD-R.
- **Retail Piracy.** "Outlets" (flea markets, kiosks, etc.) are overrun with older format console-based videogames, due to the dumping of huge quantities by pirate producers in Asia, milking what they can out of those older formats as they transition to newer formats. In addition, the majority of pirated music sales take place in outdoor markets throughout the country (Rosh Ha'ayin, Tzomet Sgula, Hakarmel and mobile markets like Ramla-Lod Market). Most of the sales are carried out on Saturdays (e.g., at Kfar Vitkin, Shfayim etc.). Haatzmaut Street in Haifa is still the most concentrated area of pirated points of sale in the North (totaling 15). About 280 points of sale exist throughout Israel. Pirated business software is also sold in these markets, with most of the units originating from Thailand, Russia, Turkey, and the Palestinian Authority.
- **End-User Piracy.** Close to 40% of software used by businesses and other end-users in Israel is still pirated. Corporate end-user piracy is the single greatest barrier to the development of the software industry in Israel.
- **Import Piracy of Optical Media, Especially DVDs.** Illegal imports of audiovisual works in optical media formats, especially VCDs and DVDs, from Asia, Russia, the former CIS, Ukraine, Turkey, Thailand, Czech Republic, Poland and Hungary, are reportedly still flooding the market in Israel

⁶ In 2000, a chief industry representative noted regarding retail piracy in Israel, "[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."

⁷ There are now six known CD plants in Israel, and two in the Palestinian territories. Of the six plants in Israel, three currently operate legally, one is barely in operation, one is the subject of current legal proceedings against it, and one is in negotiations with the industry to establish legal operations. Of the two in the Palestinian territories, one plant is closed, and one plant does not to IIPA's knowledge manufacture U.S. recorded music. The theoretical production capacity of these eight plants is 100 million discs per annum, with a practical annual production capacity of 54 million discs per annum. Israel retains a legitimate domestic demand of only 6 million music CDs and 14 million units in other media.

through airports and seaports (as VCD and DVD player penetration grows, so does the demand for new releases in those formats). There are no pirate Hebrew-version VCDs and DVDs available, but pirate English and Russian-language versions abound. Russian-language business software products also remain in plentiful supply. Meanwhile, most pirate retail copies of games in Israel are Russian language (and many of the games copied are ones that entertainment software companies have already localized into Russian-language versions), although some companies report that, due to the armed conflict in the region, silver CD exports of game from Russia have largely waned.

- **Internet Piracy.** Dozens of Internet sites based in Israel that list which stores have which titles, including one 'community' site, will custom burn CD-Rs and deliver them anywhere in the world. Israel now boasts 1 million Internet users, and the Internet can now be found in at least 600,000 households.⁸ Teenagers are becoming increasingly active in the pirating market using the latest technology to assist them. Sites hosted in Israel contain illegal downloads, "cracks," "serial numbers" and other information to circumvent copy protection. The business software industry successfully raided three Internet pirates and closed over 20 sites during 2001. The police are not actively pursuing Internet piracy cases, however, and only in rare instances are the police willing to assist in the raiding of Internet pirates. Since late 1999, the recording industry has located roughly 600 infringing websites in Israel, closing down 400 of them. During the course of the year 2001, the recording industry has focused more attention on "Napster" clone websites (i.e., peer-to-peer networks of pirated music, usually in MP3 format) in Israel.
- **Illegal Public Performances of Motion Pictures.** Illegal public screenings in Israel have become a growing problem in cafés 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.** For the motion picture industry, the main piracy concern remains the sale of pirate videocassettes. The situation changed in 2000 due to security concerns in the region: whereas the Palestine Authority territories were long sites for the production of illegal copies of videocassettes, as the borders with the territories have been closed off, the transfer of product from the territories has slowed (to roughly 1,000 pirate videocassettes per day). In addition, people are avoiding open street markets, the area traditionally having the highest volume of illegal copies, so fewer pirated cassettes are being sold. Perhaps to be expected, more Russian-language product is entering Israel to fill the void. Approximately 270 of the 300 Russian-language 'video libraries' throughout Israel engage in pirate sales. Each shop owner has five to ten VCRs and duplicates his own product. A transshipment network also still exists whereby pirated products (including CDs of all kinds, videocassettes, audiocassettes and the like) are produced elsewhere and brought to Israel. The

⁸ The World Factbook reports that there were 21 Internet service providers in Israel as of 2000, with 1 million users. See <http://www.odci.gov/cia/publications/factbook/index.html>.

level of video piracy decreased in 2001 (30% for retail establishments versus 70% for open markets).⁹

COPYRIGHT ENFORCEMENT IN ISRAEL

ISRAEL CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 1999

ACTIONS	MOTION PICTURES	ENTERTAINMENT SOFTWARE
Number of raids conducted		28
Number of cases commenced	126	28
Number of defendants convicted (including guilty pleas)		2
Acquittals and dismissals		Unknown
Number of cases Pending	126	26
Total number of cases resulting in jail time		0
Suspended prison terms		
Maximum 6 months		0
Over 6 months		0
Over 1 year		0
Total suspended prison terms		0
Prison terms served (not suspended)		
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		
Up to \$1,000		0
\$1,000 to \$5,000		0
Over \$5,000		0
Total amount of fines levied		0

⁹ The motion picture industry's anti-piracy operation in Israel continues to encounter difficulties in obtaining significant police enforcement assistance due to the ongoing security situation, but notes that the situation has improved in recent years. Nevertheless, the program still encounters difficulties with the numbers of street peddlers selling pirate product. These peddlers move from one market to the next on local market days. They keep their stocks hidden in nearby homes or warehouses, requiring extensive surveillance and investigation to locate and raid. Most peddlers have turned to video piracy because it is more profitable and less risky than selling drugs or pursuing other criminal activities.

ISRAEL CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE
Number of raids conducted		91	76
Number of cases commenced	215		76
Number of defendants convicted (including guilty pleas)	40	3	0
Acquittals and dismissals			Unknown
Number of cases pending	301		76
Total number of cases resulting in jail time			0
Suspended prison terms			
Maximum 6 months			0
Over 6 months			0
Over 1 year			0
Total suspended prison terms			0
Prison terms served (not suspended)			
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			
Up to \$1,000			0
\$1,000 to \$5,000			0
Over \$5,000			0
Total amount of fines levied			0

ISRAEL CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of raids conducted		126
Number of cases commenced	209	126
Number of defendants convicted (including guilty pleas)	122	16
Acquittals and dismissals		
Number of cases pending	301	258
Total number of cases resulting in jail time		1
Suspended prison terms		
Maximum 6 months		1
Over 6 months		
Over 1 year		
Total suspended prison terms		1
Prison terms served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total prison terms served (not suspended)		
Number of cases resulting in criminal fines		
Up to \$1,000		
\$1,000 to \$5,000		
Over \$5,000		
Total amount of fines levied		
Total amount of compensation paid to private prosecutor		75,000 USD

ISRAEL CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 1999

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	319	12
Post-search action	338	
Cases pending		6
Cases dropped		1
Cases settled or adjudicated	66	8
Value of loss as determined by right holder (\$USD)		
Settlement/judgment amount (\$USD)		81,000 USD

ISRAEL CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 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 right holder (\$USD)		less than settle amt
Settlement/judgment amount (\$USD)		\$28,900 / NA

ISRAEL CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES
Number of civil raids conducted	280
Post-search action	254
Cases pending	
Cases dropped	
Cases settled or adjudicated	89
Value of loss as determined by right holder (\$USD)	
Settlement/judgment amount (\$USD)	

IP Special Police Units Answer Call to Action in 2001

There were some major breakthroughs in copyright enforcement, particularly for the recording industry, in 2001. In particular, the specialized Intellectual Property Unit under the police (which now has four regional units, one national unit, and totals 32 officers),¹⁰ became more efficient and professionalized, and for the first time began initiating actions without the prodding of the copyright industries. As of 2001, it can be said that the private industry campaign against sound recording piracy

¹⁰ The Special IP Unit of the Police is made up of four sub-units, in Tel Aviv (five officers), the North (five officers), the Centre (five officers), and the South (five officers), and one National unit (six officers). Altogether the Special IP Units have 32 officers assigned to them (still 28 less than the repeatedly promised 60 officers). The headquarter force is comprised of the chief of the task force, who supervises the task force, the chief intelligence officer, a legal advisor, and three general assignment officers. There are no special task force officers in the Judea or Samaria districts.

in Israel, waged since 1997, has resulted in decreased piracy activities, since the piracy level for U.S. repertoire finally retreated to 25% in 2001. The recording industry saw increased raiding in 2001 by the Special IP Units, with a total of 672 raids, resulting in seizures of 270,259 CDs, 24,689 audiocassettes, roughly 7,000 pirate DVDs, and 9,500 VCDs. Out of those raids, 632 criminal complaints were filed in 2001 against manufacturers, importers, distributors and different sales points around the country. Meanwhile, the motion picture industry obtained a total of 280 raids in 2001, in which 35,804 videocassettes, 5,507 VCDs and 8,409 DVDs were seized.¹¹ A total of 254 civil actions and 209 public criminal actions were initiated in 2001. In 2001, 89 civil cases and 122 criminal cases were favorably decided or settled, and as of December 2001, 541 civil and 301 criminal cases were pending. For the first time, in 2001, a video pirate in Israel was sentenced to prison (not a suspended sentence) for 13 months, for being found guilty of selling 673 counterfeit videocassettes in Bat-Yam over a period of five years. The sentence included seven months of a suspended imprisonment given in a previous case against the pirate in 1996.¹²

The deterrent effect of raids on retail establishments dealing in pirated motion pictures is high (as the majority of video stores raided by the industry's anti-piracy group or the local police either cease distributing pirate product or close their operations), while a minority of video stores, including some in the central bus station in Tel-Aviv and the notorious Ha-Azmout Street store in Haifa, still traffic in pirate product. However, the deterrent effect of raids on open-air markets is much lower, as pirate operations replace one vendor who has been caught with another without a criminal record in order to minimize the penalties to the offender. Also, pirate operations keep limited product on-hand so that even successful raids yield fewer pirated goods. Although the industry tries to focus its anti-piracy activities on sources of production (i.e., duplication labs and distribution centers), it has been largely unable to raid large pirate labs and distribution centers because the vast majority of these are in the Palestinian territories and are thus inaccessible. As a result, the primary focus of anti-piracy activity tends to be on retail stores and markets to gather intelligence on suppliers and major distributors. It is rare that convicted pirates are jailed for their offenses, as only offenders who have been convicted many times are eligible for incarceration; even in these exceptional circumstances, the maximum sentence imposed is generally only six months (the case mentioned above is the exception to the rule).

Serious enforcement actions also began to be taken by the recording industry, in conjunction with the Israeli government, against CD-R manufacturers in 2001. Specifically, actions were taken against 30 burning manufacturers, including raids against 21 burning plants, resulting in seizures of seven CD-R burning machines (four "X32 burners" in each banked machine), twelve color scanners, printers, tens of thousands of blank and recorded CDs, case inserts and empty jewel cases. Criminal files were opened against the persons involved. Some inroads have also been made against Internet piracy in 2001. Since November 1999, about 600 infringing sites have been located, with 400

¹¹ Out of all raids run in recent years, the total quantity of CDs and audiocassettes stored by the recording industry as evidence for eventual prosecution is 2.1 million units.

¹² Other results for the motion picture industry have been less promising, as only a few of the thousands of raids carried out by the motion picture industry's anti-piracy group have resulted in criminal prosecution. Although the copyright laws authorize significant fines and prison sentences, the few cases that have been prosecuted criminally have resulted in extremely light sentences. As a result, the recidivism rate has been steadily climbing, reaching more than 50% (of investigated offenses) in 2000.

'shutdowns' and one lawsuit filed against a major Internet pirate. Sites not removed (roughly 200) are under close observation.

IIPA has long been aware of the connection between mass piracy in Israel and larger criminal, often internationally networked, organizations, engaging in commercial piracy throughout Israel. In 2001, the IP Police Units began seriously cracking down on many of these gangs (including one major "bust" on eight serious pirate organizations in July 2001), and many criminal files have been opened against them, employing all possible legal avenues against them (including tax evasion laws).¹³ This is welcomed news.¹⁴

The situation has not been as promising for other sectors of the copyright industry. For example, the entertainment software industry has found it more difficult to bring private criminal cases in the current political climate, so its members have been concentrating on civil cases. The business software industry has similarly had trouble bringing its cases to successful closure, in part because of unreasonable, overly burdensome and costly procedures.

In addition, several serious procedural hurdles at the police level during investigations continue to hinder right holders from getting optimal results from enforcement raids. First, the copyright industries still largely pay for investigations themselves, which is very costly. Second, after all the evidence about a raid target has been gathered and supplied to the police, it can take as long as one month to obtain the raid. Third, due to budgetary constraints among police in Israel, no depots have been allocated to store seized pirate product, and therefore, 2.1 million pirate music units (CDs and audiocassettes) continue to be stored at industry sites, thus creating a potentially dangerous situation for the chain of evidence, in that pirates may claim in a criminal prosecution case that the evidence of the alleged crime has been under the continued control of one of the interested parties.¹⁵

More Criminal Cases Being Brought to Prosecutors, But Courts Fail to Meted Out Deterrent Penalties

Where the enforcement system tends to break is after the raid. While some arrested suspects have served time while awaiting trial (the recording industry reports, for example, that 231 out of 876 files have been processed in all, with six persons having served in jail while awaiting trial for periods of between six and thirteen months, while another twelve persons carried out community services for periods of between three and six months), most cases linger in the court system, without the defendant

¹³ Regarding more stringent enforcement of the tax laws, in 2001, industry held several meetings with Israeli Inland Revenue service, and out of 731 suspects who were reported to the service, three cases have been processed. Customs has a specialized intellectual property unit located in the airport, and for several years, IIPA has reported good cooperation between industry and Israeli Customs. In 2001, the Ministry of Industry and Trade has not been active in the field of anti-piracy, and the "Inter-Ministerial Committee" to coordinate intellectual property policy, that showed some promise several years ago, was practically defunct in 2001.

¹⁴ To give an indication of the scope of the problem, it should be noted that 100 police officers were needed to carry out the raids in July 2001. Apparently, most of those arrested have previous criminal records. In addition to the arrests the police also raided warehouses all over the country and seized pirated and stolen material that was ready for distribution.

¹⁵ It should be noted, however, that the warehouse is guarded by the police at all times.

spending a single moment in jail. Further, while more prosecutors are now devoted to copyright piracy cases in Israel,¹⁶ their numbers are still small (eleven for all of Israel), meaning they cannot adequately serve the copyright industry's full caseload. There remains an unacceptable bottleneck at the prosecutorial level, as more than 500 cases for which the preparatory work has been done, including expert's reports and affidavits, linger at the prosecutor's office and are not taken forward. Another serious problem is the fact that repeat-offenders are often only prosecuted after they have been caught many times (sometimes more than 15 times) selling pirate product. Court procedures are then often delayed as to such multiple offenders, because all the cases against that one defendant have to be joined upon request of the defendant. This leads to massive court files, a huge workload in terms of expert's reports and affidavits and, as a result, enormous delays, during which the pirate salesmen often continue their illegal businesses.¹⁷ The motion picture industry reports similar frustrations with low sentencing by the Israeli courts, calling it the most important reason piracy rates remain unacceptably high.¹⁸ The prosecutors and courts must work harder in 2002 to impose meaningful prison sentences and monetary fines on copyright pirates, so that Israel can make significant strides towards reducing its current piracy levels. Just as disappointing is that the "test cases" from 1999 have still moved no closer to successful resolution.¹⁹ It also remains the case that no end-user pirate has ever been prosecuted, and only in the rarest of cases have any cases been pursued against illegal resellers of software.

¹⁶ There are now eleven prosecutors in total working copyright cases in Israel, four from the Justice Department, two specialized prosecutors from the Central District State Attorney's Office, and two police prosecutors from the Tel Aviv District, and two advocates from the Southern District. There are no specialized prosecutors in the Northern District, so those files are managed by advocates who are not experts in copyrights.

¹⁷ For example, one well-known repeat offender who owns a shop in the Tel Aviv Central Bus Station, serving a prison term after being caught nearly 20 times selling illegal sound recordings, is able to have his shop remain open and filled with pirate CDs, both "home-made" and imported from Russia and Ukraine. This very fact should be an embarrassment to the Israeli system, that it cannot close this blatantly pirate enterprise, even when its owner is in jail for copyright violations.

¹⁸ In one case brought in 2000 by a motion picture company against a known repeat offender, 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 NIS16,000 (approximately US\$3,837) in eight monthly installments, to 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 agreed-upon term by the victim in the case), as the defendant 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.'

¹⁹ Only one case we know of, a criminal test case against a notorious pirate, is currently pending in a court in Eilat. The matter is reportedly scheduled to follow "expedited procedures," which, theoretically, should expedite the progress of the case. The prosecutors have failed to carry forward at least one other case referred to it involving counterfeit computer mice. Due to a two-year delay in filing charges, a court has ordered the State of Israel to return to a dealer a batch of counterfeit mice seized by the police. The prosecutor finally settled the case on terms that allow the mice to remain with the government, but that do not require any admission of guilt by the perpetrators. This settlement is an example of the prosecutor appearing to go through the motions to enforce the law, but exercising no political will to ensure a good result. In another case against an optical media plant, the prosecutor has asked for an inordinate amount of documentation, imposing great burdens on the right holders in that case.

Several Procedural Hurdles Remain, Although Some Progress on “Sampling”

One abiding procedural problem involves the difficulty right holders have in obtaining *ex parte* civil search (Anton Piller) orders (i.e., a civil order to search and seize pirated product that is granted by a court without giving notice to the suspected pirate). This procedure has become even more burdensome over the past year because of a change to the Rules of Civil Procedure prohibiting plaintiffs’ lawyers from acting as receivers. August 2001 amendments to the Rules of Civil Procedure prohibit any person who has a “personal or professional relationship” with any of the parties to be appointed as receiver (the person who executes the Anton Piller order), unless the parties agree or the court is of the opinion that deviating from the rule is required and would not harm efficient and equitable performance of the order for special reasons that the court must specify. In practice, right holders must now hire lawyers and separate receivers in order to carry out civil raids. This is more costly, adds an additional layer, and therefore makes the Anton Piller order procedure even more burdensome than it was previously. The only improvement in recent years occurred when courts began setting more reasonable guarantee terms on Anton Piller orders (between \$5,000 and \$7500 per case) following the passage of the 1999 Commercial Torts Law.

Another issue that has plagued right holders has been the inability in a raid to rely upon “sample affidavits” in order to commence a criminal action. In 2001, the sampling procedure for initiation of prosecution improved based upon an agreement signed by the chief economic crime prosecutor, by which he now accepts sample affidavits of 10 out of 200 seized CDs (200 CDs being the number of CDs that fit into a standard carton box for optical discs), if all the titles are different, and 5 out of 200 CDs if all the titles are the same). If a pirate contests the samples and affidavits of the experts, there is still a risk that senior executives of the international companies will be called to testify in Israel, imposing an unreasonable and costly burden on the right holder. However, this has not occurred in practice to date.²⁰ Exacerbating this problem is the fact that, under the existing Israeli copyright laws, there is a presumption of ownership, but the Ministry of Justice prosecutors do not accept this interpretation, and still have not introduced legislation to change their view of the law (although IIPA understands that such legislation may now be under consideration).²¹

Some Gains in Government Software Management

While the “Inter-Ministerial Committee” on intellectual property policy was not very active in 2001, the forum did carry forward some work on the legal use of business software, providing guidance to each of the government ministries. They have established government targets potentially making

²⁰ Because of the excessive paperwork burdens for proof of a copyright case and to obtain assistance from police and prosecutors alike, one entertainment software company has had to resort to trademark cases to exercise its rights in Israel. This company’s experience is a concrete example of how Israel’s enforcement system does not comply with the TRIPS Agreement, particularly, as it imposes overly burdensome and costly requirements on right holders, and fails to result in effective action against piracy (in practice) (cf. TRIPS Articles 41.2, 41.1).

²¹ The business software industry has been burdened in its cases with similar requests for executives of large business software companies to fly to Israel to testify as to ownership of copyright (thus, the necessary presumptions for Israel to comply with its international obligations simply are not being applied in practice).

infringing uses of business software and have conducted investigations of many of some of these targets in 2001. The compliance rate of local municipalities with these guidelines has not matched that of the central government.²²

MARKET ACCESS ISSUES 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 Communications Law (Telecommunications and Broadcasting) 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 LAW AND RELATED ISSUES

Ministry of Justice Position on Payment for the Broadcasting and Public Performance of U.S. Repertoire Would Violate Bilateral Obligations to the United States

The Israeli government astonished the recording industry in 2001 by issuing a legal opinion to an Israeli court, opining that payment for the broadcasting and public performance of U.S. sound recordings is no longer necessary. This opinion, elaborately drafted by the Ministry of Justice, conflicts with Israel's bilateral undertaking to accord national treatment to U.S. record producers in their sound recordings.²³ If this opinion is followed in Israel, would amount to a reversal of current practices in

²² The Committee is now operated under the supervision of the Ministry of Justice (Shlomo Gour, General Manager of the Ministry of Justice), and also includes Arie Cal (Ministry of Trade and Industry). The Committee held seminars, conferences and lectures for police, attorneys, and judges during 2001, and such educational programs continue to be offered to members of the enforcement and legal communities.

²³ Israel protects sound recordings as "works" under the Berne Convention and should be bound under that Convention to extend national treatment. More important, the U.S. and Israel committed to provide national treatment to each other's nationals, under the U.S.-Israel Bilateral Copyright Agreement, reached on May 4, 1950. That agreement consists of an exchange of notes between U.S. Secretary of State Dean Acheson, and Eliahu Elath, Ambassador of Israel. According to the note from Secretary Acheson,

The Government of the United States of America accordingly considers your Excellency's note and the present note as constituting an agreement between the Government of the United States of America and the Government of Israel, which shall be considered effective on and after May 15, 1948.

The Agreement provides assurances from the government of Israel that "all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical

which U.S. repertoire is compensated.

The U.S. and Israel indeed have committed to provide national treatment to each other's nationals. The U.S.-Israel bilateral copyright agreement was reached on May 4, 1950, and consists of an exchange of notes between U.S. Secretary of State Dean Acheson, and Eliahu Elath, Ambassador of Israel. The Agreement provides assurances from the government of Israel that "all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions." Therefore, the Israeli government must immediately declare that it has abandoned its position, and will abide by its agreement with the United States.

New Piecemeal Legislation in 2001

The following bills began making their way through the parliamentary process in 2001:

Amendment of Copyright Laws (Criminal Liability) Law, 5761-2001

In the first half of 2001, the Ministry of Justice circulated a memorandum proposing the enactment of the Amendment of Copyright Laws (Criminal Liabilities) Law, 5761-2001. This bill, which IIPA has seen in memorandum form, aims to provide for Berne-compatible presumptions of ownership (amending the antiquated formulation in the 1911 UK Copyright Act, which is incorporated into Israel's copyright regime),²⁴ as well as provide for stronger criminal penalties in cases of copyright offences (up to five years' imprisonment and increased fines). The increase in criminal penalties are welcomed changes, although the amendment does not, but should, clarify that Section 3(c) clearly covers the case

compositions."

²⁴ While IIPA hopes that introduction of the Berne-compatible presumption is a positive development in Israel, given difficulties in proving ownership in case proceedings (both criminal and civil), the "Explanations" section of the legislative memorandum of the Ministry of Justice have some concerns that this modernizing of the presumption may not assist right holders:

According to the suggested section, the presumption exists only in favor of the author himself, and not in favor of the other person who states his name on the edition of the work as being the copyright owner. The only case in which someone other than the author will benefit from the presumption, is the case of a work which is published anonymously. In such a case, according to paragraph (3) of the suggested section, the publisher (and in this matter, see the provisions in the matter of "publication" in the Copyright Law and in the Copyright Ordinance) is presumed to be the owner of the rights, in order to be able to enforce the rights of the author who wishes to maintain anonymity.

of “end-user” piracy of business software as a crime (as required by TRIPS Article 61).²⁵ By adding the word “business” to Section 3(c) (given the explanation that the term “distribute” need not refer to a distribution in which any money changes hands), end-user piracy could be covered. The draft amendments also provide several options to amend the prohibition on infringing importations, all of which would remove protection that currently exists against unauthorized “parallel” importation; the current law should be adapted in a way to preserve protections against importation of goods the sale of which in Israel would be unauthorized by the right holder.²⁶ It is expected that this bill must now proceed to approval by the Constitutional Law and Justice Committee, whereupon it will proceed to the Knesset for a vote.

Copyright and Performers Right (Adjudication in Matters of Royalties) Draft Law, 5761-2001

This draft law purports to organize the activities of collective management organizations, and deal with any disputes that arise between those organizations and users of works which require licenses from the organization, as well as disputed between the collection society and its members (regarding the terms of management of the rights and including refusal to manage a person's copyright). IIPA is concerned that this legislation may restrict the private sector from freely negotiating arrangements over public performance royalties and broadcasting.

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

²⁵ Specifically, the memorandum provides, without answering the question of whether unauthorized use of software in a business setting, is covered under Section 3(c):

The expression “by way of trade” is intended to distinguish between a single or random act or one of a private nature, and between actual commerce. Into this framework will enter, for example, the owner of a record store, or a peddler in the market who sells an infringing copy of a CD, the owner of a video rental library who rents an infringing copy of a movie, a computer company which sells computers to its clients, including unauthorized copies of computer software, etc. It must be noted that “by way of trade” is not necessarily “during the course of business” of a distributor. It is possible that the commercial distributor is legally engaged in another business, and the distribution of the infringing copies was done outside the framework of his business. It must also be noted that the commercial distribution does not require consideration: even distribution free of charge, which is intended to promote other commercial interests such as advertisement for a distributor or the encouragement to purchase another product, is likely, according to that suggested, to formulate criminal liability.

²⁶ Protection against parallel importation in Israel has been the law for nearly 90 years, and there is no reason to depart from the norm now. Protection against parallel importation in Israel helps keep all unauthorized product out of Israel – including pirated copies of works (which are often shipped with parallel imports in order to hide them), counterfeits, as well as copies of works that are not authorized to be imported into Israel. Parallel import protection also allows for quality control, helping to assure consumers that products purchased in Israel can be trusted as to quality and source.

employer of a performer). The Copyright Order (Berne Convention) (1953) (as amended through 1981) implements the provisions of the Berne Convention (Brussels Act [1948] text) in Israel, while the Copyright Order (Universal Copyright Convention) (1955) implements the UCC in Israel. The United States and Israel entered into a bilateral copyright agreement on May 4, 1950, agreeing that "all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions."

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 (as required by Article 61 of TRIPS). Section 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." A recent Supreme Court case imposed criminal liability on a business end-user; however, the facts of that case were unique and the case is not regarded as 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.²⁷ As noted, the current legislative vehicle, the Amendment of Copyright Laws (Criminal Liabilities) Law, 5761-2001, and the noted Explanations, may leave some room for a simple amendment or a broad interpretation that Section 3(c) does cover unauthorized use of software in a business setting (e.g., the Ministry of Justice commentary has already opined that the phrase “commercial distribution” does not require consideration, such that a boss giving out unauthorized software to employees might fall into the category of “commercial distribution” if an “other commercial interest[]” can be demonstrated). IIPA urges the Israeli government to take this opportunity presented by this legislation to clarify once and for all that Israel provides a criminal remedy for the damaging form of piracy involving willful unauthorized uses of software in a business setting.

- Civil damages on the books in Israel are too low to compensate the right holder, while statutory damages are applied per title, not per copy and/or per infringing act, and are therefore also 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

²⁷ At the time the “TRIPS Omnibus” legislation was passed, the Israeli government’s position was that there was no need to amend the law to explicitly criminalize corporate end-user piracy of software. For many years prior to and since the passage of the omnibus legislation, the Israeli government’s position has wavered. The current position is that Israeli law does not criminalize end-user piracy. Without a clear statement from the government or a clear provision in the law, the chances of a prosecutor being authorized to file a case against an end-user pirate are slim, and the chances a judge will convict someone of end-user piracy are even slimmer. Indeed, the Israeli government has never filed a criminal action against an end-user pirate despite many years of verbal commitments to do so.

volume of cases, with greater results, through its judicial machinery.

- Procedures to obtain an *ex parte* civil search are too burdensome. The recent amendments to the Civil Procedure Regulations requiring the attorney who executes the search order to be an attorney different from the one who obtained the order adds even more expense and complexity to an already overly burdensome and costly procedure.

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 - NIS20,000, or roughly US\$2,175 - \$ 4,350), 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 \$45). This amount is far too low to serve as a deterrent.

Not surprisingly, given non-deterrent civil changes in Israel's law, illegal resellers that have been subject to private criminal prosecution or civil actions in Israel often return to their illegal activities, as the profits of piracy 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

Israel Should Move Forward to Adopt WIPO Treaties, the WCT and WPPT

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 in early 2002.²⁸ 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 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

²⁸ IIPA has heard that the Ministry of Justice is drafting other piecemeal bills, including one that would expressly permit the technique of "sampling" to provide greater efficiency in enforcement, and another that would introduce a special intellectual property court, which could be a very positive development.

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 filed a legal action in early 2000 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 take these signals without payment. The case is now pending, with simultaneous mediation efforts ongoing. These efforts may be facilitated by a recent, unrelated decision by the Supreme Court holding that cable retransmissions are subject to copyright protection. In addition, the Israeli government has reportedly considered draft amendments to the Telecommunications Law that would authorize cable operators to retransmit unencrypted 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

2002 SPECIAL 301 REPORT

KUWAIT

EXECUTIVE SUMMARY¹

IIPA recommends that Kuwait be elevated to the Priority Watch List.

Kuwait remains the worst country in the Gulf region when it comes to copyright piracy. Retail piracy in Kuwait, particularly of the latest copyrighted works in digital formats, continues largely unabated. Also, street vendors openly sell pirated videocassettes and other copyrighted goods with absolute impunity, and the government's failure to properly deal with this issue has eroded local licensees' ability to sustain their operations. Furthermore, potential international investment is deterred from doing business in Kuwait, as investors choose other markets where legitimate rights are more vigilantly protected. The government has taken a handful of enforcement actions in 2000 and 2001, and the courts even handed down one conviction recently against software pirate. Nonetheless, pirates' work destroying legitimate markets for copyright owners continues with impunity, undeterred by such sporadic and inadequate enforcement. The serious, rampant piracy, and the continued failure to open up this once-promising market, fully justify and support Kuwait's elevation to the Priority Watch List this year.

IIPA hopes that a Priority Watch List designation will result in an invigorated government will among the new leadership in the Copyright Office in the MOI, including by Sheikha Rasha Naif Al-Sabbah, who appears interested in taking steps to solve the piracy problem in Kuwait. The appointment of Sheikha Al-Sabbah indicates a positive change in Kuwait, but the results in cutting down piracy must be forthcoming in 2002 in order for the copyright industries to recognize progress. Several raids occurred in 2001, but these raids have not to date resulted in lowering piracy levels. In 2002, the copyright industries look to the Kuwaiti government to:

- make public declarations of policy that piracy will not be tolerated;
- run concerted and sustained raids against piracy of all copyrighted goods (including, in conjunction with police, against residences and warehouses being used as sources of piracy);
- publicize raids in order to achieve a deterrent effect;
- mete out administrative fines, and prosecute greater numbers of commercial infringers (including distributors, resellers, end-users, dealers in smart-cards, anyone producing piracy, etc.), resulting in jail times (actually served) and severe fines; and
- amend the copyright law to bring it into line with the TRIPS Agreement, and to establish an adequate legal framework for electronic commerce by protecting copyright in the digital environment.

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

Kuwait, a WTO member, must take steps to ensure that its law fully complies (in substance) with the TRIPS Agreement, but also that enforcement is adequate and effective at deterring piracy, something that sadly cannot be said at present.

Industry estimates that trade losses to the U.S. copyright-based industries due to copyright piracy were more than \$11.5 million in 2001.²

KUWAIT: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	9.0	85%	8.0	85%	8.0	85%	7.5	85%	7.0	70%	7.0	70%
Sound Recordings / Musical Compositions ³	NA	50%	3.0	50%	1.0	45%	3.0	50%	3.0	50%	2.5	46%
Business Software Applications ⁴	NA	NA	6.6	80%	10.5	81%	5.3	88%	5.9	88%	10.1	90%
Entertainment Software ⁵	NA	85%	NA	NA	3.1	82%	3.7	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 ⁶	11.5		20.1		25.1		22.0		21.9		25.6	

COPYRIGHT PIRACY IN KUWAIT

Kuwait Remains a Pirate Market

Indicia of rampant piracy include the following:

- Tens of thousands of pirate videocassettes are sold openly in the streets and in retail shops by the month. Retailers maintain large stocks of pirate products, and run off so-called

² The total estimate losses to the U.S. copyright industries in Kuwait could not be determined, since loss statistics were not available at the time of filing this report for the sound recording, business software and entertainment software industries.

³ The loss figures reported for music and sound recordings are unavailable at this time. The piracy level figure for 2001 is for "overall" repertoire (including Arabic, Indian and international repertoire), while the "international" repertoire piracy level was 70%. The "international" level of piracy was used in 2000-2001, while the figures for 1996-1998 represent the overall level of piracy. The "international" piracy level was 70% in 2000, up from 65% in 1999. The piracy level for Indian repertoire only remained extremely high in 2001, at over 90%.

⁴ BSA loss numbers for 2001 are not available. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss figure of \$9.7 million was also reported as preliminary, while the piracy level estimate was 79%. These numbers were finalized in mid-2001, and are reflected above.

⁵ IDSA loss estimates for 2001 are not available.

⁶ Loss statistics this In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Kuwait were \$23.2 million. Because of the adjustment to reflect BSA's final 2000 loss statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Kuwait in 2000 are adjusted to \$20.1 million.

“back-to-back” videocassette copies “while you wait.” Most products are unauthorized pirate copies (i.e., they have not been cleared for content/rating with the government) of movies that haven’t been released in the theaters (so-called “pre-release”).

- Optical disc piracy (CD, VCD, DVD, and CD-R), including large quantities of pirate VCDs of imported movies from Asia, and home-produced CD-Rs are becoming more widely available. Discs are brought by air directly into Kuwait.
- Cable piracy is also rapidly proliferating and is not effectively being addressed by the authorities. Pirates distribute copyrighted material illegally within apartment blocks and residences without the authorization of rights holders. The Ministry of Information has yet to take any effective action against this brand of piracy.
- Audio CDs are still offered to Kuwaiti wholesalers at low prices from sources in Southeast Asia, flooding Kuwaiti markets.
- Book piracy in Kuwait is dominated by unauthorized copies originally intended for the Indian market (i.e., legitimate for sale only in India), and some pirate photocopying in universities takes place, mainly if books do not arrive on time.
- Pirate retail shops selling the following under the counter or on demand from stocks sold door to door still operate with impunity:
 - all types of unauthorized compilation CD-ROMs, including copies of top-end engineering programs, entertainment software and videogames (including older console-based games, of which close to 99% are pirated, newer console-based games, of which approximately 65% are pirated; and PC games, of which approximately 80% are pirated, many reportedly coming from Syria), 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; and
 - 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 now rivals Southeast Asia as a principal source for pirated CDs).
- Business software end-user piracy (unauthorized use of software in a business) and the illegal loading of software onto a hard disk prior to sale (so-called “hard-disk loading” piracy) still appear in Kuwait, making the legitimate market size only a fraction of that of neighboring markets of a similar size (e.g., UAE).⁷

⁷ Kuwait has an estimated installed base of more than 162,000 personal computers. A paltry 2,000 legal operating systems were sold for the 35,000 computers sold in Kuwait between September 1999 and September 2000.

COMMENCEMENT OF COPYRIGHT ENFORCEMENT IN KUWAIT

Raiding Not Sustained, Infringers Let Off Without Fines or Other Penalties

The end of 2001 and 2002 will be a telltale period for the government of Kuwait to demonstrate its commitment to enforce against copyright piracy. Generally, raids have been sparse and are carried out by the government, and then, only after immense pressure by the industries, the U.S. government, and local Kuwaiti companies. Several raids were conducted in 2000 by the Ministry of Information on behalf of the motion picture industry, which netted seizures of several VCR machines and illegal videocassettes. In 2001, a local anti-piracy group in Kuwait started to work more directly with the Ministry of the Interior (police), and several raids occurred. One was a large-scale raid against a major duplication site in Kuwaiti City in January 2001 that led to the seizure of 24,000 pirate videocassettes (and 22,000 audiocassettes), as well as 35 VCRs and 8 TVs being used in the pirate enterprise. A second raid occurred in August 2001, and resulted in the seizure of almost 20,000 pirate VCDs (allegedly produced in Pakistan). Another raid occurred in November 2001, and resulted in the seizure of seven VCRs and at least 3,000 videocassettes. Finally, in January 2002, thousands of CD-Rs and four CD-R "burners" were seized in a raid on video store and duplication lab, out of which two men were arrested and charged with copyright violations.⁸ In all cases, arrests were made under the copyright law, but no fines and sentences have been meted out.

In June, October and November 2001, the business software industry experienced some very positive raids by the Ministry of Information, yielding seizures of many computers containing unauthorized copies of software. On October 30, 2001, the Criminal Court of First Instance in Kuwait City issued a judgment against two of the pirate resellers raided, and in each case, the court imposed the top fine of 500 Kuwaiti Dinars (US\$1,630) and ordered the confiscation of all infringing copies of software found on the premises of the resellers during the raids. One case has been transferred to the civil courts for assessment of compensatory damages. This raiding and the conviction of the pirate software reseller in November 2001 indicate some cause for hope, particularly for the software industry. However, objectively, these results simply cannot have a deterrent effect on the market, particularly when pirates make such enormous profits with little risk of being caught and no risk of being punished with fines commensurate to the commercial harm they cause.

Inter-Ministerial Task Force Largely Ineffective

A Task Force made up of the Ministry of Information (Sheikha Rasha Naif Al-Sabbah, and Ms. Manal Baghdadi, Legal Affairs Controller), the Ministry of Interior (under Lieutenant Colonel Mahmoud Al Tabakh), Ministry of Commerce (under Abdullah Al Kalaf), Public Prosecutors' Office (under Usama Al Babteen), and Customs (under Mohamed Al Sulaiti), was established in late 2000 under the auspices of His Excellency Sheikh Ahmad Al-Fahd Al-Sabah, Minister of Information, and under the direction of Assistant Under Secretary, Sheikh Mubarak Duaij Al-Sabah, specifically to deal with the serious problems of piracy in Kuwait.

⁸ The video store had been under surveillance for months as investigators attempted to determine the location of the supporting duplication and storage facility, and although the store did not have any pirate videos or "burned" CD-Rs in plain view, customers could request pirate content on CD-R, at which time the staff would call up to a third floor apartment above the store and place the order. The raid netted 7,200 CD-Rs and four burners.

The Task Force announced in 2001 that it will present 45 copyright piracy cases to the Commercial Prosecutor in Kuwait, and that it will be conducting continuous inspections against illegal copyright activities. The task force will also be responsible for raising the public's awareness about the importance of copyright protection to the country's economy and will conduct continuous advertising campaigns on radio, television and the print press to deter the public from using illegal copyrighted works.

While Kuwait is to be commended for having set this force up, the task force has engaged in little enforcement activity to date. It is imperative that it demonstrate some results in the coming months. Specific problems the task force must avoid include bureaucratic designation of responsibilities that would only slow down the effectiveness of enforcement (for example, the Ministry of Information has informed industry that it can only verify the legitimacy of product seized in a raid, but actual raiding comes under the Ministry of Interior). The police must carry out enforcement actions against duplication sites and storage areas used to source illegal pirate activity. Also, the task force must begin to address the true sources of piracy in Kuwait, which increasingly are outside Kuwaiti borders. Kuwaiti Customs must carry out enforcement against such piracy coming in at the borders.

The copyright industries have rightly been encouraged by the development of an inter-ministerial approach to copyright in Kuwait, and in order to assist in this endeavor, the industries offered a major training program in October 2001. The program was organized by the Ministry of Information (under the direction of Sheikha Rasha), and over 100 people participated, including enforcement trainers from the motion picture, entertainment software, business software, and recording industries, and a representative from the satellite television industry. The key focus was on pirate product recognition, and included government participation from the Kuwaiti Ministry of the Interior. In addition to this most recent training, training seminars were held for the Ministry of Information, the Ministry of the Interior (police) and the Public Prosecutors' Office on February 12, 2001, and Customs on February 13. Over 100 Kuwaiti officials were trained in 2001 on the means of effectively enforcing copyright.

Other key elements agreed to by the Kuwaiti Enforcement Task Force upon its formation in late 1999 (and progress made to date on these initiatives) include:

- training for judges and lawyers on the importance of copyright protection and deterrent penalties (this training has not 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 own 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 and 2001, including two against storage areas, but the pirates involved have not included major retail outlets or duplication sites);

- 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; and
- imposition of deterrent fines and penalties, including imprisonment and heavy fines, in accordance with Section 42 of Kuwait's copyright law (we are pleased to note the single conviction of a pirate reseller of software, but the fines imposed in that case were non-deterrent).

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 (US\$65.75) per title is a burden that distributors face in trying to market and protect their products. The censorship fee should be reduced and limited to new titles only.
- 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's Law Violates TRIPS

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 the 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.” Unless “publisher rights” refers to all the exploitation rights of Article 4 of the Kuwaiti Copyright Law, including those specifically enumerated in Article 5, this 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 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 work 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 Convention (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 Article 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 offense.”
- **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.

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). The WCT will go into effect on March 6, 2002, and the WPPT, which only requires two more deposits, will go into force soon thereafter. 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, permitting content owners to provide for the security of their property online, is essential for successful electronic commerce.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

LEBANON

EXECUTIVE SUMMARY¹

IIPA recommends that Lebanon remain on the Priority Watch List, and recommends that an out-of-cycle review be conducted later in the year to determine whether the government of Lebanon has completed the following steps:

- formed a specialized IPR unit of the police, with dedicated resources and power to act anywhere in Lebanon;
- appointed a national network of specialized prosecutors charged with the suppression of IP infringement by *ex officio* action;²
- issued a political directive to make fighting copyright piracy (including cable piracy) a high priority for all its agencies;
- closed down substantially all the unlicensed “community cable” television stations operating in the country;
- instructed police to seize all clearly infringing materials, regardless of whether they are specifically identified in the complaint (provided, of course, that there are sufficient indicia of illegality to sustain this action);
- carried out raids and initiated prosecutions against at least 100 retail stores selling or renting out pirate discs, DVDs, videocassettes, or other copyright infringing materials; and
- instructed the customs authorities to seize pirate product entering the country.

Almost three years have gone by since passage of the Lebanese copyright law, and in that time, key Lebanese government officials have taken virtually no action against severe and overt piracy in Lebanon. While the increasingly severe piracy problem in Lebanon is exacerbated by economic malaise in the region and continued political instability, part of the answer to those problems lies in Lebanon providing a stable legal environment for businesses, including adequate protection of intellectual property rights. The answer does not lie in statements like that of the Minister of Economy and Trade in May 2001 that “[Lebanon] should wait at least two years before a serious anti-piracy campaign can take place.” Piracy levels remain unacceptably high for all sectors, notwithstanding

¹ For more details on Lebanon’s Special 301 history, see IIPA’s “History” Appendix to this filing.

² This is ideally accomplished through the appointment of specialized IPR prosecutors, but may, at least initially, proceed by the designation of a prosecutor who will be responsible for IPR in each of the major jurisdictions.

some well-intentioned enforcement officials, who are enforcing the laws, but who are simply overwhelmed by the scope of the problem and their own governments' general unwillingness to take actions toward a solution. The lackadaisical approach of the government in Lebanon to piracy has made possible the infiltration of organized criminal elements, including pirate CD producers, into Lebanon.

In the coming months, IIPA members must see improvements in the government's approach to cable piracy, piracy cases now bogged down before the courts, CD piracy, and stopping pirated imports at the border. For example, the government could curb the long-standing cable piracy problem through a government-led campaign to shut down "community cable" TV stations showing programs illegally throughout the country. Such a move would undoubtedly lead to healthy competition and consolidation of what is now a smalltime pirate-laden network. In addition, the courts must adequately deal with straightforward piracy cases (including several now pending against cable pirates) by meting out deterrent results, including fines and, where warranted, imprisonments to serious pirates. Without proper controls against CD piracy, Lebanon might turn from a country with a domestic piracy problem into an 'export pirate' country. Customs has been ineffective in keeping pirate product out of Lebanon, and must take increased steps to fight burgeoning pirate imports

In 2001, IIPA filed a petition under the Generalized System of Preferences (GSP) program, a U.S. trade program whereby Lebanon enjoys trade benefits, subject to the requirement that it provide "adequate and effective" copyright protection. In that petition, which is still pending, IIPA spelled out the reasons why Lebanon is not meeting the statutorily-mandated standard.

Total losses to the U.S. copyright-based industries in Lebanon were U.S.\$13.3 million in 2001.

LEBANON: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	8.0	80%	8.0	60%	8.0	60%	8.0	80%	8.0	80%	19.0	99%
Sound Recordings / Musical Compositions ³	2.0	40%	2.0	45%	2.0	60%	2.0	40%	1.0	40%	1.0	30%
Business Software Applications ⁴	1.3	78%	1.3	83%	1.6	88%	0.9	93%	1.4	79%	1.4	76%
Entertainment Software	NA	NA	1.5	96%	0.5	70%	0.6	70%	NA	NA	NA	NA
Books	2.0	NA	2.0	NA	2.5	NA	2.5	NA	2.0	NA	2.0	NA
TOTALS⁵	13.3		14.8		14.6		14.0		12.4		23.4	

COPYRIGHT PIRACY IN LEBANON

Cable Piracy Continues to Threaten Legitimate Market for Copyright Owners

Rampant cable piracy continues to devastate the local theatrical, video and television markets. An estimated 1,300 cable operators serve over 50% of the Lebanese population, retransmitting domestic and foreign terrestrial and satellite programming without authorization to their subscribers (estimated to number about 460,000) for an average monthly fee of US\$10. Occasionally, these systems also use pirate videocassettes and DVDs to broadcast directly to their subscribers, including the broadcasting of recent popular movies and TV shows, and of movies that have yet to be released theatrically in Lebanon. 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.

³ Loss figures for sound recordings represent U.S. losses only. Piracy levels represent the "overall" piracy rate, whereas the international piracy rate for 2000 was 68% and for 2001 was 65%. The piracy level for 1999 represented above is the "international" piracy rate.

⁴ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss and level figures of \$1.5 million and 87%, respectively, were also reported as preliminary. These numbers were finalized in mid-2001, and are reflected above.

⁵ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Lebanon were \$15.0 million. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in Lebanon in 1998 are lowered to \$14.8 million.

Largely as a result of cable piracy, ticket sales to movie theaters dipped approximately 50% in 2000, compared with sales in 1999. Local broadcast television stations have canceled long-standing licenses with copyright owners because they cannot compete with the pirates. The legitimate video market has been almost entirely destroyed by the various forms of piracy in Lebanon. In 2000, a study of the economic impact of cable piracy estimated that the Lebanese government is losing approximately US\$38 million a year due to cable piracy (including lost taxes, social security contributions, and the earnings of the Lebanese government if the cable industry were legitimate).⁶

Retail Piracy in Lebanon: A Pirate Haven

Piracy runs rampant in Lebanon. 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 in retail markets for US\$7 or less.
- Lebanon is a “pirate haven” for video games. 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. Evidence suggests that many pirated videogames are being produced in Lebanon for export, and throughout the year, several customs seizures were made of product destined for South America and elsewhere, sourced from Lebanon.
- Pirate videos and DVDs of movies not yet showing in the theaters (“pre-theatrical”) and not yet licensed for video distribution “pre-release” are widespread. Many are copied from camcorders inside theaters in other countries, and many are imported into Lebanon without authorization of the right holder. 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.
- Retail piracy of business software takes several forms, including the unauthorized duplication and sale of computer programs, the sale of hardware loaded with unlicensed software (hard-disk loading), and mass CD replication of pirate copies of business software.
- The parallel importation of Zone 1 DVDs (Zone 1 refers to DVDs programmed for distribution and playback in North America only) is a growing problem.
- Pirate sound recordings are sold openly at fixed location retail shops and at the airport. Pirate CDs and locally/regionally manufactured tapes are ubiquitous. Music cassette piracy harms the industry, with Syria supplying many of the pirate cassettes. Lebanon has traditionally been a very important source for repertoire that has been sold throughout the region and in Arabic populations around the globe, and U.S. record companies make significant investments in the

⁶ The study was carried out by Statistics Lebanon, Ltd. between April and June 2000.

production and distribution of Lebanese repertoire, but these investments are undermined by the current high piracy levels.

- 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 unregulated, and that this plant has been producing over 150,000 discs per month.⁷ Without proper controls, this plant could transform Lebanon from a 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 roughly 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 any kind of manufacturer’s code to identify the place of production. Lebanese authorities should immediately contact any known plants to ensure that they are engaged in the production of authorized product, and if necessary, seize infringing copies and machinery, and impose civil, administrative and criminal penalties under the current laws (including the Copyright Law) to deter the organized manufacturing and distribution of pirate product. IIPA also urges the Lebanese government to move toward implementation of effective measures against “optical media” piracy. In particular, the Lebanese government should introduce effective optical media plant control measures, including the licensure of plants that produce optical media, the tracking of movement of optical media production equipment, raw materials, production parts (so-called stampers and masters), and the compulsory use of manufacturer’s codes (both mastering codes and a “Source Identification” (SID) code), in order successfully to halt the production of pirate CDs and CD-ROMs.

COPYRIGHT ENFORCEMENT IN LEBANON

The lack of coordinated enforcement efforts in Lebanon has led to *ad hoc*, non-deterrent results. While some self-help measures taken by some industries have led to raids being run or prosecutions against certain pirates, there is no systematic demonstration of government will to defeat piracy and foster legitimate business in Lebanon. The police and prosecutors (and courts of urgent matters) have indicated a willingness to help try to curb piracy, but they are effectively powerless to act in the absence of clear direction from the government. The chief Ministry responsible for copyright enforcement, the Ministry of Economy and Trade, simply has not done its job. Current Minister Fleihan has two inspectors in the Department of IP Protection who should be specifically tasked to fight piracy, but, for example, in the area of software piracy, these inspectors lack computer knowledge, only work until 2 p.m. (meaning piracy after 2 p.m. cannot be addressed), and won’t work with computer experts.

⁷ This plant has known ties to organized crime that spread throughout Lebanon, and was connected with a network in Latin America. For example, 4,000 pirate console-based videogames were seized in Miami in August 2001 bound for Paraguay from an aircraft inbound from Beirut. Other known exports from Lebanon have been found in Europe.

Even when these inspectors have been given targets to raid, many problems in enforcement have ensued (e.g., the pirate reseller at 4 p.m. at a computer fair could not be raided, because it was “after working hours,” etc.). Even when a raid produces results, these are usually attributable to the perseverance of the copyright holder’s efforts on the scene; the inspectors of the Ministry of Economy and Trade carry out their duties in the course of the raid in a half-hearted manner. Also, the courts remain slow and ineffective, and of all the test cases brought by the industries through private criminal complaints over the past year, only one sentence was handed down, on December 29, 2001, against a pirate reseller of software.⁸ Customs authorities have been wholly ineffective in stopping blatantly pirated materials, including audio CDs and DVDs, at the borders, even when they are well aware of the illegal nature of the goods upon entry.

To change the tide of piracy in Lebanon, the government, at the highest levels, must issue a political directive to make fighting copyright piracy (including rampant cable piracy) a priority for the Lebanese government. From there the establishment of a specialized IPR unit in the police or elsewhere is needed, with dedicated resources and special prosecutors assigned to deal with copyright infringements, actually carrying out raids and bringing down piracy levels for all sectors of copyright. Such sustained actions would set the stage for training for prosecutors and the IPR police unit, as well as judicial training, and government monitoring of anti-piracy cases proceeding from raids through to the courts, to ensure that piracy cases are resolved quickly and with deterrent penalties.

Self-Help Measures Bring Limited Results, But Agencies and Courts Need to Respond

Largely through self-help measures on the part of the motion picture and pay-television industries, some cable pirates have stopped retransmitting domestic and foreign terrestrial and satellite programming without authorization to their subscribers. Similarly, self-help measures of the software industry have led to raids against pirate resellers and pirate end-users in Lebanon. In December 2001, 27 copyright piracy cases, all involving pirate sound recordings (and 10 in combination with the business software industry), were filed with the Chief Prosecutor, but none of these cases has to IIPA’s knowledge led to successful results.

Since November 1999, the motion picture industry has filed some 28 criminal and civil lawsuits against cable pirates. As a result, a small number of pirates have come to recognize that they may not continue retransmitting domestic and foreign terrestrial and satellite programming without authorization. As a result of both civil and private criminal actions, followed by raids largely run (and funded) by the industry, in December 2000, several cable pirates were caught in the act of illegally retransmitting cable signals. Several of those pirates eventually agreed in writing not to retransmit copyright owners’ broadcasts. In addition, in 2001, some 19 cable operators were raided and either agreed to cease retransmitting certain channels or were ordered to do so by the courts.⁹ While the

⁸ The court fined the pirate US\$667, and awarded the plaintiffs US\$1,334, far below the value of the software seized in the raid, and hardly deterrent.

⁹ IIPA understands that out of these civil injunction actions, the courts are supposed to monitor the compliance of the cable operators with the injunctive orders, and impose fines of up to LL300,000 (approximately US\$200) per film or television program in violation of the injunction. However, no fines have ever been imposed because the cable operators concerned have not been monitored as they should have.

outcome of these cases has been somewhat promising, the Lebanese government has played no role in seeing that these cases were taken or that the cable pirates were brought to justice. These civil actions by the pay-television industry were effective, because they included claims on behalf of certain channels that were being retransmitted without authorization. Civil actions filed by the motion picture industry, however, have been much less effective because the injunctions obtained in those actions are limited to the specific movie titles that have already been retransmitted by the defendant cable operators.

The motion picture industry also filed seven private criminal complaints in 1999, leading to the indictment of 17 cable pirates; those cases have been referred to the appropriate trial courts (after waiting almost two years), but none has resulted in a conviction.¹⁰ IIPA understands that further cases will be brought against cable pirates by the Public Prosecutor. None of the cases brought thus far has led to a single court decision, however. Thus, while the willingness of the Public Prosecutor to take these cases is to be commended, these cases will mean little in the way of solving the long-standing cable piracy problem unless the courts follow through with deterrent results and sentences.

In June 2001, the motion picture and satellite television industries organized a press conference to launch a public education campaign (including television spots and brochures) urging cable subscribers to choose only legitimate cable companies. IIPA understands that the Minister of Information opened the press conference launching the campaign, admitting that cable piracy had reached epidemic proportions, and stating that the government had a responsibility to provide a solution. IIPA applauds the Minister for taking this stand. However, no action by the Minister (nor the government) has been taken against cable pirates. The Lebanese government has recently proposed the drafting of a law to regulate the cable television industry. IIPA looks forward to assisting the Lebanese government in this effort to regulate the industry, but such a law cannot substitute for what is sorely needed: an aggressive campaign against pirates using the existing laws.

In 2001, the business software industry filed 16 petitions with the Judges of Urgent Matters that resulted in expert's inspections of over ten different outlets. These petitions resulted in eight court settlements, and two additional defendants are negotiating similar settlements. In addition, ten criminal prosecutions were prepared, which are still under investigation. Finally, six petitions filed with the Ministry of Economy resulted in two inspections (identifying one offender).¹¹ The Court of Urgent Matters in Beirut is noteworthy as a bright spot in the Lebanese enforcement system, and the public prosecutors and police have also been cooperative. Yet there is no systematic or coordinated effort to curb piracy levels, which remain high. Cyber-cafes are also emerging as nodes of piracy in Lebanon (i.e., unauthorized use of software on computers), and it is worth noting that police raids have been conducted against many pirates in this segment.

¹⁰ The court in the cases actually found, on November 15, 2001, that it did not have jurisdiction to hear 12 of the 17 cases, and remanded the cases to the Prosecutor to bring in the proper court. In the meantime, the Public Prosecutor appealed the decision regarding the 12 defendants who reside outside Beirut, and the entire court file was sent to the Appeals Court. As a result, the hearing in respect of the five Beirut residents that was scheduled for January 29 has had to be postponed again pending the outcome of the appeal brought by the Public Prosecutor. A hearing in the appeal has now been scheduled for April.

¹¹ Once again, "working hours" got in the way of these inspections, since all the suspects were selling products on a "fair ground" that opened in the late afternoon, after the Ministry of Economy's "working hours."

Judicial Delays and a Non-Specialized Judiciary Harm Right Holders

The most significant impediment to enforcement in Lebanon remains a severely backlogged and inefficient court system. Postponements, even of urgent matters, are the norm, and criminal cases can take years to reach judgment. *Ex officio* public criminal actions against copyright infringers remain rare in Lebanon (although the police, in conjunction with the software industry, took action in 2001). In order to facilitate effective enforcement, public prosecutors and the Ministry of Economy should initiate anti-piracy actions *ex officio*. Special prosecutors and judges should also be designated for intellectual property cases.

Enforcement Against Retail Piracy Remains Inadequate

While some very limited progress has been made against cable piracy and software piracy, largely due to the efforts of industry, general enforcement against retail piracy is sorely lacking. Anecdotes indicate that industry complaints to the Ministry of Economy and Trade and to the police regarding retail piracy are not taken seriously at all – the police often respond that since the pirate retailers/distributors paid the relevant tax, there is “nothing [they] can do.” In other instances, raid targets are tipped off to impending raids, and in one reported case, the Ministry of Economy and Trade’s inspectors simply decided to cease a raid after the raided reseller became angry. In yet other instances, known pirate product from countries like Ukraine is regularly allowed into Lebanon, even though customs officials have been given adequate evidence of the illegality of the goods entering. Even though the recording industry has repeatedly requested written answers from the police and enforcement authorities, no explanation as to why pirated CDs from Ukraine have been allowed into Lebanon has been forthcoming.

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 stiff penalties (on the books) for copyright infringement, stiff penalties against those who traffic in devices that receive, or those who arrange the receipt of, unauthorized transmissions of broadcasts “dedicated to a section of the public who pay a fee to receive such broadcasting” (i.e., cable pirates), 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 provides right holders with a broad communication to the public right (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 several 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 for “personal use” (but almost never computer programs, except for “back-up” purposes), 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).
- Point of attachment for U.S. sound recordings can be achieved by simultaneous publication in the U.S. and any Rome Convention Member, but there is no direct point of attachment for U.S. sound recordings (Article 36).
- There are overly broad exceptions to protection, including Article 25 discussed above (Articles 23, 25-30, and 32-34).
- Works and sound recordings are not explicitly given 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 (phonograms) 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. Copyright owners must be assured of their ability to control the security and integrity of their creations as they are disseminated through downloading or streaming on the World Wide Web, on-demand services, or other new interactive media. Without such assurances, there will be little incentive to make these valuable works available online. Thus, inadequacies in the protection of intellectual property in the networked environment will stifle the full potential of electronic commerce. Ratification and implementation of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) would bring copyright protection in Lebanon 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 works. Lebanon's representatives at international copyright seminars have made positive statements to consider swift accession to and implementation of these treaties. The WIPO national seminars in Beirut in September 1999 and the regional seminar on the treaties in November 1999 have provided Lebanon with technical know-how on the treaties.

Generalized System of Preferences

On June 13, 2001, IIPA filed a Petition (the second in three years) to the U.S. government as part of its "Country Eligibility Practices Review" of the Generalized System of Preferences (GSP) trade program. To qualify for benefits under the GSP Program, namely, duty-free imports of many important Lebanese products into the U.S., USTR must be satisfied that Lebanon meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." IIPA's 2001 Petition notes three major deficiencies in Lebanon's protection of copyright that caused economic harm to U.S. right holders: (1) the copyright law in Lebanon contains deficiencies that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators makes protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon are totally inadequate and ineffective. During 2000, Lebanon imported \$29.5 million of products into the United States without duty, or 38.9% of its total imports into the U.S.). During the first 11 months of 2001, Lebanon imported \$34.2 million of products into the United States without duty, or 41.3% of its total imports into the U.S. Lebanon

should not continue to expect such favorable treatment, since it fails to meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

PAKISTAN

EXECUTIVE SUMMARY¹

IIPA recommends that Pakistan be placed on the Priority Watch List.

As volatile as events have been in Pakistan over the past year, the government has taken some actions to try to keep copyright piracy in check. However, the problem of CD piracy has become alarming, with millions of pirate discs produced in Pakistan now showing up all over the world, including in South Asia, Africa, Australia and New Zealand, the Middle East, parts of Europe, parts of Asia, and the United States. Our filing is intended to signal to the government in Pakistan the need to deal with the overwhelming problem of pirate exports from Pakistan that disrupts markets around the world.

In 2002, the government in Pakistan needs to reign in underground pirate optical media production facilities, as well as those plants already known to the government. Enacting measures to control optical media production will begin to address this problem. Such measures would require plants producing optical media to obtain a license, report the movement of optical media production equipment and parts as well as raw materials, and use manufacture's codes to track the source of manufacture. Optical media regulations would provide an additional enforcement tool (along with the copyright law) to fight the organized manufacture and distribution of pirate optical media product, and would follow the lead of many countries that have enacted such regulations. As regards retail piracy and monitoring of exports, in 1999, the government of Pakistan established special intellectual property anti-piracy task forces in major cities. While this was a very positive development, IIPA looks to this task force to take an even more active role in enforcing against copyright piracy in 2002, especially in intercepting intended pirate exports at the borders before they leave Pakistan.

Estimated trade losses due to piracy increased to more than \$143.3 million in 2001.

In large part because of the serious optical media piracy problem in Pakistan, in 2001, IIPA filed a petition under the Generalized System of Preferences (GSP) program, a U.S. trade program whereby Pakistan enjoys trade benefits, subject to the requirement that it provide "adequate and effective" copyright protection. With respect to optical media pirate production for export, Pakistan's system does not meet the eligibility criteria of GSP. In addition, Pakistan's copyright law still violates TRIPS in certain respects, and the introduction in Pakistan of a royalty-free government-imposed compulsory license system for copying, translating and adapting textbooks, makes the copyright law incompatible with Pakistan's current international obligations.

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

PAKISTAN: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	11.0	NA	10.0	60%	9.0	60%	9.0	60%	9.0	70%	10.0	80%
Sound Recordings / Musical Compositions ²	60.0	90%	65.0	90%	3.0	90%	2.0	95%	2.5	95%	2.0	95%
Business Software Applications ³	28.3	87%	24.5	83%	14.1	83%	18.1	86%	16.4	88%	16.7	92%
Entertainment Software ⁴	NA	NA	NA	NA	NA	NA	11.1	94%	10.2	92%	9.8	93%
Books	44.0	NA	45.0	NA	42.0	NA	40.0	NA	30.0	NA	30.0	NA
TOTALS ⁵	143.3		144.5		68.5		80.2		68.1		68.5	

COPYRIGHT PIRACY IN PAKISTAN

Optical Media Piracy Production in Pakistan Is an Export Business

Pakistan has emerged in 2001 as one of the world's largest producers for export of pirate CDs and other optical media (media read with an optical device such as a laser, including CDs, VCDs, DVDs, CD-Rs, CD-ROMs, etc.). Eight known optical media plants⁶ are responsible for an actual production of approximately 55 million units per year.⁷ The bulk of pirate optical media

² Total record industry losses for 2001 (including pirate exports) were \$60 million. In 2000, the estimated losses to the sound recording/music industry due to piracy in Pakistan were US\$3 million, whereas the total record industry losses for 2000 (including export piracy losses) were US\$65 million. The piracy level for international repertoire only is higher than that for overall repertoire (reported in the chart above); it was 99% for 1998, and virtually 100% for 1999 through 2001.

³ Reported losses to the business software industry for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, the business software loss figure of \$16.9 million for 2000, and level figure of 84%, were also reported as preliminary. These numbers were finalized in mid-2001, and are reflected above.

⁴ IDSA estimates for 2001 are not available.

⁵ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Pakistan were \$136.9 million. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Pakistan in 2000 are increased to \$144.5 million.

⁶ Reports indicate that at least two of the original eight plants have moved their operations into the northern part of Karachi, making enforcement much more difficult, due to sectarian violence. Our understanding is that all the known lines are new and are capable of being upgraded to replicate DVDs.

⁷ These figures are well supported by the confirmed import figures for polycarbonate into Pakistan. Total known imports of polycarbonate from November 2000 to December 12, 2001 were 877,184 kilos (60 CDs per kilo).

travels to India (estimated at 75-80% of pirate production), while other shipments of discs head for Sri Lanka, Bangladesh, Kenya, Mauritius, Mozambique, South Africa (and elsewhere in Africa), Australia, New Zealand, Maldives, Kuwait, Saudi Arabia, United Arab Emirates (and elsewhere in the Gulf region), Egypt, Syria, the United Kingdom, Germany, Nepal, Hong Kong, Indonesia, Singapore, Thailand, the United States, and Canada.⁸ Given Pakistan's small legitimate domestic demand for optical discs (estimated at 5.5 million), it is indisputable that pirate production in Pakistan is an export problem. Preliminary estimates conclude that of the millions of CDs being exported, approximately 45% of pirate exports, or 23.7 million discs, are music CDs, and roughly another 5% (2.6 million) are MP3 formats.

Because of the severity of the optical media problem in Pakistan, and because exports from Pakistan damage foreign markets, in 2002, the Pakistani government must take steps to implement effective measures against "optical media" piracy. In particular, the Pakistani government should introduce effective optical media plant control measures, giving the government and right holders the ability to track the movement of optical media production equipment and parts, as well as the raw materials (including optical grade and other polycarbonate), and compelling plants to use manufacturing codes, such as the Source Identification (SID) code, in order successfully to halt the production of pirate CDs and other optical media. Such regulations will give Pakistani authorities an additional tool (along with the copyright law) to conduct spot inspections and raids on plants, seize infringing copies of product and machinery, and impose administrative and criminal penalties to deter the organized manufacturing and distribution of pirate product.

Piracy in Pakistan Continues to Harm the Copyright Industries

Piracy phenomena in Pakistan include the following:

- **Optical Media Piracy:** As described above, pirate optical media produced in Pakistan decimates legitimate markets, both domestically and abroad. For example, pirate music CDs sell for around US\$1 to \$2.50 for international and Indian repertoire, and US\$1 to \$1.50 for domestic repertoire. Also, pirate VCDs and even pirate DVDs now appear in the retail pirate market in Pakistan (an estimated 12,000 shops deal in pirated optical media in Karachi alone), often containing movies that have not yet or have just begun their theatrical release.
- **Retail Piracy of Entertainment Software:** The retail markets in Pakistan all sell pirate copies of games. Presently, an estimated 10,000 (or more) retail "kiosks" operate in cities such as Karachi, Lahore, Islamabad, Faisalabad, Peshawar and Quetta, selling illegal copyrighted materials. Indicative of the seriousness of the optical media piracy problem in Pakistan is the Rainbow Centre in Karachi, a shopping arcade of 150 retail outlets filled with pirated product, including interactive games. The duty-free area of Karachi International airport even has a retail shop filled with pirated optical media, including games software.
- **Book Piracy:** Pakistan is the world's worst pirate country for published materials (per capita), with losses to U.S. publishers in Pakistan due to piracy estimated at \$44 million in 2001. Book

⁸ Notwithstanding difficulties in accurately tracking pirate shipments, it is at least known that from October 30, 2001 to December 12, 2001, no less than a total of 43 shipments (involving 36 couriers), containing approximately 160,000 pirated CDs, were shipped by air from the Karachi Airport to various different countries.

piracy (mainly photocopying of medical texts, computer books, and business titles, but including reprint piracy and commercial photocopying) is a net-export business to India, the Middle East, and even Africa. Computer and business books also continue to be popular with pirates. Entire books are photocopied and available for sale in stalls and bookstores. There has been some incremental improvement in 2001 as retail bookstores sell fewer pirated copies.⁹ However, 50% of the medical text and reference market remains pirated (no improvement over 2000). Trade bestsellers are still pirated in large numbers and available everywhere. Though compulsory licensing under the old National Book Foundation rules is no longer authorized, titles published under those licenses years ago appear to be being reprinted regularly in 2001.

- **Music Piracy on Analog Formats:** Audiocassette piracy of music continues to cause harm to the U.S. record industry. For example, pirate audiocassettes sell for as little as seven cents in Pakistan, and not surprisingly, it is impossible to develop a legitimate local market in the face of such pirate prices.

COPYRIGHT LAW AND RELATED ISSUES

Pakistan's Copyright Ordinance, Amended in 2000, Generally Strengthens Law

In September 2000, the Copyright Ordinance, 1962, was amended by the Copyright (Amendment) Ordinance, 2000. This amendment deals with many of the TRIPS deficiencies noted in IIPA's 2000 Special 301 report, brings Pakistan's law closer to compliance with TRIPS, and strengthens certain enforcement provisions. Specifically, the amendment does the following:

- provides an express "rental right" for computer programs (and cinematographic works), but not for sound recordings (Section 3), and producers of sound recordings receive neighboring rights, including a rental right, pursuant to Section 24A;
- provides for criminal penalties to up to three years imprisonment or a fine of 100,000 rupees (approximately US\$1,660), which are doubled for second or subsequent offenses (Section 66 *et seq.*);
- 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 (Section 60);¹⁰

⁹ The publishing industry reports that some raids were run against book pirate operations in 2001. However, these raids have had little to no effect on piracy.

¹⁰ The Pakistani government has stated that the court has the power to order *ex parte* civil searches "[w]here delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed, or where it appears that the object of granting the injunction will be defeated by the delay."

- broadens the Registrar's authority to prohibit (seize, detain, etc.) the export out of Pakistan of infringing copies in addition to infringing imports coming into Pakistan, and includes goods to which infringing labels are applied as subject to this prohibition (Section 58);¹¹
- provides a new right in "typographical arrangement" of a published edition of a work (with a term of protection of 25 years from publication); and
- provides express protection for compilations of data as required by TRIPS Article 10.2.

Remaining problems in the ordinance include criminal fines that are too low to deter piracy, a new compulsory license to use published materials (see below), other overly broad exceptions to protection, and 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, should adopt the 1971 (Paris) text of the Berne Convention, and should join the Geneva (phonograms) Convention.

New Compulsory License for Published Materials

The 2000 amendments contain one change, in Section 36, that could devastate the publishing industry's ability to exercise and enforce its rights in Pakistan. Specifically, the amendment contains a provision whereby the Pakistani government or the Copyright Board (established pursuant to Article 45 of the Copyright Ordinance) may grant a royalty-free, government-imposed, compulsory license for copying, translating and adapting any textbooks 'on a non-profit' basis. This amendment would take Pakistan out of compliance with its international treaty and convention obligations if not narrowed to make it consistent with such obligations. The government of Pakistan must confirm that Section 36(iii) of the amended law only applies in cases in which the conditions of Section 36(i) have been met. Otherwise, Section 36(iii) will amount to a discretionary compulsory license, which violates TRIPS.

Generalized System of Preferences

In 2001, in large part because of the serious optical media piracy problem in Pakistan, IIPA filed a petition under the Generalized System of Preferences (GSP) program, a U.S. trade program offering duty-free imports of certain products into the U.S. from developing countries, including Pakistan. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Pakistan meets certain discretionary criteria, including providing "adequate and effective protection of intellectual property rights." Pakistan's system does not meet the eligibility criteria of GSP, particularly with respect to its serious optical media piracy problem. In addition, the

¹¹ Apparently, there is also a draft "Enforcement of Intellectual Property Rights Rules" that provides for the suspension of release of counterfeit trademark goods and pirated copyright goods by the Customs authorities in Pakistan. The infringement of intellectual property rights other than counterfeit trademark goods or pirated copyright goods as defined in the Agreement on Trade-Related Aspects of Intellectual Property Rights is not covered in the draft rules. The draft rules would also not apply to goods in transit, *de minimis* imports and on the imports of goods put on the market in another country by or with the consent of the right holder, or to goods destined for exportation. These draft rules apparently would provide for TRIPS-compatible border measures, including the possibility of suspension of pirated goods from release into the channels of commerce, and the destruction under official supervision of the goods seized in the suspension order, as well as disposition "by such other manner that the disposal shall be outside normal channels of commerce and would be without detriment to the owner of . . . the copyright holder."

introduction in Pakistan of a government-imposed free compulsory license for copying, translating and adapting textbooks makes the copyright law incompatible with Pakistan's current international obligations, including under TRIPS. During the first eleven months of 2001, the United States imported \$98.6 million of products from Pakistan without charging a duty (4.7% of Pakistan's total imports into the U.S.).¹² 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. If requisite improvements are not made by Pakistan to remedy the deficiencies noted in IIPA's petition, which have adversely affected U.S. copyright owners, Pakistan's GSP benefits should be suspended or withdrawn (in whole or in part).

Pakistan Should be Encouraged to Adhere to the WIPO Treaties

Pakistan's recent amendments to its Copyright Ordinance demonstrate the government's understanding of the need to modernize its legal systems to take into account the latest technological developments. The next step is to join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Those treaties provide copyright owners with the rights they need to protect their works in the digital environment, and also protect technological protection measures used by copyright owners to protect their works. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly. Thus, while certain key elements still have not been provided satisfactorily in the legislation in Pakistan, this should not discourage the government of Pakistan from seeking immediate ratification of the WCT and WPPT, and swift deposit in Geneva.

¹² In 2000, the U.S. imported \$93.3 million in products from Pakistan under the GSP program; this represented approximately 4.3% of Pakistan's total exports to the U.S., according to U.S. government statistics.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

PHILIPPINES

EXECUTIVE SUMMARY¹

IIPA recommends that the Philippines remain on the Priority Watch List.

The Philippines stands at a crossroads this year in terms of protection of intellectual property, as the dire piracy situation stands in stark contrast to the many positive legislative developments in the country. Rampant pirate production of optical media (CDs and other media read by an optical device such as a laser) decimates markets, and pirate optical media production capacity in the Philippines has exploded, as foreign pirate syndicates flee less hospitable jurisdictions. In addition, the porous borders in the Philippines attract importers and exporters to further inundate already-pirate markets with unauthorized digital copies of software, audiovisual materials, sound recordings and books. The illegal use of software by corporate end users is the most serious threat to the business software industry in the Philippines. The government of the Philippines has heretofore been incapable of defeating such wide-scale problems, whether due to lack of capacity, funding, government will, or a combination of the three.² The country's investigative, prosecutorial, and judicial systems remain under-funded and marred by procedural bottlenecks and endless delays. Results arising out of enforcement actions, even when successful, have had little deterrent effect on the market, leaving piracy losses and levels among the highest in the ASEAN region for certain industry sectors.

On the other hand, some extremely hopeful steps were taken in 2001 toward establishing a friendlier regime toward copyright owners, but these steps must be solidified in 2002 by finalizing and swiftly implementing key legislation.³ Key among the proposals being considered is a comprehensive law to license and control optical media production, including controls on imports of production equipment and raw materials, as well as requirements to use unique source identifiers to track the loci of production. Swift passage and implementation of this law will be crucial to the fight against runaway pirate optical media production in the Philippines.

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

² For example, several Philippine government officials have been quoted in 2001 as stating that IPR issues do not rank high on the list of the present administration's priorities. This has included the Secretary of the Committee on Public Information of the House of Representatives, who opined that IPR is just one of many concerns regarding technology.

³ Philippine Senate President Franklin Drilon has made public statements assuring the passage of measures to strengthen the government's capability to curb piracy, stating in early February 2002 that three anti-piracy bills pending in the Senate would be consolidated into a single measure after a series of public hearings by the Senate committee on public information and mass media. Drillon said, "[w]e are committed to assist our entertainment sector in its fight against piracy." *Anti-Piracy Bills*, Business World (Philippines), February 1, 2002, at 6.

In 2002, the government of the Philippines must also:

- Establish better coordination among investigative agencies, with the involvement of the police, prosecutors, customs, and courts, and raiding (without imposing excessive evidentiary thresholds for or delays in issuance of warrants, and without leaks by police to the pirates), investigating, prosecuting (without delays) and seeking deterrent sentences from courts against egregious pirates.
- Work to improve the judicial system, by, for example, reinstating the previous team of specialist IP prosecutors in the Department of Justice dealing with copyright and IPR cases; expediting IPR cases and clearing the backlog (perhaps by dividing caseloads) of IPR cases according to previously issued Court guidelines; imposing higher sentences on offenders as prescribed in the IP Code, particularly for recidivists; and developing and using a cadre of expert judges in the area of copyright.
- Improve Customs enforcement in interdicting importation of piratical product, and working toward a mechanism to monitor and seize pirate exports before they leave the Philippines.

Two legislative (and treaty) developments are also worth noting, which must be completed in 2002:

- The Senate is understood to have given final approval for accession to the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in February. We urge the Secretary of Foreign Affairs to submit the Philippines' instrument of accession with WIPO forthwith, becoming an early member of these important treaties.
- Two pending bills, Senate Bill No. 1704 and House Bill No. 3182, would, if passed, implement requirements of the WCT and WPPT and TRIPS if adopted as drafted, thereby modernizing the legal framework in the Philippines to accommodate e-commerce and to outlaw online piracy.

The Philippines currently benefits from the Generalized System of Preferences (GSP), a U.S. trade program that allows duty-free imports of certain products into the U.S. from developing countries. For the first 11 months of 2001, \$627.2 million of Philippine goods (or 6% of the Philippine's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.⁴ 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.

Estimated losses to the U.S. copyright industries due to piracy in 2001 in the Philippines were US\$120.1 million, not including losses to the entertainment software industry, which were unavailable at the time of this report.

⁴ In 2000, \$745.4 million of Philippine imports to the United States benefited from the GSP program, accounting for 5.3% of its total imports to the U.S.

PHILIPPINES: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	28.0	80%	25.0	70%	18.0	65%	18.0	65%	18.0	65%	22.0	65%
Sound Recordings / Musical Compositions ⁵	23.9	36%	1.4	33%	2.0	20%	3.0	20%	4.0	20%	3.0	20%
Business Software Applications ⁶	24.2	65%	21.8	61%	26.7	70%	25.4	77%	36.0	83%	56.7	92%
Entertainment Software ⁷	NA	99%	41.0	98%	23.8	89%	24.7	90%	21.3	88%	26.0	86%
Books	44.0	NA	44.0	NA	44.0	NA	39.0	NA	50.0	NA	70.0	NA
TOTALS ⁸	120.1		133.2		114.5		110.1		129.3		177.7	

COPYRIGHT PIRACY IN THE PHILIPPINES

Optical Media Pirate Production Decimates the Domestic Market and Has Become an Export Problem

There has been a dramatic increase in the production of optical media in the Philippines in 2001. This increasingly serious problem – the production, distribution and sale of unauthorized music CDs, video CDs (VCDs), DVDs, 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.

⁵ Losses to the U.S. recording industry in 2001 in the Philippines are represented by estimated displaced sales, as opposed to pirate sales value (i.e., pirate units multiplied by the pirate unit price), which was the determinant up to 2000. The piracy loss number for 2000 was adjusted upward to \$1.4 million.

⁶ BSA estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's loss and level figures for the Philippines of \$28.2 million and 66%, respectively, were also reported as preliminary. These figures were finalized in mid-2001 as reflected above.

⁷ IDSA piracy loss estimates for 2001 were not available at the time of this report.

⁸ Total losses to the U.S. copyright-based industries of \$120.1 million do not include losses to the entertainment software industry, due to insufficient data received by that industry that did not allow for accurate estimates this year. However, the industry reports that there was no improvement in the situation in the Philippines in 2001 over 2000. In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in the Philippines were \$139.5 million. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 6), and the adjustment to the piracy loss number for U.S. sound recordings (see footnote 5), estimated total losses to the U.S. copyright-based industries in the Philippines in 2000 are adjusted to \$133.2 million.

Currently, an estimated 15 underground plants operate in the Philippines.⁹ Raids conducted by the copyright industries in the past year have continued to reveal evidence of international syndicates' involvement in copyright piracy. The underground pirate production plants are still heavily dependent on Malaysian, Singapore, Hong Kong and Taiwan-based organized crime groups for finance, management, technical assistance and the production of stampers and their mastering activities.¹⁰ Another disturbing feature is the establishment of covert production facilities in remote areas of the country, as well as in the Special Economic Zones situated in the former U.S. military bases outside of Manila.

In addition to increased evidence of pirate production for export,¹¹ there appeared to be large-scale imports of finished domestic and international products into the Philippines from elsewhere in Asia.¹² Manufacturing costs even for underground CD plants in the Philippines are believed to be higher than that of plants in Hong Kong, Taiwan, and China, yet prices of infringing discs in the Philippine market have gone down. This may be explained by Filipino repertoire shipped into the Philippines to cater to local demand. In 2001, for example, recording industry representatives encountered at least one case in Taiwan where a plant raided was found to have been manufacturing pirate Philippines repertoire. A more recent problem is "burned" CD-R piracy; however, the quantity of such discs is still quite low compared to mass pirate optical discs produced in factories or imported into the Philippines from elsewhere in Asia.¹³

The copyright industries now suffer from devastating domestic piracy in the Philippines. For example, the entertainment software industry reports that piracy levels in the Philippines of console-based and PC videogames are a staggeringly high 99%, with pirated CDs, CD-ROMs, VCDs and even DVDs now even available in malls, and through street hawkers and sidewalk vendors. Meanwhile, piracy of motion pictures on optical media, including DVDs, is on the rise in the Philippines. The hardware for playing optical discs is now quite affordable for those living in the Philippines, and in turn encourages the purchase of pirated discs. These pirated discs are of motion pictures not yet released in theaters or on video (so-called "pre-release" titles) and severely

⁹ More optical media lines may easily arrive in the Philippines, exacerbating the problem, in part because of lack of customs regulations dealing with the importation of optical media equipment. In 2001, for example, at least 20 manufacturing lines entered the Philippines without Customs monitoring or notifying right holders concerned.

¹⁰ For example, a plant raided in August 2001 in the industrial zone of Bulacan, Metro Manila was caught replicating unauthorized copies of a U.S. sound recording, with stampers having been supplied to the plant by a Hong Kong-based syndicate. In two separate raids conducted in Metro Manila in February and September 2001 respectively, illegal immigrants from Mainland China were found working in the raided premises. Another plant in Metro Manila, raided in January 2002, was found to have been established by Malaysian owners, who relocated their plant to the Philippines following the coming into force of a law to control the manufacture of optical discs in Malaysia. The second raid against this plant revealed quantities of discs and stampers of Malaysian and international artists. Replication orders and supplies apparently originated from the parent company in Malaysia, and completed orders were then shipped back to the Malaysian market. Philippine authorities arrested several suspects, including six Malaysian national workers.

¹¹ The entertainment software industry reports rampant exports of major companies' product from the Philippines this year, fueling the belief that the plants in the Philippines are linked with internationally-based organized pirates (likely having moved there from Thailand, Malaysia, etc.).

¹² There are reports of pirate CDs being smuggled into the Philippines via the areas of Mindanao City and Ozamiz, Mindano, along with other contraband such as luxury cars and rice, the latter from Vietnam.

¹³ In 2001, only one pirate commercial CD-R "burning" operation was raided, resulting in the seizure of seven machines. There are two more known operators in the Philippines conducting CD-R burning on a commercial scale.

affect the theatrical market in the Philippines.¹⁴ The video market is likewise affected as pirates continually sell relatively old titles in digital formats as well. Infringing “videoke” (“karaoke” sing-along CDs with images) discs containing Filipino and international repertoire now sell for as low as P35 each (US\$0.68), while infringing CDs retail for as low as P20 (US\$0.39) to P35 (US\$0.68) per unit. CDs and VCDs continue to flood shopping malls, markets and sidewalks throughout the country.¹⁵ In one large barter market in the center of Metro Manila, there are approximately 145 stalls selling infringing CDs. The presence of pirate VCDs in the Philippines market continues to grow dramatically, and was the cause for the increase in the level of video piracy from 70% to 80% in 2001. Optical media piracy is the scourge of other copyright industry sectors in the Philippines as well.¹⁶

Other Piracy Phenomena

Forms of piracy other than optical media prevalent in the Philippines include:

- **Cable Piracy.** Cable television piracy remains one of the most serious problems for the U.S. audiovisual industry in the Philippines. Hundreds of cable systems,¹⁷ 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 (as does the related problem of theft of home entertainment satellite signals).¹⁸ Although cable systems outside Manila are supposed to be regulated, there is still a proliferation of infringing transmissions, and it is possible to see new releases repeated several times a day. The National Telecommunication Commission (NTC), responsible for monitoring the operations of licensed and non-licensed cable operators, has shown little willingness to clamp down on cable pirates. As of the end of June 2001, the NTC had monitored the operations of 98 cable operators, and had filed 11 administrative cases. The NTC also submitted an action plan for the new President’s Administration, including the further intensification of regular inspections and extensive monitoring of telecom and broadcast

¹⁴ As an example, motion picture industry representatives recently found pirate VCD copies of the film “Black Hawk Down” as recorded on a camcorder, for 100 pesos (approximately US\$1.95) at the Verra Mall prior to the film’s theatrical release in the Philippines.

¹⁵ These low prices in turn put pressure on record companies to lower the price of legitimate CDs, as there is a popular view that recording companies should compete with prices of pirate product.

¹⁶ For the same P100 (US\$1.95), a Greenhills shopper can also buy a pirate music CD-ROM compilation of business software applications, barely 1% of its legitimate retail price. See Andrade-Jimenez, “Focus – Computer Software, Video CD Piracy,” *Business World* (Philippines), June 22, 2000, at 1. Another press report prices the latest international music full-length CDs at P30 (US\$0.59) to P50 (US\$0.97). Giselle P. Kasilag, “Special Report 2001 Yearend Report – Thriving ‘Piracy’ Industry,” *Business World* (Philippines), Jan. 7, 2002, at 42.

¹⁷ The National Telecommunication Commission (NTC) has reportedly issued approximately 870 “Provincial Authority” permits, and it is estimated that the total universe of cable operators (both licensed and unlicensed) topped 1,000 in 2001.

¹⁸ Another significant form of cable piracy concerns under-declarations of subscriber counts by cable operators. Foreign programmers find that the “certified” annual accounts of subscriber numbers filed by cable operators are inaccurate, in some cases by as much as 50%. Essentially this means cable operators pay only half of the actual program license fees to foreign programmers. The theft of satellite signals of home entertainment channels has also damaged the video retail market.

networks, including cable TV, to determine network compliance with the provisions of the satellite program piracy.

- **Book Piracy.** 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. Commercial reprint piracy also remains rampant. The piracy of scientific, technical, and medical (STM) books also continues to undermine legitimate sales in the Philippines.¹⁹ 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 No. 1203), which allowed Philippines publishers to reprint U.S. publications at will, with token compensation payable (although even that was often not paid) to the right holders. Although these decrees were repealed by enactment of the Intellectual Property Code (which went into effect over four 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 U.S. copyright owners, 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.
- **Videocassette Piracy.** Videocassette piracy continues to be a significant piracy problem in the Philippines. From January to August 2001, some 396 video establishments were newly registered by the Video Regulatory Board (VRB), and some 951 out of 3,950 licenses in the previous year were renewed. There are now 1,347 licensed video establishments and an undetermined number of unregistered and unlicensed video establishments. Almost 100% of the unregistered outlets sell pirated product. Pirated copies are often of very low quality, released within days of the title's U.S. theatrical release, making them attractive in the Philippine market.
- **Internet Piracy.** While still a small problem in the Philippines, mainly due to the poor telecommunications infrastructure existing in the country, Internet piracy is growing. 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 the Electronic Commerce Act in June 2000, which provides some provisions to fight copyright piracy on the Internet, by criminalizing acts of copyright piracy carried out "through the use of telecommunications networks, such as, but not limited to, the Internet" (Section 33(b)).²⁰ That Act also contains one troubling provision limiting liability of certain telecommunications

¹⁹ For example, pirate printers now participate in medical conventions, displaying original books but selling unauthorized bound photocopies. In 2000, a particularly aggressive pirate was arrested twice during the same annual convention of the Philippine College of Physicians for selling her pirate wares.

²⁰ Republic Act No. 8792 (2000).

service providers for, among other things, infringement of the exclusive rights of copyright owners that are carried out over their systems, but the legislation was tightened somewhat before enactment to preserve the ability of courts to enjoin service providers from continuing to allow infringing uses on their networks, and some voluntary arrangements demonstrate promise that workable cooperation may ensue between right holders and telecommunication services in the Philippines (see more detailed discussion of this legislation below).

- **End-User Piracy of Software.** Another enforcement problem that particularly afflicts the business software sector is the unauthorized use of business software in a business setting (so-called corporate “end-user” piracy). 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.

COPYRIGHT ENFORCEMENT IN THE PHILIPPINES

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

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

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

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

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES
Number of raids/searches conducted	1051
Number of administrative cases brought by agency	906
Number of defendants found liable (including admissions/pleas of guilt)	70
Ratio of convictions to the number of raids conducted	70:1051
Ratio of convictions to the number of cases brought	70:906
Number of cases resulting in administrative fines	70
Total amount of fines levied	N/A
US\$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 (e.g. \$XXX in Y cases)	0

Problems in enforcing copyright in the Philippines start at the raid (the beginning of the enforcement process) and end at sentencing, whether administrative or judicial. At every step of the way, right holders experience deep frustrations. Problems include: leaks by enforcement authorities to the suspect that is subject to the raid resulting in loss of evidence (a raid against an optical media plant by the recording industry in November 2001 failed because of a leak); delays in obtaining search warrants; "personal knowledge" requirements (the unreasonable requirement that the enforcement officer seeking the search warrant swear to personal knowledge that a crime is being committed, as opposed to the general international practice of allowing a warrant to issue

based on an affidavit from the informant);²¹ the sale of seized items (pirated goods) by enforcement officials to members of the public; the failure of the authorities to seize clearly infringing or pornographic works, or to seize or dismantle machinery used to replicate infringing optical discs; and the return by the authorities of infringing goods and machinery used to pirate (this occurred in August 2001 upon the raid of an optical media plant, due to the challenge of the search warrant on purely technical grounds, thereby securing release back to the pirates of the replicating machinery and infringing music optical discs and stampers seized). This long list of actual problems experienced in the recent past indicates that 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.

Some Enforcement Raids in 2001

Raid data for 2001 indicates that several enforcement authorities were involved in sporadic raiding, but these efforts collectively failed to deter piracy in the Philippines. For example, the Bureau of Customs (BOC) conducted some seizures in 2001, mainly at the international airport in Manila, but imports and exports of pirate optical media product were at an all-time high. Lack of resources has been another abiding problem, leaving right holders predominantly to be responsible for initiating, executing, supervising, funding and prosecuting their own cases. The main enforcement agencies, the National Bureau of Investigation (NBI), the Video Regulatory Board (VRB) and the Philippine National Police (PNP) have traditionally lacked the requisite funds to conduct operations and store seized equipment and goods. In July 2001, the Office of the President released P1 million (approximately US\$19,500) to fund intelligence and enforcement activities of the VRB, and while this is helpful, it is insufficient to make a serious dent in piracy, particularly when the pirates are so well-funded and resourced.

The VRB took some raids in 2001, seizing 105,000 audio CDs and 100,000 VCDs, and impounding a total of five optical disc replicating lines. Meanwhile, the business software industry, working with the NBI, was able to mount three raids against corporate end user pirated in 2001 (and reached settlements in three other end-user cases). These are not impressive results, and it will require much greater governmental will and fewer problems (like the ones noted above) to achieve any level of deterrence.

Prosecutors Unable to Expedite Cases

Another persistent problem noted by right holders is the failure in the Philippines to provide a specialized cadre of prosecutors who are familiar with and able to handle cases involving copyright piracy. In the past, once a raid was concluded, a special IP Task Force of prosecutors from the Department of Justice would deal with copyright prosecutions; however, this specialist team was dissolved in late 2000,²² due to the limited number of prosecutors available to deal with

²¹ Such unreasonable requirements are often demanded of the business software industry in cases involving criminal end-user piracy, when it should be well understood that in the case of a corporation making numerous unauthorized copies of business software for its internal use, the source with first-hand knowledge is not an officer, but a private informant (often a former employee of the company).

²² Two recent orders, Order No. 197 and Order No. 62, while not abolishing the special IPR Prosecutors, were issued, rather, because in 2000 the Department of Justice (DOJ) prosecutors were overwhelmed with cases, and a decision was made to give some of DOJ's powers to the regional prosecutors. Under these Orders, the filing of complaints was to be

the general case workload. In particular, higher priority was assigned to ‘more serious’ crimes. Since that time, in 2001, the copyright industries have found that – especially in the more distant provinces – numerous complaints filed with the local prosecutors have languished indefinitely.²³ Despite requests by the copyright industries for reinstatement of the special IP Task Force, reinstatement has not occurred.

Even when a local prosecutor takes copyright cases, procedural requirements almost always doom them. For example, formal complaints investigated by a prosecutor take months to complete, and decisions to prosecute are subject to appeal to the office of the Secretary of Justice. In January 2001, the business software industry received a final decision from the Department of Justice, refusing to prosecute a retailer who was caught with 2,800 units of unlicensed software, in a raid that took place in November 1995 – 62 months prior to the decision. In two other cases, two separate underground CD plants raided in October 1999 and February 2001 were found to be replicating infringing sound recordings. In each case, the accused raised a plea of “noninvolvement,” and despite clear evidence to the contrary (business documentation submitted by the complainants to prove the two suspects’ ownership and management of the underground CD replicating facility), the prosecutors in both cases determined in 2001 that the arguments of the accused parties could be upheld.²⁴

Need for a Coordinated Response

What is needed in the Philippines is effective enforcement of the existing laws (and hopefully forthcoming new laws) through adequately motivated law enforcement and investigative agencies, efficient and responsive prosecutors, and expeditious court proceedings that culminate in the imposition of deterrent penalties. The increasing sophistication of the entities involved in piracy, and the role of organized crime elements, mean that the various enforcement agencies urgently need to step up their skills when enforcing copyright. 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.

Other problems plague enforcement, as numerous enforcement agencies share responsibilities in fields such as videocassette and cable piracy, and interagency turf battles and a

done at the regional rather than the national level. However, by the middle of 2001, objections by right holders resulted in DOJ once again agreeing to accept the filing of complaints. As of February 2002, DOJ prosecutors will make a preliminary investigation of a complaint, and generally pass the matter to regional prosecutors unless the case is a matter of “national interest” (both VCD and computer software piracy are considered *prima facie* matters of “national interest”). It should also be noted that, as a practical matter, since IPR crimes involve a private complainant, “special arrangements” can operate where a private prosecutor can handle the case in court “under the direct supervision of the public prosecutor,” in which case the public prosecutor will no longer need to be personally involved in the case.

²³ The IP Task Force handled 679 complaints in 2000, dealing with 514 as follows: 128 were dismissed as without legal foundation after preliminary investigation; 218 were referred directly to a court for prosecution; 166 were referred to the relevant prosecution office for further investigation; and two complaints were withdrawn. Through June 2001, the IP Task Force had dealt with 190 new complaints, as well as most of those carried over from 2000.

²⁴ Efforts to appeal the prosecutor’s decisions in these two cases have been unsuccessful.

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. It is necessary to establish better coordination among investigative agencies, with the involvement of the police, prosecutors, customs, and courts, and raiding (without imposing excessive evidentiary thresholds for or delays in issuance of warrants, and without leaks by police to the pirates), investigating, prosecuting (without delays) and seeking deterrent sentences from courts against egregious pirates.

The Specialized IPR Courts Have Not Effectively Combated Piracy

The Philippine justice system is ineffective in dealing with piracy. While the Supreme Court has designated Special Intellectual Property Rights (IPR) Courts to hear intellectual property rights cases, and its operating guidelines allow for expeditious decisions, these courts have not had their intended effect.²⁵ In at least two cases in the past year, judges have quashed search warrants they had previously issued, after motions brought by defendants. In those cases, the defendants' applications were heard unilaterally (i.e., the copyright owner was not present). These decisions, made post-raid, to grant the defendants' motions in these cases, despite the fact that the judges in question had issued the search warrants after making due inquiry, cast doubt on the system at the first instance. Even if a piracy case manages to survive the obstacle course of raid, investigation and prosecutorial decision-making, 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.²⁶ Not surprisingly, many defendants simply disappear at some point during the long odyssey of their cases.

While 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 e-commerce legislation discussed below, in practice, deterrent sentencing remains a mirage. For example, the business software industry reports that there has not been a single criminal conviction for business software piracy in the 50 months since the code took effect. Similarly, there were no known convictions under the code in music piracy cases in 2001. Presently, the business software industry has seven active criminal cases in court (four cases still in the litigation stage and three cases on appeal), with the earliest case dating back to 1995.²⁷

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

²⁵ In 1996, the Philippine Supreme Court designated 48 courts nationwide as Special Intellectual Property Rights Courts, and in September 2000, the Philippine Supreme Court expanded the designation to include 24 municipal courts, half in Metro Manila. The copyright industries welcome these steps, 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, however, these attempts at judicial reform have been a failure. Judges are frequently rotated, retire, are promoted or transferred, further weakening the effectiveness of these courts, and lessening any benefit gained out of training.

²⁶ In one case initiated by the business software industry in 1995, the defense challenged the search warrant, and the matter eventually wound its way to the Court of Appeal, which ruled on the matter in the industry's favor in December 2001. The case took almost seven years to determine this search warrant issue.

²⁷ There are five other cases in which the business software industry is still waiting for court notices and there are nine other cases in which the accused fled, meaning the cases have been archived pending the defendants' arrests.

cases, and that consistently hand down the increased deterrent sentences authorized by Philippine law, but this goal seems no closer to attainment. While some of its ASEAN neighbors, like Thailand, have made great strides in improving the performance of their courts in piracy cases, the courts in the Philippines remain 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 the courts 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.

MARKET ACCESS ISSUES

Restrictions on Foreign Ownership of Mass Media

One abiding problem in the Philippines, especially for U.S. interests, is that foreign investment in mass media is strictly prohibited under the Philippines Constitution. The pay television sector, for example, which is classified under mass media, is burdened by such foreign investment restrictions, ultimately impeding further development of the cable television market in the Philippines. Draft cable legislation is reportedly being considered that contains a provision allowing up to 40% foreign investment in cable systems that do not produce their own programs or content.²⁸ As the broadcast industry moves towards a converging environment, operators are encouraged to provide both infrastructure and content; it is essential in this environment that foreign equity restrictions such as the one found in the Philippines be removed.

COPYRIGHT LAW AND RELATED ISSUES

The year 2001 saw a flurry of positive legislative activity in the Philippines, in the form of numerous bills relating to copyright and optical disc manufacturing that were introduced in both houses of the Philippine Congress.²⁹ IIPA sincerely hopes that 2002 will be the year that these many initiatives proceed to passage by the Congress, and more important, that they are then implemented, bringing positive gains to copyright owners through increased enforcement of their rights.

Philippines Considering Strong Optical Media Legislation

IIPA is very pleased that the government of the Philippines is considering enactment of strong regulations to control pirate optical media production in the Philippines. IIPA understands that as of early February 2002, there are two separate bills pending in the House of Representatives.

²⁸ Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

²⁹ Nonetheless, there remain some points of frustration. For example, the recording industry has lobbied high-level Customs officials to draft long-awaited implementing rules and regulations as mandated in section 190 of the Intellectual Property Code, to no avail. A drafting team has been set up to carry out the work but is understood to still be awaiting a directive from the Secretary of Finance.

IIPA strongly supports a “stand-alone” approach,³⁰ which will, if strongly implemented, effectively control pirate optical media production through: coverage of the importation of equipment and raw materials for the mastering and replication of all optical media products; licensing of all production sites; the possibility of spot inspections of their facilities and records, including production orders; and the requirement of the use of the manufacturer’s codes or similar unique markings on all masters and copies of optical media products manufactured in the country.³¹ IIPA understands that the House has decided to convene a Technical Working Committee to reconcile the two draft bills, and aims to finalize its recommendations by the end of February 2002. If the remaining questions can be promptly resolved, and if the legislative process 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.

Philippines Poised to Pass Copyright Law Amendments to Strengthen Enforcement and Protect Copyright in the Digital Environment

Identical bills to amend the Intellectual Property Code are under consideration in the Senate (S.B. 1704) and in the House (H.B. 3182). The Senate bill was introduced on September 6, 2001 by Senator Ople, and the House bill was introduced shortly thereafter. The bills, if enacted in their current form, would make the Intellectual Property Code in the Philippines one of the strongest copyright laws in the world, in full compliance with TRIPS and entirely compatible with the requirements of the WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA commends the government of the Philippines for having the foresight to move on this legislation, and hopes for swift movement in the Senate toward final

³⁰ Bill No. HB1077 is entitled “An Act To Curtail Entertainment Media Piracy In The Philippines, For This Purpose, Reorganizing the Videogram Regulatory Board Into The Entertainment Media Regulatory and Anti-Piracy Board, And For Other Purposes,” and was introduced by Congresswoman Imee Marcos (commonly known as the EMRAP Bill). Bill No. HB3825 is entitled “An Act To Curtail Optical Media Piracy, Providing Penalties For Violations, Appropriating Funds Therefor, And For Other Purposes,” and was introduced by Imee Marcos and Harry Angping (commonly known as the stand-alone Bill).

³¹ The key elements of an effective optical media law include:

- 1) centralized licensing (for a fixed, renewable term) of all optical media mastering or manufacturing facilities, as well as those persons or legal entities that engage in “multiple recording” of content onto “recordable” media (i.e., including those that burn multiple CD-Rs simultaneously by banking consumer machines together);
- 2) centralized licensing of importation, exportation, and internal transfer of optical disc mastering or manufacturing equipment and machinery;
- 3) centralized licensing of importation of optical grade polycarbonate or any other material capable of being used as the raw material for the manufacture of optical discs;
- 4) requirement to use a secure unique identifier [i.e., the placement of a licensed secure unique identifier such as source identification code, including mastering code numbers and a separate and unique mould code number for each mould used, on all masters (stamper) and finished products produced within the country to identify the source of manufacture];
- 5) licensee record-keeping requirements, including customer orders, and quantity of raw materials received at the premises;
- 6) inspections, searches and seizures by an enforcement agency at any time to ensure compliance with all reporting and license requirements;
- 7) government record-keeping requirements, including the establishment and maintenance of a register of the licenses granted, which shall be available for public inspection, and inspection action;
- 8) criminal penalties, including individual liability, for violation of any significant aspect of the regime, including the possibility of immediate shutdown of unlicensed facilities or violators.

adoption. IIPA understands that on January 29, the House Committee on Trade and Industry, chaired by Congressman Harry Angping, held a hearing on the bill, and that some minor changes may be contemplated. The comments herein are directed at the bill as it appeared prior to that hearing.³²

The Bills in the House and Senate, if passed, would, among other things, do the following:

- Section 1 of the bill provides a strong, WIPO treaties-compatible “communication to the public” right (see WCT Article 8), and Section 18 provides a somewhat analogous treaties-compatible right as to sound recordings (WPPT Article 14).
- Sections 2 and 17 of the bill confirm the protection in the Philippines of “temporary copies” as part of the reproduction right in works and sound recordings (see Agreed Statement Concerning WCT Article 1(4), Agreed Statement Concerning WPPT articles 7, 11, and 16). IIPA understands that one of the topics that came up at the hearing was the protection of temporary copies. “Temporary” copies of works or other protected material made in the RAM of a computer (or through other similar technologies) should be recognized as reproductions in the Philippines. The duration of time that a “copy” of a work or other protected subject matter exists should not be a factor in whether there is a reproduction, but rather whether that duration, however long, permits the work to be exploited in the same manner as if it were a permanent copy.³³
- Sections 3 and 33 of the bill provide for necessary protections against circumventing, and trafficking in devices that circumvent, technological protection measures (WCT Article 11, WPPT Article 18), and against unlawful tampering with rights management information (WCT Article 12, WPPT Article 19).
- Section 4 of the bill provides an exclusive importation right, extremely important in the Philippines to ensure that it provides adequate and effective protection against pirated imports, including of optical media.
- Section 5 of the bill appropriately clarifies ownership of rights in an audiovisual work.
- Section 10 of the bill appropriately narrows an exception to protection regarding computer programs, so that the law is TRIPS-compatible (TRIPS Article 9.1).

³² At the January 29 hearing of the House Committee on Trade and Industry (chaired by Congressman Harry Angping), discussion was mainly focused on the optical disc regulation. Discussion of H.B. 3182 was limited to the Intellectual Property Office raising some questions about temporary copy protection and the need to include *ex parte* search and seizure remedies in light of recent changes to the Supreme Court’s Rules of Court. A “technical working group” will be established for further discussion on the House bill.

³³ Note that this is the spirit of the Agreed Statement concerning Article 1(4) of the WCT, which states in part, “[t]he reproduction right, as set out in Article 9 of the Berne Convention . . . fully appl[ies] in the digital environment, in particular to the use of works in digital form . . .” (while the Agreed Statement concerning Articles 7, 11 and 16 of the WPPT states in part, “[t]he reproduction right, as set out in Articles 7 and 11 . . . fully appl[ies] in the digital environment, in particular to the use of performances and phonograms in digital form . . .”). As WIPO has explained, this agreed statement states the obvious: the concept of reproduction, under Article 9(1) of the Berne Convention, extends to reproduction “in any manner or form”; therefore, a reproduction should not be excluded from the concept of reproduction just because it is in digital form, through storage in electronic memory, nor should it be excluded from the concept of reproduction just because it is of a temporary nature.

- Section 13 of the bill empowers Customs to deal with pirated exports, important in the Philippines to ensure that it provides adequate and effective protection against pirated exports of optical media.
- Sections 20-22 of the bill provide for extension of duration of protection for works, performances, and sound recordings.
- Section 23 of the bill provides for protection against contributory and vicarious infringements.
- Sections 25 and 26 of the bill provide for, on their face, adequate civil damages, including (in Section 26) for the possibility of pre-established damages (TRIPS Article 45).
- Section 27 of the bill provides for TRIPS-compatible provisional measures (TRIPS Articles 46 and 50). We understand that the January 29 House hearing included discussion of the language expressly providing for *ex parte* remedies in the bill, in light of the Supreme Court "Rules on Search and Seizure in Civil Actions." However, since the Supreme Court Rules are only advisory as to the judiciary, and are subject to change, Section 27 should retain the explicit language in the Intellectual Property Code to provide the greatest clarity that the law in the Philippines complies with TRIPS on this matter.
- Section 30 of the bill provides for disclosure of certain information to right holders to assist them in carrying out enforcement of their rights, and for acceptance by enforcement authorities of a "proportional examination" of articles seized (i.e., "sampling").
- Section 31 of the bill provides for TRIPS-compatible retroactive protection of works, sound recordings and performances fixed in sound recordings, as also required by the WIPO treaties (WCT Article 13, WPPT Article 22).
- Section 32 allows for recovery of damages for cases commenced within four years of the time the cause of action arose.

Philippines Poised to Join the WCT and WPPT

A related positive development in the Philippines involves movement toward accession to the WCT and the WPPT. In October 2001, President Arroyo signed off on the accession, and on January 21, 2002 the Senate Committee on Foreign Relations held its first and final hearing on the WIPO treaties ratification, at which time there was unanimous consensus to accede to the treaties. The Committee reportedly prepared a report at the end of January for submission to the full Senate. The second and final Senate reading is expected to take place in February 2002. IIPA understands that once the Senate gives final approval, the resolution will be sent to President Arroyo's office for implementation by the Secretary of Foreign Affairs, and that then, it will be the responsibility of the Secretary of Foreign Affairs to deposit the instrument of accession with WIPO. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly.

Supreme Court “Rules on Search and Seizure in Civil Actions” Appear to Provide for TRIPS-Compatible *Ex Parte* Civil Searches

IIPA was pleased to learn that, on January 22, 2002, the Supreme Court issued “Rules on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights.” The new rules give courts authority to issue *ex parte* civil search orders, thereby addressing a long-standing deficiency in the legal system in the Philippines. Senate Bill No. 1704 and House Bill No. 3182 (discussed above), currently pending before both bodies, propose to amend the current Intellectual Property Code to expressly provide such a remedy as well. The Rules as well as the explicit clarification in the Intellectual Property Code hopefully will ensure that enforcement against institutional end-user piracy can be carried out more effectively (through, for example, unannounced searches of an institution’s computers for evidence of illegal copies). The Rules and the explicit fix in the Code will hopefully ensure that the Philippines meets its TRIPS Articles 41 and 50 obligations on this point.

Nonetheless, there are some fundamental issues that either were not addressed in the Rules, or for which the Rules as promulgated leave questions. For example:

- Courts should be allowed to receive “unattributable evidence” (Section 4), so that informants will be able to come forward without fear of retaliation.³⁴
- The requirement of a “strong” *prima facie* case may leave the threshold for obtaining provisional measures unreasonably high (Section 6(b)).³⁵
- Searches and seizures should be permitted (to be carried out) whenever they will be most effective, including at any time, day or night (Section 10).
- Safeguarding defendants’ legal rights should not require the appointment of an extra commissioner and the involvement of the sheriff (sections 11 to 19).³⁶

³⁴ Evidence to support an *ex parte* civil search order is obtained primarily from witnesses who come forward with information about suspected copyright infringements. These witnesses are often employees or former employees of suspected violators – the only individuals with reliable knowledge of the organization’s working practices. They are, however, often afraid to come forward, fearing retaliation by defendants as well as loss of future employment prospects, social standing and professional reputation. Therefore, witnesses should not be required to be named or to give direct evidence of infringement in order for a search order to issue. Hearsay evidence, provided for example by qualified lawyers or hotline operators, should be sufficient. Section 4 of the present Rules should be amended accordingly, and along the lines of the Irish Copyright Act, section 132(3), courts should be empowered to receive hearsay evidence.

³⁵ The applicant should not need to provide complete evidence in support of his claims when applying for a provisional measure; rather, but rather, sufficient evidence in support of the applicant’s claims. The Rules should be interpreted accordingly.

³⁶ Anton Piller Orders are too expensive and too cumbersome. One of the major causes for this is the obligatory involvement of very expensive “independent” court-appointed supervisors. We note that in the Rules, the commissioner and the sheriff have been entrusted with duties and responsibilities similar to law enforcement officers in the execution of a criminal search and seizure order. While IIPA understands the need for orderly execution of the writ, we submit that the Rules of Court contain sufficient safeguards for the defendant from abuse by the applicant; therefore the requirement for the Commissioner and the sheriff should be dispensed with. Alternatively, the function of the Commissioner can be fulfilled by an applicant’s attorneys, acting in his/her capacity as an officer of the court. We recommend that references to the Commissioner and the sheriff be deleted and substituted with applicant’s attorney.

- Seized articles that cannot manually be “delivered up” should be “sealed” or otherwise rendered unusable (Section 14, paragraph 2).
- The *ex parte* civil search order should be revoked, upon application, only if the right owner fails to bring legal actions or the writ is improperly issued (Section 18).³⁷
- Right owners should not be held liable for improper actions by the authorities (sections 9 and 21).³⁸

Continuing Concerns Over the Electronic Commerce Act

As noted, the infamous “Love Bug” virus led to the passage of 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 P100,000 (approximately US\$1,950). 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.

Of great concern to right holders is the provision in the Act limiting 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 the Act 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 the Electronic Commerce Act clearly makes a violation of these rights a criminal offense, the basis for civil liability remains murky. It

³⁷ The present provision would allow for the revocation of the order if the bond issued turned out to be of insufficient amount or if the suspected goods are found to be not infringing. The reason a bond would be insufficient is that the extent of infringement is greater than anticipated at the time of the placing the security, thus this should not be grounds for revoking a civil search order. Further, it is not to be determined at the time of the search whether the goods are infringing, thus, it is inappropriate for an order to be discharged on these grounds.

³⁸ Right owners or their representatives should naturally not be held liable for improper or illegal actions over which they have no control. Right owners’ obligations to indemnify and pay damages should be limited to injury resulting from right holder wrongful actions.

remains to be seen whether the Electronic Commerce Act 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. Other industries have been successful in cooperating with ISPs in addressing piracy on digital networks, albeit in a limited way.³⁹

³⁹ The recording industry, for example, sent two cease-and-desist letters to Philippine ISPs with respect to infringing MP3 files. A positive response was received for one letter.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

RUSSIA

EXECUTIVE SUMMARY

In the past five years it is estimated that the copyright industries have lost over \$5 billion due to piracy in Russia. There are three major reasons for these staggering losses and they must remain the focus of U.S. and Russian government attention to reverse this situation: (1) optical media piracy and the need to adopt an appropriate regulatory and enforcement response; (2) the lack of deterrence in the Russian enforcement system to the widespread commercial piracy that persists there; and (3) the need for critical legal reforms especially including the adoption of laws that comply with both the substantive and enforcement obligations of the WTO TRIPS agreement.

Russian optical media piracy continued to grow in 2001; in fact, production has eclipsed the production capacity of the region's worst offender, Ukraine. This is in part because some of the Ukraine plants have migrated to Russia as a result of the international pressure brought to bear on Ukraine, but it is largely the result of the Russian failure to adopt its own effective optical media production regulatory and enforcement scheme. The Russian optical media problem consists both of domestic production and lax border enforcement resulting in the receipt and distribution of product from Asian countries and Ukraine. Although Russia is still one of the major destination and transshipment points for pirate optical media product from these other markets, it also is quickly becoming one of the leading producers of illegal recorded music.

For another year, the copyright industries reported raiding by the police and the municipal authorities, but still without the necessary follow-up by prosecutors and the courts. With one notable exception, no deterrent sentences were meted out or actually served (in fact, in May 2000 all of the deterrent sentences were voided by the general amnesty). Amendments to the criminal procedure code were adopted on December 18, 2001, and will enter into force on July 1, 2002; further amendments to the criminal code are reportedly in progress. Russia failed in 2001 to use its existing provisions to impose deterrent penalties. The amendments to the criminal procedure code that it did adopt last year do not properly address the problems facing the copyright industries. The passage of inadequate provisions was a failed opportunity to upgrade and improve procedures for effective enforcement; this was combined with the continued failure to use existing provisions effectively. Absent these key steps, it remains almost impossible for Russia to keep up with its piracy problem.

As a sign it was losing patience, in 2001 the U.S. government accepted the IIPA's petition to examine whether Russia should continue to be eligible to receive duty-free trade benefits under the Generalized System of Preferences program. Hearings were held in March 2001, but no decision has yet been announced by the U.S. government on whether to fully or partially suspend GSP benefits for Russia. For the first 11 months of 2001, Russia exported goods valued at \$359.2 million to the U.S., which received preferential duty-free treatment under the GSP program (in

calendar year 2000, Russia exported \$514.7 million of such goods). While Russia was receiving these benefits, losses to U.S. industries from copyright piracy in Russia in 2001 amounted to \$849.3 million.

Very high estimated piracy levels in all copyright sectors accompany these massive losses. The piracy levels reported by the copyright industries are as follows: the recording industry is at 64%; the motion picture industry is at 80%; the software industry is at 83% for business software and 90% for entertainment software; and the book publishing industry reported high levels of piracy, but was unable to provide actual statistical levels.¹

For the past several years, the powerful and organized criminal syndicates that control much of the pirate market in Russia have continued to increase in strength and wealth. That is why the most significant problem in Russia continues to be the lack of deterrence in the criminal justice system, with low penalties meted out and currently only a small number of jail sentences for piracy. IIPA has again outlined (below) its enforcement benchmarks; these are steps it believes are necessary to begin to bring down the piracy levels.

There are a number of crucial legal reforms that are necessary to improve enforcement in Russia. These include the need to adopt: (1) proper optical media regulations; (2) amendments to the Criminal Procedure Code to provide police with the proper *ex officio* authority (amendments adopted in 2001 to the Criminal Procedure Code made many changes but ignored this most important one, and essentially left unchanged the commencement and investigation of copyright criminal cases); (3) amendments to the Criminal Code (the problems with Art. 146 "grave harm" provision); (4) amendments to the Arbitration Procedure Code and Civil Procedure Code (to provide for *ex parte* search provisions); (5) amendments to strengthen the Administrative Code; (6) amendments to the Customs Code (to provide *ex officio* seizure authority). 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 result in the opportunity to defeat, or at least significantly improve and shorten, the current deficient and dangerous draft.

Despite a relatively good copyright law, Russia's legal regime is still deficient in a few key areas. Protection for pre-existing works and sound recordings is still not provided. This applies to U.S. sound recordings prior to the 1995 accession to the Geneva Phonograms Convention (and for domestic recordings prior to the 1993 Copyright Law); and, for works it applies to pre-May 27, 1973 material (the date of Russia's official accession to the Universal Copyright Convention as a successor state to the Soviet Union's obligations). A number of draft copyright law revisions have circulated over the past several years; the drafts reviewed by IIPA in 2001 would, we believe, correctly address the protection for pre-existing works and sound recordings. The current draft reviewed by the IIPA was prepared by an amalgam of government ministries under the supervision of ROSPATENT, the agency in charge of copyright matters since 2000, and serves as a joint draft of two key parliamentary committees tasked with enactment of the law. These draft provisions to correct the protection for pre-existing works and sound recordings must be adopted in 2002, not only to comply with the Bilateral Trade Agreement and the Berne Convention (and eventually WTO TRIPs), but also as an effective anti-piracy measure to stop the flood of back-catalog material

¹ In an article in the IPR strategic business information database (July 23, 2000), Lieutenant-General Magomed Abdurazakov, deputy chief of the Main Department for Public Order in Russia, estimated that in the case of videocassettes, audio products and computer software, the overall piracy rate was 90%. He called it one of the most profitable criminal businesses in Russia.

from drowning out legitimate markets. The draft copyright law is also intended to add new provisions to implement the new WIPO Internet treaties. Unfortunately, these amendments appear stalled at the moment as the result of many competing ministerial versions and interests, and a misguided prioritization of adopting Civil Code (Part IV) amendments ahead of the more critical copyright amendments.

In 2001, President Putin met with representatives of the information technology industries and later announced the adoption of a program entitled “Electronic Russia” to facilitate the development of these industries, including the software industry, in Russia. In addition, upon the urging of all of the major copyright industries, the President’s Office and the Ministry of Justice prepared amendments for the Duma to the Criminal Code aimed at strengthening copyright protection. Although the proposed amendments still need additional improvement if they are going to result in effective enforcement, they are seen as a step in the right direction.

Nevertheless, Russia’s copyright regime remains TRIPS-incompatible substantively, and especially with respect to enforcement.

For these reasons, IIPA recommends that the Russian Federation remain on the Priority Watch List in 2002, and further, that the United States aggressively utilize the GSP program to obtain the needed enforcement actions from the Russia government, as well as the necessary legislative reforms.²

RUSSIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	250.0	80%	250.0	90%	250.0	90%	312.0	85%	312.0	85%	312.0	95%
Sound Recordings / Musical Compositions	285.0	64%	250.0	70%	200.0	70%	170.0	75%	165.0	65%	170.0	70%
Business Software Applications ³	92.7	83%	89.0	89%	134.5	89%	196.1	92%	174.5	89%	298.2	91%
Entertainment Software	173.6	90%	NA	94%	241.1	95%	240.8	97%	225.8	95%	223.0	93%
Books	48.0	NA	48.0	NA	48.0	NA	45.0	NA	45.0	NA	45.0	NA
TOTALS	849.3		637.0		873.6		963.9		922.3		1048.2	

²For a history of Russia’s involvement in the Special 301 process, see Appendix E.

³ BSA loss numbers for 2001 are preliminary. In IIPA’s February 2001 Special 301 filing, BSA’s 2000 estimates of \$124.4 million at 89% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

COPYRIGHT PIRACY IN RUSSIA

Optical Media Production Grows

Over the past several years, Russia's capacity to produce pirate optical media product (music CDs, videogames, VCDs and, increasingly DVDs) has grown significantly. It is now estimated that 17 optical media plants operate in Russia with a total capacity of at least 150 million units per year, and possibly that number is as high as 183 million units. The motion picture anti-piracy organization (RAPO) reports that there are now three DVD plants in Russia: Two are in Moscow (Repli Master and Russobit-Soft) and one in Odintzovo, 15km from Moscow (ROFF), with a combined maximum capacity of 3.6 million discs per year. The Repli Master plant is a new plant opened in 2001. The copyright industries also know of one pirate DVD plant just outside Moscow that is under investigation and could be producing up to 25,000 discs a month. RAPO reports that pirate DVDs are appearing on the market within two days of legitimate release of theatrical motion pictures. The recording industry reports that two new CD plants opened in 2001 and six of the existing plants increased their production capabilities.

Russia remains one of the largest destination points for pirate optical media product, and as these figures show is now one of the major producers as well. Most of the imported material is smuggled in from neighboring states like Ukraine and from pirate operations throughout Southeast Asia (Malaysia, Thailand, Hong Kong, Macau, etc.).

To stop the growth of optical media piracy in Russia, the government must improve its efforts at the border (to stop the import and export of this material), and it must adopt comprehensive optical media regulations and enforcement provisions. In 2001, Russia did adopt a law intended to improve enforcement against local optical disc plants. That law, "On Licensing Separate Activities" (under which production facilities must be licensed by the Ministry of Press and Information effective February 1, 2002), unfortunately is an inadequate response to the serious problem of optical media regulation. The Russian government must work with the international copyright industries to adopt regulations and enforcement provisions that have worked successfully in other countries to stop this form of piracy. In fact, the copyright industries report that sales of illegal optical media material increased in 2001, in part because of a weakening of the administrative measures aimed at regulating the production, distribution and sale of this material.

Proper optical media regulations and enforcement provisions would effectively strike at the production and distribution operations in Russia. In the absence of these provisions, the copyright industries have had to rely on raids and seizures of pirate optical media product; while successful, these activities do not result in closing or stopping production at illegal plants. As in other years, such raids and seizures continued in 2001.

In June 2001, IFPI reported on the successful completion of an investigation and prosecution of members of an international organized crime group implicated in the illegal manufacturing and distribution of CDs. Since many raids and seizures do not end in criminal convictions, this operation was a notable success. In this case, the Russian Ministry of Interior (Investigation Unit) was responsible for the ultimate conviction of the head of the organized crime group, who was given a three-year sentence, and 11 members of that group. The members were sentenced to a variety of terms, and were convicted of criminal offenses including customs and

contraband violations. The syndicate had been involved in illegal CD manufacturing in Bulgaria, including distribution in Russia dating to 1997; the IFPI estimated that over 2 million CDs were smuggled and distributed in the Russian territory through over 20 fictitious companies and agreements in Bulgaria and Russia and a network of wholesale distributors. The key to the investigation was the discovery by Russian customs officials of CDs and inlay cards coming from Bulgaria to Russia through an intricate network of couriers. A raid on the organization resulted in the confiscation of 400,000 CDs and a very large number of inlay booklets (as well as many false contracts and delivery agreements). IFPI estimated that its member companies lost \$300,000 due to this one operation.

In June 2000, IFPI investigators, together with officials of local police departments, conducted a number of joint raiding operations, which resulted in the seizure of 6,540 CDs consisting of international repertoire. The director of the VITACOM Company was charged with violations of the administrative code, and all of the products seized in a raid on that plant were destroyed. Despite this fact, the company continued its unlawful activity, albeit with more care in light of the raid and administrative law action. In April 2001, IFPI investigators, acting undercover, made test purchases from the company's catalogue; they ordered over 66 CD titles of clearly pirate product. In late May 2001, investigators ordered an additional 500 pirate CD titles. Local police officers conducted raids in June 2001 and confiscated 22,200 CDs and 59,600 inlay booklets in the same company's warehouse. Further investigations are underway; in October several company employees were charged with administrative law violations and the seized CDs were destroyed. But no criminal prosecutions have yet resulted.

The 2001 raids followed several successful ones in 2000 including the January 2000 raid by the Ministry of the Interior's Economic Crime Unit against the Moscow-based Storm Company, in which 600,000 illegal music CDs and other pirate optical media product plus 2 million inlay cards destined for the domestic market and export were seized. The company was making and distributing pirate CDs for sale in Russia and other European countries. But like many cases, this one did not lead to a criminal conviction; in fact, the case was closed due to the May 2000 amnesty declaration. In October 2001, the 600,000 CDs that had been seized were destroyed.

In 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. In December 2000, RAPO seized 110,000 CD-ROMs with MPEG4 titles and identified the plants suspected of producing these discs, one in Zelenograd near Moscow and the other in the Urals, Siberia. These plants appear to have ceased the manufacture of CD-ROMs containing MPA member company titles following approaches by RAPO, and this, combined with RAPO's retail raiding activity, reduced the availability of such discs. Smaller, yet to be identified facilities are, however, still suspected to be in operation. Throughout 2001, RAPO seized a total of 890,000 MPEG-4 CD-ROMs and over 5,300 pirate DVDs.

The pattern of successful raids without successful prosecutions (with the exceptions noted above) dates back several years. 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. In that case, 100,000 CDs and 500 stampers were seized from the plant's premises, and the plant's equipment has been seized. However, even after tens of thousands of discs were seized and four

members were accused of crimes, only two members of the reported “criminal gang” responsible were arrested, and even their convictions remain elusive.

The business software industry reports that in 2001, 46 police raids against CD-ROM resellers were undertaken, but only one of those cases was considered a “large-scale” raid. In that case, about 50,000 CD-ROMs containing illegal software were seized.

Piracy of videogames in console and PC optical media formats continues to be rampant. However, the vigorous enforcement efforts and large seizures noted just a few years ago (in IIPA’s 2000 submission, for example) have greatly diminished due to the dangerous conditions that exist because organized criminal elements control videogame piracy in Russia.

That is why there is virtually no importation at present of pirate PC entertainment software products from other countries. The Russian syndicates are now able to produce more than sufficient amounts to meet domestic demand and are exporting their additional production into other countries in the region (such as Estonia and Bulgaria) and throughout the world. CD factory production has increased; in part this is due to the migration of production facilities back to Russia from Ukraine. It is believed that this increased production capacity is due to the exclusive involvement of organized crime in the piracy operations in Moscow. It is widely suspected that during 2001 these criminal syndicates consolidated their efforts and divided the markets among themselves. In the past, individual syndicate operations were smaller in scale; now, with the suspected consolidation of these syndicates, the operations are so large that they can potentially destroy legitimate markets in the Scandinavian countries, as well as expand into the Western and Eastern European territories. 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 in the Russian language to Israel.

There is little enforcement on-going in Russia against entertainment software piracy at present. This is largely due to control of the market for PC entertainment software products by these syndicates. The raids that are conducted are only against small retail operations; thus, these actions have little or no effect on ridding the market of pirate game products. In some instances, police officers know where pirate products are being sold, but will only conduct raids on establishments if money is paid by the right holders to the police. If the pirate “outbids” the legitimate distributor, the goods will often be returned to the pirate after the “raid.” No further action or prosecution is taken. For obvious reasons, it is difficult to document these instances of government corruption. The IDSA member companies and other videogame publishers now have legitimate local contractors in place, but the problems of insufficient enforcement and corruption are major obstacles to successfully launching their businesses. The situation is comparable to the era when legitimate motion picture home video distribution was brought to Russia. As was the situation then, the danger faced by local distributors from organized crime groups is considerable; the crime syndicates routinely threaten legitimate game publishers. So it is very difficult, if not impossible, to bring any enforcement action, and to operate a business with success, in this climate.

RASPA, the Russian anti-piracy organization for the entertainment software industry, continued its frequent raids, especially in the 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, lack of follow-up and court

action with deterrent penalties also continue as a core problem, as with piracy of other copyrighted products.

The piracy rates in the area of videogames remains at an estimated 90%. Total losses in 2001 in the entertainment software industry were estimated at \$173.6 million.

While a large amount of pirate optical media product continues to be smuggled, domestic Russian pirate production capacity has increased to between 150 and 180 million units a year, and production itself has increased to 42 million CDs a year (including local and international repertoire), which is a 20% growth from the previous year. Illegal VCD, DVD and CD-R product is showing up in markets with increasing regularity. For the motion picture industry, optical discs are growing in popularity, even though they remain generally eclipsed by VHS use. RAPO now believes that most of the pirate DVD material available on the market is being produced in Russia. Ukraine used to be a major supplier to Russia, but due to the closure or suspension of some of the plants there production has slowed; in some cases plants or lines have migrated into Russia. CD-ROMs containing movies "ripped" from DVDs with Russian language tracks are indications of the increased sophistication of those that are producing pirate products for the Russian population. In addition, some producers are taking advantage of the legal gap that denies protection to pre-1973 works, and are manufacturing and distributing DVDs containing important back catalog titles.

In sum, the success caused by the raids and seizures of illegal musical, audiovisual, videogame and software material noted above, will remain limited, without proper optical media regulations combined with a vigorous campaign of convictions and deterrent penalties to control further pirate production.

Other Piracy Problems and Piracy Levels

Video piracy around Moscow remains at an estimated 50%; piracy outside Moscow remains at about 70% to 90%. Organized criminal gangs control over 50% of 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. The increased availability of legitimate product in the marketplace has resulted in consumer demand for better quality copies (which in turn has resulted in higher quality counterfeits).

A major step in early 2001 was the closing of the infamous Gorbushka outdoor market in January. Until its closure it was the major source of pirated material in Moscow, with many distribution hubs located in the vicinity. Now that Gorbushka has closed, the market has been split into two separate markets (in an enclosed pavilion and army sports center), making it somewhat easier to enforce and control piracy. However, the local anti-piracy organization (RAPO) reports that video piracy has returned to the new Gorbushka market (which is partly owned by the Moscow city government) and that it is encountering severe difficulties in securing any police enforcement there. The Mitino market, which was the second major outdoor market after Gorbushka, remains open and has now surpassed Gorbushka as the major focal point for pirate distribution and regular raids by RAPO. It is also a major source of pirate optical discs. RAPO also reports that the Moscow police have become less willing to conduct raids anywhere in the past few months and that RAPO is encountering increasing problems with corruption. Senior police officers are no longer interested

in intellectual property protection. The reduced raiding activity is leading to an increase in the availability of pirate product of all kinds on the streets.

The recording industry reports that the closure of the Gorbushka market resulted in the migration of illegal sales moving to the nearby Lia-Lia Park, a new trade center for music piracy that has created a very serious problem. The Moscow city government has pledged to clean up Lia-Lia Park and to regulate the sale there of only legal product, but so far this has not transpired.

During 2001, RAPO began to expand its activities outside of Moscow; it now has local operations in St. Petersburg, Ekaterinburg, Novosibirsk, Rostov-on-Don and Nizny Novgorod. RAPO's raiding activity outside Moscow included one raid on a pirate video laboratory in Nabereznaya Chelny, Tatarstan. In the raid, RAPO found 190 VCRs recording pirate product. The packing operation occupied two rooms that included packing machines, a scanner, 11,000 recorded VHS tapes, 50,000 blank tapes and 6,000 masters. Documents found during the raid indicated that during the past year this one lab had produced and sold in the neighborhood of 700,000 pirate VHS tapes. This resulted in about \$1.2 million in income to the pirates.

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.

Although broadcast television piracy continues to be a problem outside Moscow, the government has made significant progress in regulating this industry. The Federal Service for Television and Radio (FSTR), began in 1998 by working with MPA member companies to regulate the broadcast market; it has now been folded into the new Ministry of Press, Television and Mass Media. The new ministry, along with RAPO, has established an inter-ministerial "Expert Committee" to forge strategies to fight this type of piracy. Their actions resulted in several stations receiving fines. In addition, RAPO institutes two or three regulatory actions a month and has been involved in several criminal actions.

Cable piracy in Moscow has all but disappeared, but there are still rampant abuses in the rest of the country. RAPO is working closely with the Ministry of Press on this issue.

The recording industry conducted around 300 raids against music pirates in 2001, and seized and destroyed a considerable number of CDs, inlay cards and equipment. Audiocassette piracy levels remain very high (at about 64%) despite this major raiding activity and the expenditure of major resources by IFPI. Moscow and its region are accountable for most 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. In fact, for the first time, the volume of counterfeit cassette sales decreased by approximately one million copies. Out of a total of 154 million counterfeit cassettes sold in Russia in 2001, 94 million were international repertoire, which is 40 million less than in 2000. The reason for this is partly due to the expansion by some of the U.S. and European labels of their legal catalog in Russia at competitive prices, so the pirates moved into the market with more local repertoire. Also, there are more illegal copies available now than in previous years of MP3 format material, which is offered at very low prices (70 rubles, or less than US\$3) for hours of music per disk. This has contributed to the increase in CD production and distribution. It is estimated that approximately one million counterfeit CDs with MP3 music were sold in Russia in 2001. Music piracy will continue to grow unless there is considerably more effort undertaken by the Russian law enforcement agencies and the courts against pirates, including

imposing deterrent penalties. Efforts also have to be taken to increase general public awareness of and the harm done to the local economy (and local artists) by piracy.

As noted above, the level of piracy for entertainment software is 90% of the market; losses incurred by the entertainment software industry in 2001 were estimated at \$173.6 million. Just as the growing penetration of computers and the Internet in Russia is causing a growth in online piracy of music and sound recording in the MP-3 format, it also has resulted in a growth in the amount of online piracy of games in Russia. There are also a large number of hacker rings in Russia that have caused problems, particularly for the videogame industry.

The business software industry reports losses of \$92.7 million in 2001 (these are preliminary figures; final figures will be available later in 2002). The preliminary piracy level was estimated to be 83%.

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. Unlicensed imports of pirated reprints from the Ukraine, pirated reference books and medical texts still abound. A new wrinkle seems to be the unlicensed translations of fiction bestsellers that are available for download on Websites in Russia. This phenomenon is appearing in a number of the C.I.S. countries, but more often in Russia than in any of the other countries. Increasingly, the Russia crime syndicates control the pirate book business. The "hidden print run" and "overrun" problems remain, where printers of legitimate editions deliver additional unauthorized copies to crime syndicate distributors before delivering books to legitimate publishers. The Association of American Publishers (AAP) estimates losses in Russia in 2001 were \$48 million.

COPYRIGHT ENFORCEMENT

Criminal Enforcement

Inadequate criminal enforcement cutting across all copyright industries remains the most glaring deficiency in the Russian copyright system. This is especially true as the role of organized crime syndicates have grown in influence in commercial piracy in Russia. This lack of effective criminal enforcement has kept piracy levels at unprecedented high levels (see the trade loss and piracy rate chart above). The federal police and the IP unit in the Ministry of the Interior have generally been cooperative in running raids against major pirates (the Unit "R" has had IPR enforcement jurisdiction taken from it). At the retail level, however, it is now clear that anti-piracy 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 anti-piracy organization for the film industry, RAPO, conducted a total of 1,839 raids in 2001, seizing over 1 million pirate videocassettes, 890,000 pirate CD-ROMs containing films in MPEG4 format, and 5,330 DVDs. In addition, they seized 4,500 VCDs and over 3.5 million preprinted sleeves.

In 2001, RAPO initiated police raids on 232 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.

RAPO initiated 256 criminal cases in 2001 and received 80 favorable decisions. Unfortunately, 32 cases were dropped, and 35 ended with a not guilty verdict. On far too many occasions, prosecutors continue to 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.

As reported above, the recording industry reported a large number of seizures and raids. However, most of these cases were later dismissed or were turned into administrative cases with *de minimis* fines (on average, a fine of five times the minimum daily wage, i.e., 500 rubles, or roughly US\$16).

In 2001 the business software industry assisted with 46 police raids against the CD-ROM resellers resulting in 15 court verdicts based on Article 146 of the Criminal Code. In almost all of these cases, the defendants were lone individuals distributing the products. Unfortunately, the police investigators were either not willing or not able to go after wholesale distributors and the producers of counterfeit products in 2001.

In addition the business software industry obtained two criminal convictions against computer shops selling computers with illegal software installed onto the hard discs (HDL piracy). Notably, in one of these cases, the criminal court found guilty not only the actual salesperson, but also the managing director of the infringing company. This trial court ruling was later affirmed on appeal. Unfortunately, such court rulings have been extremely rare. In fact, a large number of these cases were simply terminated by prosecutors on the notion that there was no proof of "grave harm" – evidence that the threshold in the criminal code is a hindrance to effective enforcement. Despite the fact that there were a few police raids against software end users (companies using illegal software in their business activities), there were no cases initiated against any of the individuals responsible in those instances.

Through RASPA, many IDSA member companies also undertook raids of larger targets hoping for criminal prosecutions. However, most raids involved seizing product in the local markets in cooperation with 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
2001**

ACTIONS	MPA	IFPI	BSA
Number of Raids conducted	1839	266	99
Number of indictments filed	256	337	42
Number of defendants convicted (including guilty pleas)	80	60	14
Ratio of convictions to the number of raids conducted	4.3%	22.6%	NA
Ratio of convictions to the number of indictments	14.3%	17.8%	NA
Total number of cases resulting in jail time	28	NA	9
1 to 12 months	17		8
13 to 24 months	8		1
25 to 36 months	3	1	
37 to 60 months			
Over 61 months			
Number of cases resulting in criminal fines	17	NA	8
Total amount of fines levied			\$3,500
US\$0-\$1,000	5		6
\$1,001-\$5,000	6		2
\$5,001-\$10,000	4		
\$10,000 and above	2		
Total amount of restitution ordered) in how many cases (e.g. \$XXX in Y cases)	NA	\$2 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. For the third straight year, the recording industry and the motion picture industry report that administrative raids have been positive; RAPO reported that it is able to average nearly 19 administrative court decisions a week against pirate retailers that order illegal product to be confiscated and that impose small fines (on average less than US\$17). Market seizures continue to involve 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 with *de minimis* penalties.

**ADMINISTRATIVE COPYRIGHT
ENFORCEMENT STATISTICS
2001**

ACTIONS	MPA	IFPI	BSA
Number of raids/searches conducted	1072	266	4
Number of administrative cases brought by agency	1061	235	NA
Number of defendants found liable (including admissions/pleas of guilt)	986	203	4
Ratio of convictions to the number of raids conducted	91%	76.3%	100%
Ratio of convictions to the number of cases brought	92%	86.4%	100%
Number of cases resulting in administrative fines	986	183	4
Total amount of fines levied	\$16,433	\$3000	
US\$0-\$1,000	986		4
\$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)			

Civil Enforcement

RAPO has brought and won a few civil cases in 2001 (civil add-ons to criminal prosecution), including one case in Rostov on Don in August 2001 in which the Court ordered the defendants to pay US\$122,300 in damages to the rights holders (in addition to fines totaling US\$2,533 and taxes of US\$22,857). The court found that the accused had been part of an organized gang engaged in piracy for over a year. RAPO had seized 119 VCRs and 11,800 pirate cassettes in a raid on the gang's laboratory. One of the accused was given a suspended sentence of three years; two others received six month suspended sentences.

In 2001, the business software industry chose to file separate lawsuits in the arbitration court, rather than pursue civil claims as an adjunct to a criminal prosecution. In 2001, a major case was won against one of the biggest Russian PC assemblers installing illegal copies of business software onto sold computers. The Moscow Arbitration Court granted the rights holder damages in the amount of almost US\$20,000. The higher courts then affirmed the court decision.

However, deficiencies in the copyright law still make it very difficult to apply civil remedies in end-user piracy cases. In 2001, courts issued contradictory rulings in similar civil cases against end-user companies caught using illegal software in their business activities.

**CIVIL COPYRIGHT
ENFORCEMENT STATISTICS
2001**

ACTIONS	MPA	BSA
Number of civil raids/searches conducted	25	NA
Post Search Action		4
Cases Dropped	20	0
Cases Settled		4
Cases Adjudicated	5	
Value of loss as determined by Court (\$USD)	\$327,500	
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		
\$20,001-\$50,000	1	
\$50,001-\$100,000	2	
\$100,000 and above	2	
Settlement Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)		\$18,660

IIPA Enforcement Objectives and Benchmarks

For the past five years, IIPA has outlined a series of benchmarks that the USG has periodically provided to the Russian government on improvements needed in Russia's enforcement system. To date, these have not been implemented. That is unfortunate, because IIPA believes that these steps would go a long way toward the implementation of an effective enforcement regime in Russia.

In addition to taking more forceful and consistent enforcement actions in 2002, 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. While the Russian government has not seen fit to implement any of these obvious measures (first proposed by the IIPA in 1997), they remain fully valid today. Now that the U.S. government has accepted the IIPA's GSP petition and heard testimony on these very proposals, it is hoped that the Russian government can be persuaded in bilateral talks under the Special 301 and GSP process to move this agenda forward.

The President and the Prime Minister should issue a decree or internal directive making copyright enforcement a high priority.

The Interministerial Task Force 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 follow-up 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 (e.g., the presumption of authorship and rights ownership, and the necessity to put the burden of proof on the violator, not the right holder; admittance of evidence regarding title/ownership, etc.) 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. Anti-piracy 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.⁴ Without deterrent financial penalties and imprisonment, experience shows that piracy, indeed economic crime in general, cannot be brought under control.

⁴ IIPA has been 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. However, special teams consisting of prosecutors, police officers and representatives of other enforcement agencies often conduct investigation of other serious crimes.

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. The U.S. government proposed a comprehensive training program to the Russian government; but only 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. For the first 11 months of 2001, Russia exported goods valued at \$359.2 million to the U.S. that received preferential duty-free treatment under the GSP program (in calendar year 2000, Russia received \$514.7 million). This preference was granted to Russia even while the copyright industries were losing close to \$1 billion a year (for each of the past five years); the more precise number is that the industries lost \$849.3 million in 2001. As a result of the frustratingly slow progress against piracy in Russia, the IIPA filed a petition (in August 2000) to suspend some or all of Russia's GSP benefits. The U.S. government accepted the IIPA petition in 2001 and held hearings in March 2001. It is hoped that the U.S. government will announce its decision soon and that it will suspend these benefits unless or until there is significant progress with the enforcement regime in Russia.

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. Another frustrating step was the adoption in 2001 of a new Criminal Procedure Code without adopting the key enforcement tool of providing *ex officio* authority to the police as recommended by the U.S. government and the IIPA for a number of years. In addition, it is critical that Russia extend full protection to pre-existing sound recordings and works consistent with the TRIPS Agreement (and Berne/bilateral) obligations, and that Russia adopt civil *ex parte* search procedures in its Civil Procedure Code and Arbitration Procedure Code. All of these are clear TRIPS requirements.

For the past several years, IIPA has provided an analysis of draft amendments to Russia's copyright law, and to the criminal code, the criminal procedure code and the administrative codes, all with the goal of increasing the penalties for copyright infringement and providing more effective enforcement procedures. Unfortunately, with the exception of the disappointing Criminal Procedure Code, these laws have remained unchanged. In addition, some of the proposed amendments remain TRIPS incompatible, and if adopted, may result in further delaying Russia's progress toward WTO accession.

Regarding the copyright law amendments, it was hoped that 2001 would be the year of the adoption of improved draft laws, but this was not the case. The most recent draft that is now “in play” is the amalgamation of several ministerial and parliamentary committee drafts that are now reportedly being reconciled by a working group into a single draft (the “consolidated draft”) in order to move the process forward.

As previously noted, the most positive development in the past two years was the placing of responsibility for copyright matters under ROSPATENT, which also has the portfolio for patent and trademark matters. The agency sought the help of WIPO and other experts on the draft laws. In discussions with the IIPA in 2001, the drafts that were provided to IIPA would properly correct the “retroactivity” (protection for pre-existing works and sound recordings) deficiencies; the draft law was also intended to make other changes, most notably adding provisions directed at implementing the WIPO treaties. Russia has also announced that it wants to join the WTO sometime in 2003; this will necessitate a major legislative push, both on the copyright law as well as on enforcement-related laws to make its laws compatible with the TRIPs agreement.

Recent reports are that the so-called “consolidated draft” (incorporating the ROSPATENT, the “Komissarov” and the Duma Committee on Culture’s competing draft laws) is now being discussed and reconciled by a working group so that it can be formerly submitted by the Committee on Culture and Mr. Komissarov for the Duma’s consideration. The consolidated draft reportedly contains the following provisions:

- a. Provisions providing protection (for a minimum of 50 years) for pre-existing works and sound recordings. These so-called “retroactivity” provisions appear to be satisfactory, but there should not be any transition period for selling off previously unprotected material;
- 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 (or 70 years from publication), but left at 50 years for phonograms – which is inadequate;
- d. There have been improvements in the computer program decompilation provisions from earlier drafts;
- e. New provisions were added in 2001 governing technological protection measures (TPMs) and rights management information (RMI), both WIPO treaties requirements;
- f. Provisions that would clarify the TRIPs rental rights: One troubling development is a provision that would narrow the rental rights granted to copyright holders with respect to computer programs;
- g. Some of the other troubling provisions in the draft include: the failure to clarify the protection for temporary copies; the failure to clarify the scope of exclusive rights for producers of sound recordings; new provisions giving collecting societies even more power and interests; failure to rectify the scope of the existing private copying levy in the digital environment; and the failure to narrow certain overbroad exceptions to the rights of authors and producers of sound recordings.

While most of the revisions are positive (with exception of the term for sound recordings and the brief points highlighted in (f) and (g) above), there remains opposition within certain quarters of the Putin Administration and the Duma to passage of the copyright law. It is hoped that the USG will continue to engage the Russians to ensure that the law passes both quickly and with provisions that repair all substantive TRIPs deficiencies and correctly implement the WIPO treaties.

A new Code on Administrative Misdemeanors was adopted on December 30, 2001 and it will come into force on July 1, 2002. Pursuant to this Code, it will be possible to initiate administrative cases against legal entities and to impose fines on them in the amount from US\$900 to US\$1,200 for copyright infringements. However, the practical implementation of this new law is likely to be very limited because it falls under the competence of underqualified municipal police. It is also unfortunate that none of the long-pending amendments to the Criminal and related Procedure and Administrative Codes were adopted (even though the Criminal Procedure Code was revised last year).⁵

The following details the history of the enforcement-related amendments that still await and which 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 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 limits 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 limits 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; this has been made even more difficult because these changes were ignored in the 2001 amendments adopted to the CPC, effective July 1, 2002.

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 2002:

⁵ Amendments to the Administrative Offenses Code were passed in 2000, effective March 1, 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 that 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\$1,500). 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 was, in years past, a proposal to further lower the threshold to 50 times the minimum wage, or US\$150, but this was never adopted.

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.

In December 2001, President Putin sent Parliament an amendment to Article 146 to abolish the “significant damage/grave harm” language, and to substitute for it a formal criterion of what would be used to determine “in a significant amount” for criminal infringement of works and phonograms. The concept of the amendment, setting a fixed amount, is consistent with industry proposals, but reportedly the threshold amount still is too high in the proposal. The proposal reportedly defines two thresholds: a “grand-amount offense” (200 times minimum wage) and a “gross-amount offense” (500 times minimum wage). The punishment for convictions would increase from 200 to 400 times the minimum wage (approximately US\$600 to US\$1200) for grand-amount offenses; it would increase for up to 3 to 6 years imprisonment for “gross-amount offenses”. If these thresholds can be further lowered to a fixed but reasonable amount (starting, for example, at 50 times the minimum wage), then this will improve criminal enforcement when coupled with the tougher penalties, if such a proposal can be actually implemented by the courts.

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, 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.

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 in all other cases. Although it had been reported in 2000 that the Duma's IP Working Group might 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, the CPC amendments were adopted in 2001 without this important change. Also unchanged by the 2001 amendments, but in serious need of revision, 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 and the Arbitration Procedure Code or the copyright law to provide *ex parte* search authority. While the current Civil Procedure Code (Articles 134 and 136) and Arbitration Procedure Code appear to permit imposition of liens on property as security for judgment measures, the law must secure evidence through civil searches and civil seizures in *ex parte*

proceedings to be able to commence civil relief. 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. Article 50 of the TRIPS Agreement requires the availability of civil *ex parte* search procedures.

Second, the Duma 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 (i.e., Ukraine), and from Asia. It was reported in 2000 that the State Customs Committee was working on a draft of a new Customs Code with the assistance of the Ministry of Economic Development and Trade; however, these provisions were never adopted. Reportedly, a new Customs Code will have its second reading in the Duma in March 2002. Since the Russian government is seeking WTO acceptance, the U.S. government should insist that Russia make these necessary changes before its accession to the WTO can proceed so that Russia will have a fully TRIPS-compatible Customs Code in place.

Civil Code

The effort to include detailed copyright provisions as part of comprehensive civil code reform remains a continuing threat. In December 2001 it was again reported that the IPR provisions of the Civil Code are very much alive, and supported by many entities both within and without the Russian government. Last year, the controversy surrounding this issue resulted in a decision to place the IPR issue into Part IV of the Civil Code, where it could be dealt with independently. It is imperative that Russia not adopt the copyright provisions in the latest draft IIPA has seen. That draft continues to contain numerous provisions incompatible with the bilateral Trade Agreement, Berne and TRIPS. At most, 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

An issue of concern for the past couple of years was the Moscow Stamp Tax. Until January 2001, the Moscow city government required all video and audio cassettes, optical discs and computerized information carriers to have a "protective identification mark" (i.e., a stamp) tax. The stamps bore no relation to copyright ownership, yet purported to legalize product in the market. Protests against this tax from the copyright industries resulted in another ordinance (Ordinance No. 73) that abolished the stamps but created a registration stamp/mark in its place. There is a lingering question whether or not the new registration stamp/mark is mandatory because the law is not clear. However, this discussion is, for most industries, theoretical because in practice most of the copyright industries continue to purchase the stamp/marks out of fear of retaliation. There is now discussion in the Russian government about creating a federal stamp. For at least one industry, a

self-regulating program of affixing holograms and monitoring compliance on behalf of rights holders is now under consideration as well.

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. From the time of its enactment, this tax effectively barred legitimate companies from entering and developing a video rental market in Russia, and instead protected and promoted pirate activity. On January 1, 2002, Chapter 25 "On Profit Tax of Organizations" of the Russian Federation Tax Code came into force. The 70% tax is excluded from this law, and video rentals will now be taxable at the general rate of 24%. Although this is still a very high rate, it is obviously a major improvement from the oppressive existing tax. Hopefully, this will help the video market's growth in Russia.

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. Until now, as a result of the 70% tax, companies were forced to enter the video market (if at all) with sell-through product only, which essentially limited the market to only those few consumers who could afford higher end entertainment. Since buying a video is beyond the means of the average Russian consumer, but renting a video is not, it is hoped that the rental market can now expand.

Optical Media Regulation

There are reportedly at least 17 CD plants in Russia, including one underground plant. With the reduction in the availability of pirate product from Bulgaria, China and Ukraine, these plants have increasingly become involved in producing for pirates. In fact, some of the Ukraine plants migrated to Russia during the past year. Russia remains a haven for CD pirates.

A licensing law, signed by President Yeltsin in 1998, required any plant manufacturing audio or video product on CD to obtain an operating license; but that law failed to extend to all copyrightable subject matter, and was inadequate. Then, in 2001, Russia adopted a law intended to further improve enforcement against local optical disc plants. That law, "On Licensing Separate Activities" (under which production facilities must be licensed by the Ministry of Press and Information effective February 1, 2002), was unfortunately a further inadequate response to the serious problem of optical media regulation.

As the scope of the problem of optical media production in Russia has grown, the need for comprehensive and effective regulations and enforcement laws has become even more critical. IIPA and its members continue to urge the U.S. to press Russia to implement an overall optical media regulation program, following those that have been proposed for or adopted in many Asian and other Eastern European countries. This must be undertaken quickly before the problem gets even worse. The elements of an effective optical media regulatory and enforcement 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 internationally recognized identifier (such as a source identification [SID] code or its successor) on all masters (stamper) and finished products produced within the country, indicating the source of manufacture.
- Record-keeping 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. At a minimum, the licensing body should have the statutory authority to obtain the above information and to share it with rightsholders in its discretion. 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 right holder 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

In addition to the other legal reforms, Russia should adopt legislation that fully implements the digital treaties (WCT and WPPT); this 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. This draft law should be carefully watched by the industries and the U.S. government to ensure that e-commerce is not over-regulated and that liability issues for copyright infringement on the Internet are dealt with in a manner to ensure that right holders can properly and effectively enforce their rights, consistent, for example, with the U.S.'s 1998 copyright law revisions pertaining to ISP liability and remedies in the Digital Millennium Copyright Act (DMCA).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY¹

Progress in the fight against piracy in South Korea turns increasingly on its ability to modernize its legal framework and reform its enforcement practices to respond to a growing challenge of digital and online piracy. The steps Korea has already taken to update its two principal copyright laws are commendable, but much more is needed, notably with respect to exclusive rights for record producers in the online environment; comprehensive prohibitions on measures aimed at circumventing protective technologies; providing incentives for online service providers to cooperate in combating piracy; and clarifying the copyright owner's right to control the making of temporary copies. Despite a two-month crackdown campaign, enforcement against institutional end-user pirates of business software remains hobbled by a lack of transparency, reluctance to coordinate with the private sector, a lack of sustained effort, and ineffective public education, all of which contribute to a gap between presidential statements against corporate end user piracy and government performance in this area. Book publishers hailed a high-profile conviction and sentencing but wait to see whether this indicates a trend. While the government remains responsive and cooperative in fighting videocassette piracy, the rates of piracy remain disturbingly high. A long list of unfinished law reform business also calls out for attention. Finally, screen quotas remain as an unjustified market access barrier. 2002 may be a significant year in determining whether Korea's unquestioned progress in broadband penetration, and the proliferation of low-cost technology such as CD-R, will be used to promote legitimate e-commerce or simply to spawn new forms of piracy. Accordingly, IIPA recommends that South Korea be maintained on the Special 301 Priority Watch List for 2002.

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

SOUTH KOREA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	25%	20.0	20%	20.0	20%	20.0	20%	16.0	13%	18.0	15%
Sound Recordings / Musical Compositions ²	4.0	14%	7.0	19%	10.0	20%	10.0	15%	10.0	15%	6.0	10%
Business Software Applications ³	134.2	47%	177.2	56%	118.9	50%	115.7	64%	274.6	67%	193.2	70%
Entertainment Software	487.7	63%	157.0	90%	119.0	63%	122.1	65%	145.8	62%	186.0	65%
Books	35.0	NA	39.0	NA	39.0	NA	35.0	NA	30.0	NA	30.0	NA
TOTALS	685.9		325.3		306.9		302.8		476.4		433.2	

KOREA MUST RESPOND TO THE LAW REFORM AND ENFORCEMENT CHALLENGES OF DIGITAL AND ONLINE PIRACY

The shape of piracy in Korea is rapidly changing: it is becoming more predominantly digital, moving online, and migrating to dispersed production formats such as CD-Recordable (CD-R). Piracy of analog formats – audiocassettes, videocassettes, and books and other printed materials – remains a serious, and in some instances a worsening, problem. But technological and market trends are clearly pushing piracy in a new direction. Simply put, technological advances are increasing the opportunities for piracy, and pirates are taking full advantage of them.

As the OECD concluded last year, “in terms of broadband access to the Internet, Korea is by far the leading performer.” In mid-2001, an estimated 13.9% of all South Koreans were subscribers to broadband access – more than twice as high a percentage as in any other country in the world. OECD observed that this rate could reach 20% by the end of 2001. It is sure to grow: One provider alone claims to have the facilities in place to offer DSL service to 92% of all Koreans.⁴ Such high-bandwidth connections open up an enormous market for downloads of music, audiovisual materials, videogames, and software, both legitimate and pirate. Combined with the growing penetration of low-cost CD-R technology in the Korean marketplace, new avenues for piracy abound, bringing new challenges to the Korean government.

The experience of the recording industry may be instructive. Audiocassette piracy remains a huge problem: Nearly 900,000 pirate cassettes were seized in 2001, according to the Recording Industry Association of America (RIAA). But nearly all of these involved local Korean repertoire.

² The originally reported estimated music piracy level of 23% for 2000 was adjusted during 2001 to 19%, based on additional data analysis.

³ BSA loss numbers for 2001 are preliminary. In IIPA’s February 2001 Special 301 filing, BSA’s 2000 estimates of \$102.3 million at 52% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

⁴ “The Development of Broadband Access in OECD Countries,” OECD Paper DSTI/ICCP/TISP(2001)2/FINAL, Oct. 29, 2001, at 32-33.

Pirate international recordings make up a much higher percentage of seizures in digital formats: conventional CD and CD-R. Indeed, in 2001, commercially produced pirate CD-Rs appear to have overtaken CDs in terms of seizures. This is driven in part by the declining prices of CD-R equipment and hence of pirate product: Typical street prices for pirate CD-Rs are around 6000 Won (U.S.\$4.50). Many CD-R pirates employ small, dispersed operations, and many of these are fed by peer-to-peer (P2P) online networks, or by high-speed links to a wide array of online sites – more than 100 were located in a recent survey – offering pirate sound recordings in MP3 format. 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 and public institutions. Unauthorized home production of CD-Rs is also on the rise. The RIAA-estimated piracy rate in Korea of 14%, and its estimate of \$4.0 million in trade losses to the U.S. recording industry, do *not* include losses due to online piracy, since the estimation methodology currently in use does not capture these losses.

All the products of the entertainment software industry are digital, of course, but the trends noted above are reflected in the piracy profile for this sector as well. For games in formats to be played on personal computers, the piracy stream increasingly originates from numerous online sites, accessed via broadband, from which games are downloaded as masters for “burn-to-order” operations using CD-R writers. Factory-produced pirate products are becoming less common in the PC game sector, although still a predominant factor in products designed to play on game consoles. Overall, the Interactive Digital Software Association (IDSA) estimates piracy losses to U.S. companies at \$487.7 million, based on an estimated piracy rate of 63%.⁵

In another digital sector, one of Korea’s most intractable problems concerns the piracy of business software applications, which 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 \$134.2 million on U.S. companies in 2001, reflecting a piracy rate of 47%. Most 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.

In the pirate markets in Korea for the audiovisual and book publishing industries, analog formats continue to predominate. These are discussed in more detail below.

An effective response to the challenge faced by the changing nature of digital copyright piracy in Korea will require both new legal tools and substantial improvements in enforcement practices. Korea made considerable progress on the first of these fronts in 2001, but many of the needed law reform tasks remain incomplete. On the digital enforcement side, substantial challenges remain, as exemplified by the problem of end-user piracy of business software.

⁵ Methodological improvements have enabled IDSA to provide a more realistic estimate of piracy losses than in prior years. The sharp increase in the 2001 estimate reflects better data both as to the high level of penetration of both PCs and game consoles in the Korean market, and as to the extraordinarily high ratio of games per platform that is applicable in this uniquely videogames-oriented market, a ratio higher than that used in any other country. The estimated piracy level for 2001 is consistent with the estimates from 1999 and earlier; the higher 2000 estimate reflects a transitional methodology and is believed to be an aberration.

Law Reform: More Modernization of Legal Tools Is Needed

Efforts are being made, of course, to deal with the changing nature of digital copyright piracy within the confines of current Korean law. The notorious music file sharing service Soribada – the so-called “Korean Napster” – was the subject of a criminal indictment during 2001, although legal action has not yet succeeded in closing down the site.⁶ A Seoul trial court also ordered a Website operator to pay damages for allowing infringing activity on its site, reportedly a first for the Korean legal system.⁷ However, there remains plenty of evidence that the current legal framework is inadequate to deal effectively with new forms of piracy. For instance, in an earlier case, a different court in Seoul enjoined an internet service provider from disabling access to MP3 files identified by the rightholder as infringing, thus sending precisely the wrong message to the marketplace regarding the responsibility to cooperate to combat online piracy.

To their credit, Korean authorities have begun to move to update those parts of its copyright legal framework which have become outmoded in light of technological and market developments and the changing character of piracy in Korea. Under Korea’s unusual bifurcated statutory framework, this requires amendments to both the Copyright Act of Korea (CAK) and to the Computer Program Protection Act (CPPA).

CAK Amendments

At this writing, extensive amendments to the CAK are pending before Korea’s National Assembly, and their enactment is expected very soon. In the version of the legislation reviewed by IIPA in late 2001, the CAK amendments contained two important features. First, a new civil and criminal prohibition is proposed on the production of, or trafficking in, devices aimed at circumventing copy control technology used by rights owners. Second, a new Article 77-2 sketches out the framework for a “notice and takedown system” under which an Internet service provider would be given some legal incentive to respond promptly and positively to requests from copyright owners to take down or cut off access to sites where pirate activities are taking place. Both these provisions are important steps forward toward a legal regime more conducive to enforcement against online and digital piracy. However, the proposed legislation contains significant flaws in both these areas which must be corrected; and just as important, the CAK amendments lack key elements that Korea must include in its law in order to respond comprehensively to the challenges that face it.

With regard to technological protection measures (TPMs), the proposed CAK amendments fall short by failing to clearly protect technologies (such as encryption or password controls) that manage who may have access to a work. Another insufficiency is that the amendments do not outlaw the act of circumvention itself, but only the creation or distribution of circumvention tools. Thus, a party who strips off protection and leaves the work “in the clear” for others to copy without authorization may escape liability. Other provisions regarding the scope of the prohibitions and their relationship to copyright infringement also need clarification.

⁶ “Soribada Sued for Copyright Infringement,” Korea Times, Feb. 21, 2001; Newsline, Billboard, August 25, 2001, at 50.

⁷ Kim, “Court Orders Music Web Site Operator to Pay Damages for Copyright Infringement,” Korea Herald, Aug. 27, 2001.

With regard to service provider liability, the proposed amendments leave unclear the consequences (in terms of liability for infringement) for a service provider who fails to promptly take down an infringing site after receiving notice. The amendments also contain a huge potential loophole for those situations in which “it is difficult to reasonably expect [a takedown] for technical, time or financial reasons”; such an exception could easily swallow the rule which the amendments aim to create. Finally, issues about the definition of “service provider” and the mechanics of a “put-back” response from an accused primary infringer must also be resolved.

At least some of the ambiguities surrounding these critical provisions of the CAK amendments could be resolved in implementing regulations, and the Korean government should be urged to do so and to dramatically increase the openness of the process by which it drafts such regulations. But the omissions exhibited by these new amendments can only be corrected by new legislation. Korean authorities should be urged to turn immediately to the preparation of additional CAK amendments that contain at least the following provisions:

- The exclusive transmission right accorded to works under Article 18-2 of the CAK should also apply to sound recordings, and Article 67 should be amended to recognize that sound recording producers have an exclusive right of transmission with respect to their recordings. This is required in order for Korea to implement the WIPO Performances and Phonograms Treaty (WPPT) and would underscore Korea’s commitment to combat the worsening problem of online piracy of sound recordings. This deficiency 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 levels of Internet piracy. Additionally, all phonogram producers, regardless of nationality, should be accorded exclusive rights over digital and subscription broadcasting of their phonograms.
- In order to meet the international standards embodied in Article 9.1 of the TRIPS Agreement (incorporating Article 9(1) of the Berne Convention), the reproduction right accorded to works should be made clearer and more comprehensive, by including within the scope of the reproduction right (1) direct or indirect reproduction; (2) temporary or permanent reproduction; (3) reproduction by any means or in any form and (4) reproduction in whole or in part. Parallel provisions are needed with respect to neighboring rights in order to implement the WPPT. In the networked digital environment, the right to make and use temporary copies of all kinds of works is attaining ever-increasing economic significance, and indeed in some cases will become the primary means of legitimate exploitation of copyrighted materials. Korea’s law must spell out that this right is encompassed within the copyright owner’s exclusive control over reproduction.
- In line with the international trend exemplified by recent enactments in the European Union and the United States, Korea should extend the term of copyright protection for works and sound recordings to the life of the author plus 70 years, or 95 years from date of first publication where the author is a legal entity, or in the case of the neighboring rights of a sound recording producer. In a global e-commerce marketplace, the presence of inconsistently short terms of protection invites piracy and distorts the ordinary flow of copyrighted materials in the market.

CPPA Amendments

As a result of amendments enacted in both 1999 and 2000, the CPPA contains new provisions on protection of TPMs used in connection with computer programs. These provisions avoid several of the pitfalls found in the CAK amendments, although they include several broadly worded exceptions (such as circumvention for the purpose of revising or updating programs, or for encryption research) that must be narrowed. Additionally, the application of the CPPA provisions to access control technologies should be clarified; the offering of services that circumvent a TPM should be explicitly outlawed; and civil enforcement of the prohibition should be explicitly provided for.

Furthermore, no provision of the CPPA specifically addresses the problem of service provider liability. An amendment on this topic should provide the framework for takedown after notice of sites engaged in piratical activities involving computer programs.

Perhaps the most significant gap in the CPPA is Korea's continued failure to provide specifically for the copyright owner's control over temporary copying of a computer program. 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 achieve 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. Finally, and perhaps most importantly, clarification of this point is needed to bring the CPPA in line 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 "use right" recognized under the CPPA, while a valuable contribution to the bundle of rights granted to copyright owners, is not a fully adequate substitute for an appropriately comprehensive reproduction right.

Prompt enactment of the further CAK and CPPA amendments outlined above would also have the benefit of bringing Korea close to full compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and thus of facilitating Korea's speedy accession to these two treaties. It is ironic, to say the least, that such a technologically advanced nation, which seeks to participate more actively in global electronic commerce, lags so far behind in committing itself to the fulfillment of these benchmarks of an advanced legal regime for e-commerce: both these treaties will come into force without Korea as a member. While Korea should be commended for taking the first steps, it should also be encouraged to dedicate itself to completing the task of implementation of the WCT and WPPT during 2002, and to depositing its instruments of accession to both treaties with WIPO as soon as possible.

Business Software Enforcement: Deficiencies Must be Corrected

Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years. 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 and throughout 2000, these enforcement actions dropped off precipitously. Perhaps even more troubling is the fact that during this period, the enforcement operations of the government became

entirely opaque to the U.S. and Korean software industries, and have remained virtually hidden ever since.

As 2001 opened, hopes were raised for a significant turnaround in Korea's record of enforcement against end-user business software pirates. In an on-site briefing on February 19, 2001, President Kim Dae-Jung personally instructed MOIC in no uncertain terms: "Intellectual property rights must be protected.... Where software piracy exists, creative ideas wither... For the market economy to function smoothly and outstanding creativity and ideas to be appreciated and successful, the Government needs to be firm and decisive in this matter." MOIC announced soon afterwards that the government would conduct two "special enforcement periods," in the spring and fall of 2001, to crack down on software piracy in government agencies, educational institutions, and corporations. MOIC drew up the master plan for these crackdowns, which prosecutors were responsible for executing. MOIC also pledged to establish a standing enforcement unit to respond to private sector reports of piracy on an ongoing basis, as well as to conduct publicity campaigns and public education. Both Korean and U.S. software producers, working together in the Software Property-Rights Council (SPC), were encouraged by these announcements, and hoped that a new era of cooperation and effective enforcement against end-user software piracy was beginning.

During the March 5-April 30 crackdown campaign, prosecutors investigated 2,315 companies and public offices that appeared to have been selected at random. According to data released by the Supreme Public Prosecutor's Office, a total of 99,867 PCs were inspected. Of the 359,090 software programs found on these computers, 34,181 were determined to be unauthorized, resulting in a piracy rate of 9.5%. They found that 1,024 of the offices inspected had no illegal software, which means that 56% of those inspected had at least some illegal software. 88 offices were found to have 100% pirate software, and 390 were found to have piracy levels of 50% or more.

While the software industry appreciated these efforts, the results fell far short of industry hopes. The crackdown campaign was conducted under a veil of secrecy. Prosecutors included few if any targets identified by the private sector through the SPC; industry was not called on to provide technical assistance; and copyright owners were not informed about the categories of software or the software programs covered by the inspections, which kept alive suspicions that some U.S. and other foreign-made software is excluded from inspections. Due to shortcomings in the raiding strategy, the level of piracy detected in the raids fell far short of the actual level of organizational piracy in Korea. The lack of cooperation with industry and lack of transparency also made it extremely difficult for companies to follow up the raids 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 second special enforcement period promised for the fall never materialized, and the permanent channel that MOIC said it would create for receiving and acting upon piracy reports still has not invited all representatives of the software industry to participate. It is not even clear whether this Standing Enforcement Committee has any enforcement authority beyond making "educational" visits.

Enforcement against software piracy must be conducted on a sustained basis if it is to be effective. Enforcement agencies must also be willing to act on complaints by industry. The prosecutors' reluctance to investigate industry-designated targets, either during or after last spring's special enforcement period, is particularly frustrating. The explanation given to industry is that the complaints lack sufficient evidence. Korean prosecutors are requiring, in effect, conclusive proof of infringement 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.

The software industry also turns to the police for enforcement. The results are mixed. In the first half of 2002, the police typically acted on complaints within a few weeks of filing. However, from July onward, police actions virtually ground to a halt. The police appear to be reluctant to make voluntary investigations unless there is a government-driven crackdown.

Another long-standing problem is that the penalties that are imposed on pirates are rarely publicized, thus undercutting the deterrent value of the sentence. Frequently, right holders are in the dark about the status of cases involving violations of their rights. Right holders and the public will never appreciate the government's commitment to reducing 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. The anecdotal evidence the industry has been able to compile strongly suggests that sentencing of convicted business software pirates falls far short of deterrent levels.

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. Korean authorities should be urged to:

- Conduct criminal enforcement actions against corporate end-user software pirates on a sustained basis at a rate of approximately 50 raids per month throughout the year. Fifty raids a month, every month, will be a far more effective deterrent than 3,000 inspections carried out during a brief special enforcement period, while piracy is ignored for the rest of the year.
- Provide adequate resources and training to those carrying out enforcement. Industry stands ready to provide training and to offer technical assistance during the raids.
- During the raids, computers must be checked for all categories of software, including programs produced by BSA member companies.
- Eliminate advance notice of enforcement actions and raid targets identified by industry investigators as likely sites of piracy. No institution, including government entities and Korea's powerful *chaebols*, should be immune.

- Allow industry representatives to accompany law enforcement on the raids, and provide complete reports to representatives of right holders 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 to representatives of the companies whose rights have been infringed.
 - Make a determined effort to ensure, and to demonstrate publicly, that the government is a model user of business software applications, by strictly enforcing Prime Ministerial Order No. 1997-12, which requires government agencies to use legal software.
 - Work with industry to provide software asset management training to businesses and government agencies. The public needs to understand why compliance with the law is important, and to receive the tools necessary to allow them to do so.

While structural and statutory changes 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 against institutions that pirate business software.⁸ 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.

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: Will a Landmark Case Set the Tone?

2001 was an exceptionally eventful year for the book publishing industry in its efforts to combat book piracy in Korea. It remains to be seen, however, whether the events of 2001 mark a real change in course from the deteriorating piracy situation faced by U.S. book publishers over the past few years. The losses to U.S. publishers inflicted by book piracy in the Korean market in 2001 are estimated at \$35 million.

On February 26, 2001, in what may have been the largest anti-piracy raid in book publishing history, Korean law enforcement officials, in cooperation with the Association of

⁸ One “reform” promoted at the time the spring 2001 special enforcement period was announced was to give MOIC greater authority to conduct enforcement actions on its own. This will be counterproductive until more transparency is brought to the MOIC inspection system. IIPA has twice proposed to MOIC specific implementing regulations under the CPPA that would achieve this transparency, and both times these proposals were ignored.

American Publishers (AAP), seized a Seoul-area warehouse containing 600,000 counterfeit English language books, comprising some 2,000 separate titles, running the gamut from bestsellers to textbooks, to reference works. The warehouse belonged to Han Shin, one of the oldest book distributors in Korea, which evidently had operated, alongside its legitimate operations, a thriving business in counterfeit texts, some of them virtually indistinguishable from the original. In a case which attracted national media attention in Korea, Han Shin's principal ultimately pled guilty and was sentenced to one year's imprisonment without probation. This outcome sent a powerful message that book piracy would not be condoned in Korea, even when carried out by a supposedly legitimate businessman defended by a high-powered legal team.

While the Korean authorities' persistence in pursuing the Han Shin case was exemplary, developments later in the year raised questions about whether it was indicative of any positive trend. For instance, when Mr. Hong Bong-Ki was convicted of possession and distribution of pirated medical textbooks, after a raid in which pirate texts valued at hundreds of thousands of dollars were seized, his sentence included no prison time and a nominal fine of 10 million Won (US\$7540). Unfortunately, the significance of the Han Shin case risks being undermined by such "business-as-usual" verdicts in cases of serious book piracy.

Because of the high quality of the counterfeits involved, the Han Shin case required book publishers to 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 Korean 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.

The chronic problem of unauthorized mass photocopying and binding of college textbooks continues to sharply reduce legitimate sales by U.S. publishers in Korea. Around the start of the academic terms (i.e., March and September), when students acquire their course materials, areas around many college campuses become hotbeds of piracy. Some photocopy shops build up stocks of infringing copies of textbooks; others make them only to order. Vans are stationed around campuses to sell pirate textbooks, especially to graduate students. The universities take no steps to prevent these piratical activities, nor does the Ministry of Education. Student unions openly endorse pirate copy shops and silence professors who try to discourage use of pirated texts. 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.

Recently, some pirate copy shops have claimed the right to make copies of textbooks because they hold licenses issued by the recently formed Korea Reprographic and Transmission Rights Center (KRTRC). This claim is unfounded because, even if the KRTRC licenses authorized copying of complete textbooks, no foreign publishers are members of or represented by KRTRC. MOCT, under whose auspices KRTRC operates, should make clear to enforcement authorities the

limits of the KRTRC licenses, so that these baseless assertions can no longer impede enforcement against book pirates.

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 a case like Han Shin all the more newsworthy. Combined with a 2000 case in which a convicted book pirate was sentenced to (and reportedly served) a one-year prison term for a massive piracy scheme involving raids on four different warehouses, it can be hoped that a trend toward more nearly deterrent sentences is at least beginning. If the trend continues and accelerates, 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.

Video Piracy: Sustained Enforcement, but Persistent Piracy

Despite active enforcement efforts, video piracy in Korea continues to creep up to increasingly unacceptable levels. Overall, annual losses to the U.S. motion picture industry due to piracy in South Korea during 2000 are estimated by the Motion Picture Association (MPA) to have increased to \$25 million, reflecting an elevated video piracy rate of 25%.

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 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 can be found nationwide in night markets, computer outlets and retail stores. While the volume of this digital 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 36 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 enjoyed an unprecedented share of the Korean theatrical market in 2001,

approaching 50% according to Korean government estimates and press reports.⁹ This far exceeds the 40% box office share that Korean officials informally indicated that domestic films must achieve before the screen quota could be relaxed. 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.

Further Needed Law Reforms

In addition to the CAK and CPPA amendments outlined above as vital to deal with the increasingly digital and networked nature of piracy in Korea, other improvements in these statutes are long overdue. Korean authorities should be urged to consider at least the following further statutory reforms:

Copyright Act

- Korea remains in violation of its obligations under Berne Article 18 and TRIPS Article 14.6 to protect pre-existing works and sound recordings for a full TRIPS-compatible term (life of the author plus 50 years, or 50 years from publication for sound recordings and for works whose term is not measured by the life of an individual author). Under amendments to the CAK adopted in 1995, sound recordings and works whose term is measured from publication are only protected back to 1957. For other works whose term is measured by the life of the author, foreign works whose authors died before 1957 are totally unprotected by copyright in South Korea. The CAK should be amended to provide a TRIPS-compatible term of protection to audiovisual works or sound recordings originating in WTO member countries but released during 1952-56, and to other works from WTO member countries whose authors died in 1952-56. These steps should be taken without excessive transition periods,¹⁰ and without disturbing other, noncopyright laws and regulations that are used to combat piracy of this older subject matter.¹¹

⁹ See, e.g., Kim, "Local pix leaving H'W'd in dust," *Weekly Variety*, September 24-30, 2001, at 13; Kim, "Korean Auds Seoul'd on Local Fare," *Weekly Variety*, July 16-22, 2001, at 14.

¹⁰ Under the 1995 amendments to Korea's Copyright Act, 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 right holder. (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 was ever paid to a U.S. copyright owner for continued exploitation of an unauthorized translation prepared before 1995; nor is there any clearly prescribed procedure for doing so.)

¹¹ 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 move to dismantle this essential element of the South Korean antipiracy apparatus must be swiftly and forcefully opposed by the U.S.

- Although the pending CAK amendments would, when enacted and fully implemented, cure a number of the problems created by the ill-considered 1999 amendment to Article 28, regarding library exceptions, the operation of the expanded exceptions for the digitization of materials in a library's collection should still be made dependent upon the certification by the appropriate governmental body that adequate technical measures are in place to prevent unauthorized dissemination of these materials outside library premises.
- Current law and practice in Korea does not make *ex parte* civil relief available to right holders on a basis expeditious enough to satisfy TRIPS Articles 41 and 50. Amendments should be adopted to make this essential enforcement tool available promptly.
- Article 91 of the CAK should be amended to clarify the availability of injunctive relief in civil enforcement against copyright infringement. Because TRIPS compliance also requires that right holders be able to enforce injunctions efficiently and expeditiously, a further amendment to Article 91 is desirable to make it clear that courts may enforce their injunctions directly, without the need to file a separate criminal action for violation of the injunction.
- Korea is obligated under Articles 41 and 45 of TRIPS to make available fully compensatory and deterrent damages in its civil enforcement system. To aid in fulfilling this obligation, Korea should give right holders the option to choose preset statutory damages at a level sufficient to achieve the deterrence objective.
- The private copy exceptions in Articles 27 and 71 of the CAK should be reexamined in light of the growth of digital technologies. The market harm threatened by the unauthorized creation of easily transmittable perfect digital copies far exceeds the harm threatened by analog personal copying. Accordingly, in the digital environment, the CAK private use exception no longer satisfies the requirements of Berne and TRIPS.

CPPA

In addition to the changes outlined above, 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 right holder;
- 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY¹

IIPA recommends that Taiwan remain on the Special 301 Priority Watch List.

Piracy rates in Taiwan continue to hover at levels not seen since the 1980s, when Taiwan was singled out as the world's worst piracy haven. Such rampant piracy can be attributed to the government's heretofore ineffective management of plants producing optical media (i.e., CDs and other discs read by an optical device such as a laser), inadequate enforcement against other forms of piracy, involvement of crime organizations in piracy, increasing involvement of students/juvenile offenders in piracy, insignificant court judgments, and increasing "burning" of pirate CD-Rs.

The pirate trade in optical media remains at epidemic proportions. Ironically, on November 16, 2001, just days after Taiwan passed a law to control optical media production, law enforcement officers in Los Angeles announced the largest seizure of counterfeit software in U.S. history, valued at \$100 million, coming from what police and federal investigators said was a "well-funded syndicate" operating in Taiwan, and noting that the bust was like "intercepting a drug cartel." Passage of the optical media law was a most positive sign, and IIPA hopes that this new Law will be aggressively enforced. Unfortunately, however, it contains gaps that, if not remedied in regulations or in actual, practical enforcement, could protect those who presently engage in pirate production. The law must be strictly implemented and enforced and followed up with tough, deterrent penalties and equipment seizures that will effectively reduce piracy rates. The new Law, for example, fails to require licenses of those who make or use the key tools of piracy – pirate masters and stampers – which have no legitimate use other than to pirate U.S. movies, music, business and entertainment software. The optical media piracy problem in Taiwan has become out-of-control, and requires aggressive enforcement to provide necessary relief to right holders. IIPA believes the Taiwan government has the political will to ensure that pirate production is severely reduced through aggressive enforcement and the imposition of truly deterrent measures. The next few months will tell the tale.

Other piracy phenomena in Taiwan that must be tackled in 2002 include: the illegal use of software in organizations; retail piracy, including the notorious *Ta-Bu-Tieh* or CD-R compilations of works, sound recordings, computer programs and games, and pirate night market vendors; the illegal distribution of pirate works over the Internet; the burgeoning cross-border trade in pirated products (including the export of product that is illegal in the destination country – now clearly illegal under the WTO); the distribution of pirate product, including optical media and "burned" CD-Rs, at schools and on college campuses by students acting on their own or on behalf of

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

criminal gangs; illegal photocopying and publishing of academic textbooks at universities; and unauthorized public performances of copyrighted movies in “MTVs” (mini-theaters).

In order to address the piracy problems in Taiwan, and in order to meet Taiwan’s obligations under the WTO/TRIPS Agreement, to which it is now a party, the government needs to effectively implement its new Optical Media Management Statute (2001) and work to eradicate optical media piracy. In addition, the government must kick off a sustained copyright enforcement campaign throughout 2002 against all pirates in the manufacturing, distribution, and retail sectors. A related campaign must address corporate end-user software piracy as an incentive to get companies to take legal compliance seriously. Enforcement actions and results should lead to deterrent results, and be widely publicized for maximum deterrent effect.

The government in Taiwan must also work to solve the many procedural hurdles that continue to hinder copyright owners’ efforts to protect their works in Taiwan. These include: the transfer of power for issuance of search warrants from prosecutors to courts, which is negatively affecting the ability of some industries to get warrants; making piracy a “public” crime in all cases; continued challenges to powers of attorney (POAs) of U.S. right holders in some court cases and in raids; raiding authorities’ failure to seize all pirate product and tools and implements used in piracy; and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids.

Finally, as a new member of the WTO, Taiwan’s leaders must be forward-looking, and Taiwan’s consideration of amendments to its copyright law that include many provisions needed to establish an adequate legal framework for electronic commerce is a welcomed sign. While there are many positive aspects in the latest draft IIPA has seen, some further changes (outlined below) are needed to bring Taiwan’s law into compliance with TRIPS, as well as make Taiwan’s law one of the world’s most modern, by implementing the key requirements of the latest WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

For 2001, trade losses to the U.S. copyright industries due to piracy in Taiwan were an estimated \$333.1 million.

TAIWAN: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	35.0	30%	30.0	30%	20.0	20%	15.0	10%	15.0	10%	17.0	10%
Sound Recordings ²	51.7	48%	60.5	44%	60.0	35%	55.0	20%	10.0	12%	8.0	8%
Business Software Applications ³	107.0	52%	123.9	53%	97.6	54%	112.1	59%	104.6	63%	111.7	72%
Entertainment Software ⁴	119.4	70%	319.3	90%	115.7	68%	103.2	65%	102.6	65%	109.0	69%
Books	20.0	NA	20.0	NA	21.0	NA	19.0	NA	5.0	NA	5.0	NA
TOTALS⁵	333.1		553.7		314.3		304.3		237.2		250.7	

COPYRIGHT PIRACY TRENDS IN TAIWAN

Pirate Optical Media Production in Taiwan

At least 61 known optical media plants in Taiwan (and possibly nine or more underground plants) now engage in the manufacture of finished optical media products, including CDs, CD-ROMs, VCDs, DVDs, and “burned” CD-Rs, as well as blank media, including blank CDs, CD-Rs, CD-RWs, DVD-Rs and DVD-RWs. At least 18 of these factories have DVD replication facilities. The 61 plants in Taiwan contain well over 1,187 replication lines, including 93 DVD lines, 229 VCD/CD lines and 865 CD-R lines. Total production capacity of the plants (not including the CD-R capacity) is an astounding 1.127 billion (calculated by multiplying 322 lines X 3.5 million copies per line per annum),⁶ dwarfing any possible legitimate domestic demand (only about 40 million units) for Taiwan’s nearly 22.4 million people. Taiwan is now arguably the world’s worst piracy haven for optical media production for export, as product from Taiwan has been found in 2001 in far away places as Paraguay⁷ and Mexico.⁸ In addition, “burned” CD-Rs in Taiwan, including

² Estimated displaced sales of sound recordings in Taiwan due to piracy were \$51.7 million. The piracy level for 2000 was revised upward to 44% in May 2001.

³ BSA loss numbers for 2001 are preliminary. In IIPA’s February 2001 Special 301 submission, BSA’s 2000 loss figure of \$127.3 million was reported as preliminary. This number was finalized in mid-2001, and is reflected above.

⁴ IDSA’s loss estimates for 2001 approximate lost in-country sales, but do not attempt to estimate losses attributable to in-country production for export.

⁵ In IIPA’s 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Taiwan were \$557.1 million. Because of the adjustment to reflect BSA’s final 2000 statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Taiwan in 2000 are adjusted to \$553.7 million.

⁶ A more aggressive industry assessment, based on production 365 days per year, put Taiwan’s production capacity at well over 2.6 billion discs per year.

⁷ In April 2001, twelve containers shipped from Taiwan via Uruguay were intercepted in Paraguay. Inspection revealed 4.9 million blank CD-Rs along with various other contraband including printers, computers and clothing.

compilations of music (including MP3 audio files), computer programs, console-based games, etc., flood the domestic markets in Taiwan.

Other Piracy Phenomena in Taiwan Evidence a Culture of Illegality

The illegal use of software in organizations (i.e., end-user piracy), as well as direct sales of infringing discs, Internet-based piracy and CD-R burning of U.S. copyrighted works, flourished in 2001. Piracy phenomena in Taiwan that must be tackled in 2002 include:

- **The Illegal Use of Software in Organizations:** Not only companies, but also the Taiwan government itself, as well as educational institutions, continue in their use of unauthorized software. The Directorate General for Budget, Accounting & Statistics (DGBAS) conducted a survey on SAM practices within central level government ministries, departments and agencies in the first half of 2001.⁹ Information technology staff at over 900 agencies completed the survey.¹⁰ The results indicate the same results or slight improvement over a similar survey conducted in 1999, since a little over 30% of respondents still admitted they did not purchase software through one centralized office (the same as 1999), but only 32% of agencies in 2001 did not maintain a database or catalog of assets to manage software and license agreements (down from 55% in 1999), a positive sign. The business software industry is pleased that DGBAS continues its work, but points out that DGBAS has no enforcement powers to ensure that government agencies are following good software asset management practices. The government must set up an enforcement mechanism to conduct audits on government agencies on software use and determine penalties for non-compliance.
- **Retail Piracy, Including “Burning” of CD-Rs:** Piracy includes the notorious *Ta-Bu-Tieh* or CD-R (CD-recordable) compilations containing audiovisual works, sound recordings, computer programs (including reseller piracy and unauthorized loading of software onto hard disks of computers prior to sale) and games (e.g., piracy of console-based videogames is nearly 100% in Taiwan, including both CD-Rs and CD-ROMs, while roughly 30% of all personal computer games sold in Taiwan are pirated). There are also reportedly 250 night-market vendors regularly selling both pirated and counterfeit products throughout Taiwan. Another emerging problem is “burning” of CD-Rs. For example, illicit websites located on Taiwan college and university campus servers make illegal files available for downloading or copying onto blank CD-Rs. 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. Students involved in such piracy either act alone or at the behest of criminal gangs. With respect to audiovisual works sold

⁸ In December 2001, simultaneous raids conducted in 13 locations in Tepito, Mexico revealed 10 million blank CDRs seized and found to be manufactured by Princo, a major Taiwanese supplier of blank CD-Rs throughout Latin America.

⁹ Similar SAM questionnaires were conducted in 1999, when the Directorate General for Budget, Accounting & Statistics (DGBAS) had government agencies in Taiwan fill out a questionnaire, and 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.

¹⁰ Replies for the Sam survey were broken down by agencies, with a range of PC counts from as low as 1 PC to over 1,000 PCs per agency.

and/or rented through the retail shops, as a result of the Government Information Office's loosening of its regulatory control over retail shops in 2001, more of those shops engage in the unauthorized duplication of CD-Rs. GIO must once again tighten its grip on the retail markets.

- **Internet Piracy:** Distribution of finished pirated product using the Internet (mainly on-demand "burning" of copyrighted content), as well as downloading of copyrighted works over the Internet, are growing phenomena in Taiwan. 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. The problem of Internet piracy must be addressed by the Ministry of Education, the Ministry of Transportation and Communications (MOTC), and other law enforcement authorities. Phenomena include the following:
 - **Distribution of Finished Product (Advertising Over the Internet):** Distribution from websites at schools and elsewhere 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), including CD-R sales of "finished" as well as custom-made infringing discs (including MP-3 format) over the Internet and located in Taiwan. As much as 30% of all piracy of entertainment software in Taiwan may be connected with the Internet.
 - **Downloads of Pirated Materials from Websites, "Peer-to-Peer" File-Sharing, "Napster" Clones, at Cyber-Cafés, etc.:** There are increasing numbers of infringing FTP ("file transfer protocol") sites in Taiwan, making available unauthorized MP3 files for download. Another problem involves pirated uses of copyrighted works (including entertainment software) at "cyber-café's," of which there are 3,000 throughout Taiwan. The record industry is also aware of at least two Napster clones operating out of Taiwan, with mirror sites set up in neighboring Asian countries and/or other countries. A number of these sites or infringing files have been traced back to the servers of Taiwan educational institutions or government agencies.
- **Cross-Border Trade in Pirated Goods:** There is still a burgeoning cross-border trade in pirated products, including the export of product that is illegal in the destination country.¹¹
- **Unauthorized Public Performances:** Such piracy includes the unauthorized public performances of copyrighted movies in "MTVs" (mini-theaters).
- **Illegal Photocopying and Publishing of Academic Textbooks at Universities:** Such piracy is most prevalent in Taipei and other major cities, including around prestigious campuses such as

¹¹ One success story involving cross-border piracy was the infringement finding by the Taiwan High Court on May 25, 2000, ruling that Chungtek's Technology Co. must pay Microsoft Corp. NT\$242.32 million (US\$7.87 million) for pirating Windows 95 and other software. The court said Chungtek's 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 Chungtek'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, Chungtek'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.

the National University in Hsin-Chu, and now makes up roughly 20-40% of the total textbook market in Taiwan. Local photocopy shops actively carry out photocopying and binding services mainly for students and teachers at schools and universities. In 1999-2001, several copy shops were raided. Pirate "offset" printing has largely disappeared in Taiwan; in 2000, one commercial pirate of books was convicted, although the result was a disappointing seven-month, suspended, sentence.

- **Ad Masking:** Some Taiwanese cable systems either substitute or "mask" ads carried on satellite pay TV channels. They do this either by putting a "surround" of their own around an advertisement or by substituting the advertisement altogether. This is explicitly contrary to the Taiwan Broadcasting Act, the enforcement of which rests with GIO. GIO has been approached and agrees that such action is illegal, but offered the excuse that enforcement of the law had been delegated to the municipal level, and they did not have the resources to enforce the regulations. They undertook to contact the local authorities to remind them of the law, but so far, there has been no successful resolution.

COPYRIGHT ENFORCEMENT IN TAIWAN

Taiwan Must Effectively Implement the Optical Media Management Statute

In order to address the optical media piracy problem in Taiwan (and in order to meet Taiwan's obligations under the WTO/TRIPS Agreement, to which it is now a party), the government needs to effectively implement its new Optical Media Management Statute (2001) and work to eradicate "optical media" piracy. As a start, Taiwan must do the following in the first half of 2002:

- Put on notice existing optical media plants that licensure must be completed by May 14, 2002, and gear up administrative organs for sustained enforcement against plants failing to comply;
- Set stricter standards for new plants wishing to engage in the production of optical media, including inquiry into production capacity, verification of rights, etc.;
- Seize illegal prerecorded optical media and machines and tools used to produce such media, and also give administrative authorities the discretion to seize illegal stampers/masters and machines and tools used to produce them; and
- Provide transparency of permit information, filings by "blank" manufacturers, reports of exports/imports of machines or tools, reports of investigations, raids and results of such investigations and raids, Customs' activities, etc.

The Optical Media Management Statute is merely an additional tool to fight unauthorized optical media production, which often also amounts to copyright piracy (actionable under the copyright law). The proof in 2002 will be in the results of efforts garnered by the various enforcement authorities, including MOEA and the police, to root out unauthorized optical media production from Taiwan, including by seizing product from wholesalers and warehouses and tracing the source of production. Also instructive will be the extent of seizures at the Taiwan borders of what we know to be multiple millions of illegal discs per year. IIPA understands that the factory run by Digi Gold was sealed in 2001, the managers of the plant were indicted in February

2001, and one further hearing was held in June 2001. However, disappointingly, there has been no further progress on this case.

The year 2002 will be pivotal in determining whether the Taiwanese have succeeded in shutting down or stopping the illegal producers of finished optical media, optical media plants that fail to comply with the requirements of the new statute, and unscrupulous importers and vendors of the key tools of optical media piracy, namely, pirate stampers and masters. The authorities should also raid against the “conscience-vending box” stands in the night markets (stands often run by children or students in which customers place money in a box in exchange for their choice of CDs). Where possible, the Taiwan authorities should introduce internal merit systems so that police officers have incentives to pursue this new form of piracy distribution.

Criminal Enforcement in 2001

As in previous years, the industries continued to get a sizeable number of cases brought criminally in 2001, although most were against small-time pirate distributors (in night markets and the like). For the music industry, in 2001, 766 of 807 defendants (around 95%) were convicted in criminal cases brought before the courts, although the majority of judgments granted were either commuted to fines or suspended sentences, regardless of whether they were first-time or repeat offenders.¹² Such court judgments obviously have little deterrent effect on infringers. Also, in 2001, the number of juvenile offenders far exceeded the number of adult offenders, a very disturbing trend: out of the 2,235 raids conducted, a total of 2,621 offenders were arrested. Of those arrested, 1,669 were juvenile offenders (aged 11 to 17 years),¹³ compared with 952 adults arrested). Because juveniles are below the statutory age for criminal responsibility, judges cannot impose criminal penalties on them; instead, they only reprimand them for their misconduct or send them to a juvenile correctional institute. As a result, criminal organizations frequently employ juveniles to distribute infringing discs in order to avoid liability. Regarding newer forms of piracy, including MP3 files from computers and the “burning” of music CD-Rs, the recording industry reports that of the 54 cases filed by it in 2000, seven have been prosecuted, resulting in 35 convictions (involving 39 defendants). In 2001, of the 50 cases filed, four have been prosecuted, resulting in 14 convictions (involving 16 defendants).

The motion picture industry conducted 1,118 raids in 2001, leading to the commencement of 1,060 cases (including 644 cases involving juveniles).¹⁴ A full 465 cases resulted in a criminal conviction; however, 36 of the sentences were either commuted to fines or suspended, and a full 390 cases involved juveniles. The criminal docket was not as full for the business software industry, as they focused efforts on mounting raids against unauthorized corporate “end-users” of business software (ten raids were run), while only four raids were run in 2001 against pirate resellers of software; the time-frame for prosecutions has ranged from six months to an unacceptably slow two years, depending on workload of the Prosecutor’s Office.

¹² Only 107 out of the 766 defendants convicted (or only 14%) actually served time in jail.

¹³ Recording industry statistics indicate that of the juveniles brought before the courts, five were only 11 years old, 27 were only 12 years old, and nearly half were 15 or younger.

¹⁴ Seizures included five VCD production lines, six printing machines, four VCD players, 465 silk-screens, 251,518 pirated VCDs, 901,199 pirated VCDs/CDs and 1,849 pirated DVDs.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	TOTALS
Number of raids conducted	1,118	13	2235	3,366
Number of cases commenced	1,060	15	2255	3,330
Number of defendants convicted (including guilty pleas)	488	3	766	1,257
Acquittals and dismissals	10	0	34	44
Number of cases Pending	562	19	1435	2,016
Total number of cases resulting in jail time	96	3	743	842
Suspended prison terms	49	2	300	351
Maximum 6 months	25	0	150	175
Over 6 months	6	0	23	29
Over 1 year	18	2	127	147
Total suspended prison terms	506	NA ¹⁵	10,800	11,306
Prison terms served (not suspended)	47	1	443	491
Maximum 6 months	33	0	331	364
Over 6 months	3	0	28	31
Over 1 year	11	1	84	96
Total prison terms served (not suspended)	386	NA ¹⁶	4688	5,072
Number of cases resulting in criminal fines	1	2	57	60
Up to \$1,000	0	0	5	5
\$1,000 to \$5,000	1	0	49	50
Over \$5,000	0	2	3	5
Total amount of fines levied (in US\$)	1,515	15,142	114,000	130,657

¹⁵ Total duration of suspended prison terms was six years.

¹⁶ Total duration of served prison terms was 1.2 years.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	MOTION PICTURES	BUSINESS 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 ¹⁷	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 ¹⁸	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

¹⁷ These suspended sentences range in time from one to twelve months, but most were over six months.

¹⁸ Twelve cases brought in 2000 against juvenile offenders involved piracy against motion picture titles. All 12 cases led to convictions, but as juveniles, they received reprimands and accepted reformatory education until the age of 20.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 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 ¹⁹	NA	1
Total Prison Terms Served (not suspended)	209 months	NA	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

Enforcement Against Internet Piracy in 2001

With the exponential growth of Internet piracy in Taiwan (both distribution of finished pirated goods using the Internet as advertisement, and direct download of infringing materials) in the past couple of years, the Taiwan government, beginning to recognize the magnitude of the problem, has begun taking actions against such piracy. Previously, its efforts had focused on pornography, but in 2000 and 2001, enforcement authorities began focusing more on online marketing of *Ta-Bu-Tieh* (compilation) CDs as well as pirated VCDs and DVDs, with some encouraging results. The motion picture industry conducted 23 raids against pirates distributing infringing works via the Internet, resulting in the seizure of 31,570 pirated CD-Rs and the arrest of 23 pirates. Subsequent prosecutions resulted in nine convictions, with one defendant being imprisoned immediately for 18 months, and seven defendants given suspended sentences with jail terms ranging from 7 to 24 months (with probation periods ranging from two to four years). The recording industry searched 654 unauthorized web and FTP sites (225 Taiwan sites and 429 foreign sites). A total of 157 warning letters were sent to the above, as well as 134 letters to related ISPs. This letter campaign resulted in 150 sites being closed down. Other industries report more trouble getting cooperation of Internet service providers (ISPs).²⁰ The business software industry has

¹⁹ 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.

²⁰ For example, the entertainment software industry reports that many ISPs are refusing to take down pirate sites, many of which are mirror sites with the server located in Hong Kong.

provided numerous leads to the police on Internet piracy cases, but has not gotten raids or other feedback from the police on the status of the cases.

IIPA also began to see some positive results from the Ministry of Education's (MOE) agreement 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. From December 2000, the recording industry has provided the MOE information regarding infringing Internet websites and servers on a monthly basis. In 2001, the recording industry provided information regarding 50 illegal pirate music (MP3) websites and 43 FTP ("file-transfer protocol") sites hosted within the servers of educational institutions for MOE's further action. This information resulted in the shutting down of 48 pirate music websites and 21 FTP sites being closed down. In April 2001, the Tainan District Prosecutor's Office raided the dormitories of National Cheng Kung University (NCKU), revealing that 14 students were allegedly infringing 18,000 copyrighted song titles owned or controlled by Taiwan record companies through FTP sites. While this case eventually settled, one of the conditions of the settlement was the MOE's issuance of "Guidelines for the Use of Internet in Campus Networks," which were finally issued on December 26, 2001. 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 National Police Administration of the Ministry of Interior, to coordinate a joint effort to enforce against all forms of Internet piracy, including MP3 piracy.

Call for Sustained Copyright Enforcement Campaign in 2002

A *permanent* enforcement body must be established, perhaps headed by a special prosecutor, to carry out sustained, island-wide enforcement. The merits of such task force are:

- To centralize executive authority, helping to integrate manpower and intelligence from other agencies;
- No jurisdictional limitations on enforcement authority means increased chances of successful investigation of the origins of piracy and criminal organizations;
- Professional training can be given effectively; and
- A fixed contact for industry information, complaints and requests.

Such an enforcement body, in conjunction with other enforcement authorities (including the police, the Ministry of Justice Investigation Bureau (MJIB), and the Prosecutor's Office) must adequately follow up and prosecute all forms of piracy mentioned above.

In addition, Taiwan must enhance the legal tools available to crack down on the burgeoning cross-border trade in pirated products. 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 broad 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, based on the notion that such product was not illegal in Taiwan. Since Taiwan is now a member of the World Trade Organization, and bound by the TRIPS Agreement, those products destined for export are clearly illegal in Taiwan, as well as in the destination country. 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.

In 2001, the police devoted resources (as they had in the 1999 "K Plan") to anti-piracy, leading to 2,235 successful raids on behalf of the recording industry alone.²¹ For the business software industry, there have been fewer raids on markets and Internet pirates, when compared with the 1999 "K Plan." Thus, actions in 2001 have had little impact in minimizing piracy levels. In order to lower piracy levels, what is needed is the devotion of adequate resources from the Taiwan government to engage in a sustained copyright enforcement campaign throughout 2002, to focus on all aspects of pirating, including manufacturing, distribution, and retail sectors.

Campaign Must Address "Corporate End-User Piracy" as Well as Legalized Use of Copyrighted Materials by Government, Businesses and Schools

A related campaign in 2002 must address the legal use of copyrighted works in a business setting (so-called corporate "end-user piracy"), as well as by government entities and in schools. Due to the prevalence of software piracy and unlicensed copying of software, many companies and individuals do not recognize that the purchase of legal software is a mandatory business practice (just as is the legal purchase of raw materials or the legal employment of labor). The campaign must convince decision makers in Taiwan organizations, particularly small- and medium-sized companies, to legalize their software use, by providing them with the skills and resources they need to legalize, through public/private sponsored software asset management training and government financial assistance for IT deployment. The government must act as a model for entities on how to manage their software use, educate entities of the need to use software responsibly, and carry out high profile enforcement actions against organizational pirates. The Taiwan government has made encouraging statements about the need for legal use of software in Taiwan's businesses, government entities and educational institutions.²²

With respect to government software management, which will provide a model for the rest of the business and academic community, several steps must be taken:

²¹ This was a significant increase in raiding from 2000, when there were 1,460 raids taken on behalf of the recording industry.

²² One of Premier Chang's key ministers announced in mid-January 2002 that the government had decided to dub 2002 as the "Action Year of IPR Protection." The premier appealed to all business owners to audit their software and to use only authorized software. He said the government would demand each ministry and department to promote IPR measures, to provide staff with IPR training and to establish internal audits. He said the prosecutor's office of the Taiwan High Court would set up a joint task force with the police to initiate searches. He appealed to students and the general public not to get involved in software or Internet piracy, and encouraged Taiwan's people not to buy, sell or use unauthorized software, and instead, "set a role model for the knowledge-based economy, corporate citizenship and the digital society."

- Require each government office to appoint a senior official who is responsible for compliance with that office's software asset management rules;²³
- Name the Research, Development and Evaluation Commission as the entity responsible for auditing offices' compliance with the guidelines, and determining penalties for non-compliance;²⁴
- Publicize each government office's software asset management practices; and
- Have Taiwan government contractors self-certify that they use legal software, and make such use a condition to bid on government contracts.

The government should also kick off a broad public educational campaign focused on corporate end-user piracy, to show that corporate end-user piracy is a threat and that the government will follow up to enforce software copyrights. The Ministries of Justice and Economic Affairs should join in this campaign through a press conference, public notices/advertisements, and enforcement actions. Publicity on the government's efforts to enforce software copyright to the general public will have tremendous impact on the public's perception of what is right and wrong with respect to copyrighted software. IIPA looks to the Taiwan government to make 2002 a year of public education and enforcement by the Ministries of Justice and Economic Affairs against corporate end-user piracy, and that the dialogue coming out of the Cross-Ministerial Meeting on Software IPR Infringements in December 2001 now be turned into action.

²³ The Executive Yuan's "Operating Guidelines for the Management of Computer Software in Government Agencies" (EY Tai 86 Su Shou Shen No. 0745, Nov. 25, 1997), issued by the Directorate General for Budget, Accounting & Statistics (DGBAS), needs to be revised along the lines of the U.S. government's "Model Guidelines [to] Implement the Executive Order on Computer Software Piracy (March 17, 1999) and the Hong Kong government's Implementing Procedures for the Proper Use and Management of Software (2000). In particular, the Guidelines should specifically appoint a single management-level official to be personally responsible for implementing the agency's software management policy, and certify compliance with this policy on an annual basis. Each government agency should immediately make available on its website all rules, procedures and practices it employs to manage its software assets. BSA recommends that the Research, Development and Evaluation Commission be appointed with this responsibility. BSA also recommends that DGBAS revise their *Operating Guidelines for the Management of Computer Software in Government Agencies* ("Operating Guidelines") (11/25/97) along the lines of the U.S. Federal Government's *Model Guidelines [for] Implementing the Executive Order on Computer Software Piracy*" (March 17, 1999). To assist DGBAS, BSA provided to DGBAS in Dec. 2000, a comparative analysis of DGBAS' Operating Guidelines with the U.S. Federal Government's Model Guidelines, the Hong Kong Government's Implementing Procedures for the Proper Use and Management of Software and Deloitte & Touche's Best Practices in the format of a table.

²⁴ The RDEC has achieved remarkable success in promoting "E-Government."

Campaign Must Address Connection Between Organized Crime and Piracy

The Taiwanese government must acknowledge the involvement of criminal organizations in what has become the highly profitable piracy business.²⁵ The Taiwan government must commence concerted and coordinated efforts to combat such organized criminal activity, including white-collar criminal activities. For example, pirate companies engage in elusive (e.g., name and address changes, convoluted paper trails of piratical and investment activities in Greater China and in Latin America, etc.) and sometimes even violent behavior.²⁶ The enforcement task force established to fight other forms of piracy must also work to coordinate among government agencies that specialize in “white collar” crimes, to improve the government’s ability to keep track of evasive efforts of pirates. The task force should identify training needs in order to enhance their ability to investigate and pursue sophisticated criminal networks engaged in cross-border pirate operations. In this way, foreign governments, international organizations and industry can cooperate to help fill those needs.

A new method of piracy distribution which appeared in 2000 and 2001 illustrates the adeptness of the criminal organizations in eluding enforcement. Pirate vendors in night markets island-wide now set up a “conscience vending box,” namely, a payment collection box placed beside the stand selling infringing discs, manned by a juvenile. Consumers wishing to buy the infringing discs simply throw money into the collection box and select the infringing discs they want. Should the police raid the stand, the person minding the stand will abandon it as well as the collection box and abscond. Because the police cannot identify the offenders, no prosecution case can be brought, or even if the lackey is caught, s/he will not be subject to criminal penalties but only reprimands and “correctional” education (see discussion above).

Procedural Hurdles That Result in Ineffective Enforcement of Copyright

The government in Taiwan must also work to solve the many procedural hurdles that continue to hinder copyright owners’ efforts to protect their works in Taiwan. These include: the transfer of power for issuance of search warrants from prosecutors to courts, which has made obtaining warrants difficult for some industries;²⁷ continued challenges to powers of attorney

²⁵ Links between the piracy business and organized criminal activities abound. For example, in February 2001, record industry representatives, together with enforcement authorities, raided a building in Lou Chou, Taipei, where almost 57,000 infringing CDs of local and international music, 2,500 CD-Rs and 142 music “stampers” (the key part needed for mass production of optical media) were seized. Six stolen luxury cars were also found concealed within the premises, which were being dismantled for spare parts. In May 2001, another raid on a residential premises in Kaohsiung city yielded 70,000 unauthorized optical discs, mainly of pornographic material, and illegal firearms. A storage facility linked to the premises uncovered three modified rifle barrels and a quantity of ammunition. The following month, another address in Kaohsiung was discovered to be a sophisticated CD-R “burning” laboratory as well as an illegal firearms factory. Criminal organizations engaged in the manufacture of pirated works also control distribution channels, especially the night markets island-wide. In 2001, the record industry together with the police successfully raided ten packaging houses and more than ten warehouses storing pirated goods, seizing over 800,000 units of pirated CDs.

²⁶ 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.

²⁷ The Legislative Yuan transferred the power to issue search warrants from prosecutors to the courts effective July 1, 2001. The system prior to the amendment worked well, because prosecutors could issue warrants immediately upon request and were familiar with the timing needs and operational difficulties encountered during raids by enforcement authorities.

(POAs) of U.S. right holders in court cases and in raids;²⁸ raiding authorities' failure to seize all pirate product and tools and implements used in piracy;²⁹ and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids. Most importantly, all piracy offenses must be "public" crimes, without the need for a prior complaint from the right holder.

Failure of the Export Monitoring System (EMS) to Deter Export Piracy

As noted already, Taiwan is now one of the world's worst exporters of pirate copies of U.S. copyrighted works. All of the mechanisms that have been put in place by the Taiwan government to catch pirated exports at the borders 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

²⁸ 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 somewhat 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. 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.

²⁹ 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 software found in raids that includes pirate initialization codes in the hands of the pirates.

ineffectiveness. In 1998, the government published and implemented a new set of EMS regulations. Those regulations 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); and
- The retention by the IPO of its responsibility to verify copyright authorization/SID code for VCDs and DVDs, and the expansion of this authority to the export of other copyrighted goods.

COPYRIGHT-RELATED LEGAL REFORM IN TAIWAN

Taiwan Passes Long-Awaited Optical Media Management Statute

On October 31, 2001, the Legislative Yuan of the Republic of China (Taiwan) passed the Optical Media Management Statute (2001) (“OD Law”) (the OD Law was promulgated on November 14, 2001).³⁰ This new Law represents a weakened version of the draft law that had been approved by the Executive Yuan (EY) earlier in 2001. The Law brings under regulatory control (of the Ministry of Economic Affairs, MOEA) plants now engaged in the production of optical media in Taiwan, employing a system of: granting permits to persons/entities engaged in the production of “prerecorded optical discs”; otherwise regulating production of stampers/masters (through SID Code and other requirements); and requiring transparency (i.e., a reporting requirement) with respect to production of “blank” media.³¹ Failure to obtain a permit, the unauthorized manufacture of “prerecorded optical media,” and other infractions, can result in criminal fines and the remote possibility of imprisonment against plants (and their “responsible person[s]”). Seizure of unauthorized prerecorded discs and equipment used in such unauthorized production is also possible, though it is disappointing that this is not made mandatory. In addition, it is highly unfortunate that seizure of unauthorized stampers/masters, or equipment used for manufacturing stampers/masters or blank media, is not expressly provided for in the Law.

The Taiwan government’s weak permit requirements as to “blank” media, and its refusal to require permits to produce stampers/masters (or at least expressly provide for seizure of unauthorized stampers/masters), result in a weakened law with the possibility of serious gaps in

³⁰ IIPA understands that MOEA planned to begin visiting optical disc factories in January 2002; however, this exercise means little in that the plants to be visited were to be pre-warned of such visits.

³¹ IIPA has now seen a preliminary translation of some of the implementing regulations, including “Laser Disk Production Permit and Application [Regulations],” and understands that this regulation also provides that companies that wish to produce “blank laser disks should apply in advance” for a permit. While IIPA has not yet fully analyzed these regulations, it appears that the requirements to produce blank media are far less stringent than those for producing “pre-recorded” media.

coverage. With respect to persons/entities that produce “blank optical discs” (which would include production of blank CD-Rs), the OD Law only appears to provide for transparency (and according to the newly promulgated regulations, even those transparency requirements are far weaker than those for pre-recorded media). Also, as was the case with the EY-approved Bill, the OD Law does not require permits to produce stampers/masters, but instead only imposes fines on persons/entities manufacturing stampers/masters who: 1) manufacture without applying for,³² without using, or using false, SID Code, or provide SID Code for use by others (art. 20); 2) fail to report the export or import of manufacturing equipment to MOEA (art. 12 and 21); or 3) evade, impede, or refuse inspections (arts. 13 and 22).

In addition to these noted weaknesses, the OD Law (in comparison with the EY Bill) drastically weakens criminal penalties against plants engaged in unauthorized production (i.e., without a license, at an unauthorized location, or without or with false SID Code) of optical media. Imprisonment for manufacturing “prerecorded” discs (which under the EY Bill would be mandatory after the first offence) is now possible only after a third offence (and a failure to cure),³³ and in the case of blank media producers, only minimal fines are available for failing to adhere to the transparency requirement. The ability to cure violations (i.e., to avoid further fines after the first offence) eviscerates the effectiveness of the criminal remedies under the OD Law.

Other problems abound, including that the OD Law fails to cover persons/entities that engage in the unauthorized “burning” (or “manipulation”) of recordable, writable or re-writable optical media (including those who burn massive copies of unauthorized content on CD-R and like media through, e.g., the use of banked CD-R burners). Lastly, the new law increases in the ‘transition’ periods afforded existing plants, either to file an application for a permit (art. 26) or to file a report as to already-allocated identification codes (art. 24), to six months (from three months) further weaken the transition provisions for implementation of this Law.

Some deficiencies in the Taiwan OD Law may be due to the Law’s failure to specifically deal with certain key issues, such as how to deal with a “grandfathered” plant that fails to meet its requirements on time, how to deal with a person/entity wishing to open a new plant, or under what authority seizures of pirate stampers/masters will take place. Perhaps most importantly, there are no express requirements that the Taiwan government make information about plants transparent. It is possible that implementing regulations that are now being considered or written up will resolve some of these concerns, but it is also vitally important that USG and industry press vigorously to ensure that the Taiwan government follows through with implementation and that it addresses some of the major weaknesses either in the implementing regulations or in practical enforcement of the Law.

³² Unless they already have “identification code” from an agency other than MOEA, in which case, they merely have to notify within six months that they have it (art. 11; *cf.* art. 27).

³³ For example, even after a third offence, imprisonment for manufacturing prerecorded optical discs without a license can be avoided merely by ceasing at that point and “applying” for such license. As another example, even after a third offence of manufacturing prerecorded optical discs without or with false SID Code, imprisonment can be avoided by ceasing at that point and merely “applying” for SID Code allocation.

Problems in Implementation of Optical Media Management Statute

The following bullets identify some of the key problem-areas that must be addressed in the implementation phase of the Optical Media Management Statute:

- **“Grandfathered” Plants Should Not Be Permitted to Avail Themselves of Cure Provisions:** The OD Law requires existing (as of November 14, 2001) producers of so-called “prerecorded optical discs” to merely apply for a permit within six months of the promulgation date (art. 26) (and requires producers of such discs as well as stampers/masters who have been separately allocated identification code “by an agency other than” MOEA to report such to MOEA (art. 27)). Implementing regulations should make clear that failure to apply for a permit and record already allocated identification code by May 14, 2002 will result in refusal to issue a permit, and that the loopholes contained in arts. 15 and 17 (allowing plants to cure after the first offence) do not apply to existing (“grandfathered”) plants. Therefore, the most severe penalties available for those offences would immediately be applicable to an existing plant that fails to comply with its arts. 26 and 27 requirements. MOEA should also be permitted to set forth conditions in permits granted, including, e.g., verifying, through the production of documentary evidence or other means, the rights of its customers to manufacture or reproduce the discs ordered.
- **New Plants Not Contemplated (or Regulated):** The OD Law does not mention the procedures for a person/entity wishing to start a new plant at all. Implementing regulations should make clear that as there is already over-capacity in Taiwan, MOEA will in its discretion, refuse to grant further permits, and applications received for new plants will be subject to review of the grounds for refusal as laid out in art. 5, as well as such factors as capacity in Taiwan (with the presumption that unless capacity decreases, no new plants would be granted permits in Taiwan), verification of rights of proposed customers to manufacture, etc.
- **Seizure of Stampers/Masters and Seizure of Machines/Tools Used for Making Stampers/Masters:** A serious gap in the OD Law is the failure to expressly provide for seizure of stampers/masters found without SID Code, with false/untrue SID Code, or produced with SID Code provided to an unauthorized third party. It is imperative that authorities be able to seize stampers/masters that fail to meet requirements, as well as machines and tools used to produce such stampers/masters. Authorities such as BOFT and Customs should announce that they will inspect and seize masters not complying with the requirements of the OD law, and they should notify copyright holders or their local representatives for verification as soon as they come across any suspect illegal masters/stampers either in a raid or in an inspection at the border. MOEA should also have seizure authority at least over illegal stampers/masters found in the inspection of a multi-purpose plant (one where both prerecorded optical discs and stampers/masters are found).
- **Seizure of Machines Tools Used to Violate the Law:** IIPA’s translation of Article 15 of the OD law indicates that the machinery used for manufacturing optical media products in contravention of the provisions may be forfeited or seized when they are found to be “specifically” used for making illegal products. However, an alternate translation indicates that the standard for seizure of such machines/tools may be stricter, requiring proof that the machines/tools are “exclusively used” for illegal purposes. If the alternate translation is correct, manufacturing machines used to make legitimate blank discs in the daytime and unauthorized

pre-recorded products at night would not be subject to forfeiture or seizure, making the provision totally meaningless. If that is the correct reading, the OD law must be amended or interpreted in the implementing regulations by removing the restriction.

- **Transparency of All Applications, Notifications, Permit Information, and Records:** It is imperative that implementing regulations confirm that the Taiwan authorities (MOEA, IDB, BOFT, Customs, and the Bureau of Standards, Metrology and Inspection) are required to provide transparent information to relevant parties, including opening up:
 - applications by prerecorded optical disc manufacturers (Article 4);
 - permits issued pursuant to such applications (a copy of the “Permit Document” as referred to in Article 6);
 - “permit information” (Article 6);
 - filings by blank disc manufacturers (Article 4);
 - amendments to “permit information” filed (Article 6);
 - customer orders for “Prerecorded Optical Disks,” documentation of rights licensing by rights;
 - holders, and content of prerecorded optical discs manufactured (Article 8);
 - all SID Code allocations (Articles 10 and 11);
 - reports involving export or import of manufacturing machines or tools (Article 12);
 - reports of inspections by “competent authority,” police (art. 13), or other administrative agencies appointed (Article 14);
 - reports of administrative fines and/or criminal penalties meted out against persons/entities under Articles 15-23; also, reports of any seizures of optical discs and machinery and tools under those articles;
 - Customs reports of activities with respect to prerecorded optical discs, stampers/masters, and machinery and tools (*cf.* Article 24); and
 - applications or recordations pursuant to Articles 26 and 27.

The MOEA has apparently already enacted several implementing regulations for the Law, which will assign responsibility for various aspects of the Law to different agencies. For example, the Intellectual Property Office (IPO) under the MOEA will administer SID Codes, the Industrial Development Bureau (IDB) will administer the issuance of permits for manufacture of pre-recorded optical discs, the Board of Foreign Trade (BOFT) will administer the importation and exportation of optical disc manufacturing machines and implements, and the Bureau of Standards, Metrology and Inspection will administer the inspection of manufacturing plants.

Taiwan Draft Copyright Law Strengthens Regime, Although Adjustments Are Still Needed

Taiwan's copyright law was amended in November 2001, as part of the package of laws needed for Taiwan to join the World Trade Organization, to provide a TRIPS-compatible term of protection for computer programs (life of the author plus 50 years). However, the major set of amendments to the copyright law was not considered by the Legislative Yuan before it completed its 2001 session in October. That second set of amendments include attempted implementation in Taiwan of several key requirements of the latest WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA commented in early 2000 on the September 2000 iteration of the draft, and then again on the May 5, 2001 draft (noting that several key improvements were made between the September 2000 and May 2001 drafts, e.g., ISP liability provisions were dropped, the definition of "technical protection measures" was improved, etc.). IIPA has obtained a draft in Chinese in January 2002, but has not yet analyzed it. Like the May 2001 draft, it reportedly includes: legal safeguards for technological protection measures used by rights owners, a broad "public transmission" right, including a right to make available works and sound recordings for on-demand dissemination to 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 WIPO treaties' provisions now as part of its development strategy and before online piracy levels become acute.

The following bullet list summarizes the remaining items that, if clarified, would bring the Taiwan draft closer to compliance with TRIPS and the WIPO treaties:

- **Coverage of Temporary Copies Under the Reproduction Right:** The definition of "reproduction" in the draft (Article 3(5)) must explicitly cover "temporary" reproductions, in order to comport with WCT Article 1(4) and the Agreed Statement, TRIPS and the Berne Convention (incorporated by reference into TRIPS). The definition of "reproduction" must also include "fixation of a performance" to ensure compatibility with Article 14.1 of TRIPS, where an initial "copy" is not involved. While we understand that MOEA's position is that temporary copies are already considered reproductions under the current definition, we continue to believe the law should be specifically clarified to remove all doubt.
- **Adequate Coverage of "Communications to the Public" in the Digital Environment:** The new definition of "public transmission" (Article 3(6*bis*)), and the definitions of "public broadcast" (Article 3(7)), "public presentation" (Article 3(8)) and "public performance" (Article 3(9)), must be adjusted so that the rights and exceptions are clearer, and so that any interactive or similar transmissions are subject to exclusive rights, including for performances and sound recordings, under the WPPT.³⁴
- **Definition of "Public Presentation":** The definition of "public presentation" (Article 3(8)) should include references to "sounds" (necessary to cover sound recordings) in addition to the reference to images and sounds (covering audiovisual works).

³⁴ Additionally, the new definition of "interactive transmission" (Article 3(7*bis*)) should not include the word meaning "automatically"; whether a transmission is automatic is not relevant.

- **Definition of “Technological Protection Measures”:** The definition of “technological protection measures” (Article 3(15)) must be amended to comply with the copy and access control requirements of the WCT and WPPT.
- **TRIPS-Compatible Protection of Performances:** In Article 7*bis*, the word “pre-existing” should be deleted as regards a protected performance, since a protected performance may be of a work created simultaneously with the performance. Also, Article 22 must be amended to give performers the right to control the unauthorized fixations of their performances, in order to comply with TRIPS and the WPPT.
- **WCT/WPPT Distribution Right:** A new Article 22*bis* should be added to give authors (including owners of sound recordings) and performers an exclusive distribution right, in line with the WCT and WPPT.
- **Coverage of Reproductions of Unfixed Performances/Public Presentation:** Articles 23*bis*, 24 and 25 must be amended to ensure coverage for reproductions of unfixed performances, since sound recordings should carry an exclusive right in the situations now drafted as exceptions, and be covered by the public presentation right.
- **Rental Right for Performers (WPPT):** The exclusive right to “lease” (Article 29) must apply to performers to comply with the WPPT.
- **Term of Protection:** Taiwan should follow the modern trend of extending term of protection (both the EU and US have extended their terms of protection, and Japan has, with wartime extensions, in effect, a longer term than life plus 50 years) to “life plus 70” and 95 years from publication for the work of a juristic person (Article 33) or other specified works (Article 34). This change will benefit Taiwan copyright owners who can, for example, only enjoy a longer term in the EU if Taiwan provides longer terms for EU works.
- **Narrowing of Exceptions in the Digital Environment:** Exceptions must be narrowed to preserve the exclusivity of the new “public transmission” right for the WCT (see Articles 47, 50, 56, 56*bis* and 61). The public transmission right encompasses interactive transmissions which must be covered by an exclusive right under the WCT and WPPT. Hence, the term “transmission” should be replaced with “broadcast,” which is a special subset of the public transmission right under the Taiwan draft, and where certain narrow exceptions are permissible under the international treaties. Also, the personal use exception in Article 51 should be narrowed, in light of digital technologies, to permit a single, analog, copy for personal and private use.
- **Scope of Licenses:** Article 37, dealing with licensing, should be amended to ensure that an exclusive licensee may, in addition to exercising rights in the capacity of the economic rights owner, also sue in its own name. In addition, Article 37 should also ensure that while the economic rights owner may not exercise rights within the scope of an exclusive license unless otherwise agreed, the economic rights owner may sue in its own name or may join a lawsuit brought by the exclusive licensee with respect to rights within the scope of an exclusive license unless otherwise agreed.
- **Provision of Ex Parte Civil Searches (TRIPS):** Article 84 should be amended to add a clear reference to *ex parte* search relief as required by Article 50 of TRIPS.

- **Appropriate Proof Requirement for Civil Liability for Infringement:** Article 87(2) should be amended, since TRIPS does not permit conditioning a civil infringement on having a profit motive (such a profit motive is not a condition to any of the other civil infringements, except that in Article 87(2)). While we recognize the courts have not required actual knowledge that the alleged infringer knew that his/her act was infringing, the law as literally drafted could be interpreted this way. We know of no country which has an “actual knowledge” test for civil infringement. Instead the test is whether the defendant “knew or ought reasonably to have known” that the act or copy was infringing. We believe this change should be made.
- **Criminalization of Corporate End-User Piracy (TRIPS):** Article 87(5) should be amended since it would violate TRIPS (Article 61) for that provision to be read to require that end-user piracy be motivated by “direct profit.” Instead, it should be enough that the unauthorized use of software was done in a “business context.” Alternatively, Article 92 of the draft should be amended to add a crime for a person who “possesses in the course of, in connection with, or for the purpose of trade or business” an infringing article, to provide that end-user piracy is a crime (to comply with TRIPS Article 61).
- **Violation of Any Exclusive Right Grounds for Redress:** A new Article 87(6) should be added to include as an infringement “any other act undertaken without the consent of the rightholder which violates his exclusive rights,” since the enumerated list does not cover all the possible infringements e.g., public presentation, public performance, public transmission etc., although these infringements could be “inferred” from other articles, e.g., Article 88.
- **Rights Management Information (WCT/WPPT):** The WCT and WPPT provide that Taiwan should make both unauthorized removal or alteration of rights management information and the circumvention of technological protection measures subject to civil infringement remedies. The current draft only refers to rights management information. A new Article 87ter should be added to provide that both RMI and TPM violations are subject to civil remedies (but not the same as copyright infringements). Corresponding changes should be made to Articles 92bis and 92ter, and the criminal penalties provided in Article 92ter should correspond to those provided for copyright violations.
- **TRIPS-Compatible Criminal Liability for Copyright Infringement:** Article 91 must be amended to be compatible with TRIPS Article 61, which requires that any infringing act constituting “copyright piracy on a commercial scale” be subject to criminal remedies. This is a lower threshold of liability than the “intent to profit” test in the draft Article.
- **TRIPS-Compatible Enforcement Remedy:** A confiscation remedy must be added (namely, by reinserting the previously deleted Article 98) to comply with Article 61 of TRIPS. In addition, the provision must, in order to comply with TRIPS, apply also to tools and implements, the predominant use of which is in the infringement (rather than the “sole use” which would violate TRIPS).
- **Making Copyright Infringement a “Public Offence”:** Articles 100 and 103 should be revised to remove the anachronism that deems copyright piracy to be a “private, non-public offense” requiring a complaint from the rightholder. Since piracy hurts all of society just like other

economic crimes, piracy must be treated as a “public” offense in Taiwan, as virtually all countries do. The police should be able to act *ex officio* in piracy matters.

- **Berne and TRIPS-Compatible Retroactivity:** Article 106*ter* and *quater* should be revised to make them consistent with Article 18(3) of the Berne Convention. These transition provisions are far too broad and the period far too long. Taiwan citizens have been on notice of these needed changes to the law (occurring on WTO accession) for many years. A two-year transition period is unfair to copyright owners and goes beyond what is permitted to countries in Article 18(3) of the Berne Convention, as incorporated in the TRIPS agreement.
- **Appropriate Contributory and Vicarious Liability for the Digital Age:** The current provisions of the copyright law do not afford adequate remedies for copyright owners against either contributory or vicarious infringers (such as the operators of “Napster”-type clones). IIPA understands that the doctrine of contributory liability under Taiwan’s criminal law may not be sufficient to hold the entity aiding and abetting a person in infringing copyright (either by uploading or downloading pirate files from the Internet, for example) liable, without that infringer first being convicted. Accordingly, the copyright law should be amended to expressly allow for the contributory infringer to be held responsible for their actions, irrespective of whether or not the principal offender is prosecuted and/or convicted.

Taiwan Joins the WTO

IIPA is most pleased that Taiwan’s accession to the WTO was approved on November 11, 2001 in Doha, Qatar. Taiwan’s Legislative Yuan ratified the WTO accession on November 17, 2001, and Taiwan officially became a member of the WTO on January 1, 2002. Therefore, as of January 1, 2002, Taiwan is subject to the requirements of the TRIPS Agreement, including the requirements of the enforcement text (Articles 41 through 61). However, as noted above, Taiwan’s law, in many respects, still does not comply with TRIPS. One of the more significant shortcomings is the overly broad and lengthy transition period before all WTO members’ works (including sound recordings) and performances will be protected (Articles 106*ter* and *quater*); if not corrected, those WTO members’ works (sound recordings) and performances that do not already enjoy protection under a bilateral or other arrangement will not receive protection until, at the latest, January 1, 2004. Articles 106*ter* and *quater* must be revised to make them consistent with Article 18(3) of the Berne Convention (and TRIPS).

Reporting of Enforcement Statistics

The Taiwan government has long provided through the Intellectual Property Office, under the Ministry of Economic Affairs (MOEA), aggregate enforcement statistics, including statistics about investigations carried out against retailers, night market vendors, and other small-time pirate distributors. Apparently, reporting on enforcement statistics is far more extensive than the public reports IIPA has received to date, and the government is considering ways to provide less, but more useful, information, to foreign government counterparts and industry representatives. IIPA agrees that some time and effort can be saved in efficiently directing the government’s energy to providing only the most pertinent information about enforcement cases in Taiwan. IIPA commends to the Taiwan government the enforcement charts found in this report to indicate the kinds of aggregate data that is useful to the copyright industries. Future reporting on enforcement should at least include the following:

- Number of Raids conducted
- Numbers and types of product seized
- Numbers and types of machinery and equipment seized
- Number of cases commenced
- Number of rejections for a criminal search warrant filed by an IPR owner (this data point will distinguish cases brought by IPR owners and retail/street piracy cases brought by the Government as a result of crackdowns)
- Cases broken down by major cities and counties
- Number of defendants indicted
- Ages of accused (or defendants if under 18)
- Number of defendants convicted (including guilty pleas)
- Acquittals and dismissals
- Reasons for acquittals and dismissals
- Number of cases pending
- Total number of cases resulting in jail time
 - Total suspended prison terms
 - Maximum 6 months
 - Over 6 months
 - Over 1 year
 - Total prison terms served (not suspended)
 - Maximum 6 months
 - Over 6 months
 - Over 1 year
- Number of cases resulting in criminal fines
 - Up to \$1,000
 - \$1,000 to \$5,000
 - Over \$5,000
- Total amount of fines levied
- Number of cases involving infringing/violating CD manufacturers
 - Numbers of machines or pieces of equipment seized, and if not seized, the reason why
 - Information for the SID code embossed on the seized CD products
 - Administrative penalties imposed against those failing to imprint SID code
- Information regarding the confiscated arms and munitions found in copyright raids
- Individual case
 - Case number and contact information for the police and prosecutor assigned to the case
 - Whether U.S. product is involved
 - Nature of infringement (movie, music, software and games)
 - What works were infringed
 - Number of infringements

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

TURKEY

EXECUTIVE SUMMARY¹

IIPA recommends that Turkey be elevated to the Special 301 Priority Watch List.

The piracy situation for most copyright industry sectors has worsened in Turkey over the past twelve months, with several contributing factors. First, the banderole (sticker) system is not working to defeat piracy. Fraud and abuse mar the system (for example, this year many millions of stickers earmarked for anti-piracy/enforcement of copyright were unaccounted for), and the government is not taking adequate steps to catch and punish those using banderoles or dealing in or otherwise illegally allocating banderoles. Second, unauthorized distributors have obtained registrations from the government (Ministry of Culture) to distribute pirate or unauthorized copyrighted product based on false documentation. In one administrative case that is still on appeal at the highest court, the appellate court ruled that registrations issued by the Ministry of Culture to a company that did not have proper authorization to distribute the works in question should be cancelled. The Ministry of Culture that issued the registrations has appealed the ruling, an extraordinary step. The issuance of registrations to “false” licensees is one example in Turkey of the government condoning piracy, with another example including photocopy piracy at public universities. Lastly, technological advancements have meant increasing levels of digital piracy in Turkey, and the government of Turkey has done little to address high piracy levels, for example, in the area of entertainment software (all platforms) and motion pictures (mainly pirate VCDs).

The government of Turkey must apply its will to attack the problems of piracy, and root out systemic roadblocks in order to lower levels of piracy. The implementation of the banderole system should be seriously improved this year. The Ministry of Culture must also cease supporting piracy through issuing registrations to unauthorized distributors, and should drop its appeal of the motion picture industry’s case against an unauthorized distributor. To fight digital piracy, the government of Turkey must also strengthen enforcement within and at the borders. The positive steps taken in 2000 and early 2001, including passage of an improved copyright law in March 2001, will only result in improvements on the ground if, in addition to the steps mentioned above: Customs reinvigorates its efforts to stop pirate imports (and where applicable, exports) at the borders; authorities engage in sustained raids against known pirate operators and seize all instruments of piracy; provisions purportedly allowing civil *ex parte* searches and orders are implemented and utilized by the judiciary; and the new intellectual property courts take steps to decrease burdens and costs placed on right holders in civil cases, award increased civil damages in cases brought forward, and mete out deterrent sentences in criminal cases. And while the amended copyright law is an improvement over the previous legislation, the government in Turkey was ill-advised in, and should reconsider, its introduction of regulatory measures during the

¹ For further details on Turkey’s history under Special 301 and GSP, see the “History” Appendix of IIPA’s 2002 Special 301 submission.

summer 2001 that conflict with international standards and/or impose unreasonable restrictions on the ability of parties to contract freely, especially in the areas of collective management and compulsory licensing of certain broadcasts.

The government of Turkey must also address problems within the court system that hinder effective enforcement of the copyright laws, including: remedying lengthy delays and protracted proceedings; decreasing the reliance of courts on experts that do not have the requisite experience in copyright law; improving the recovery of costs in legal proceedings; addressing understaffing problems within the judiciary; and providing training in copyright law for judges and personnel involved in copyright practice.

The long-standing review of Turkey under the Generalized System of Preferences trade benefits program is still underway, and while many of the benchmarks noted as necessary steps in resolving the review in favor of Turkey have been accomplished, the key notable failure is in the area of enforcement, namely, taking effective enforcement actions to their conclusions to address widespread piracy. This last standard has obviously not been met.

Estimated losses due to copyright piracy of U.S. copyrighted materials in Turkey were \$163.1 million in 2001.

TURKEY: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	50.0	40%	50.0	50%	50.0	85%	59.0	95%	59.0	95%	59.0	95%
Sound Recordings / Musical Compositions	3.5	35%	4.0	40%	4.0	30%	4.0	30%	8.0	30%	7.0	30%
Business Software Applications ²	58.9	64%	78.6	63%	78.2	74%	44.5	87%	48.4	84%	85.7	87%
Entertainment Software	23.7	90%	116.2	96%	95.1	82%	92.3	80%	96.7	84%	98.0	89%
Books ³	27.0	50%	28.0	NA	32.0	NA	28.0	NA	20.0	NA	20.0	NA
TOTALS⁴	163.1		276.8		259.3		227.8		232.1		269.7	

² BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's loss number of \$68.3 million for 2000 was reported as preliminary. BSA's final 2000 numbers were finalized in mid-2001, and are reflected above.

³ The publishing industry reports that over 50% of all published materials purchased in Turkey are pirated. Thus, the 50% piracy level reported herein is considered conservative. Also, the value of the Turkish lira declined 50% from spring 1999 to January 2001, and a further 59% in the next 11 months of 2001, and while it has rebounded, it is still worth only 51% of its February 1, 2001 value. Thus, loss numbers have diminished slightly, but the number of pirated copies has increased.

⁴ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Turkey were \$266.5 million in 2000. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 2), estimated total losses to the U.S. copyright-based industries in Turkey in 2000 are raised to \$276.8 million.

COPYRIGHT PIRACY IN TURKEY

Retail Markets Now Afflicted With Digital as Well as Analog Piracy

Piracy losses and levels remained roughly the same in 2001, with the entertainment software, business software and motion picture industries continuing to suffer the most egregious losses. Piracy levels for entertainment software in Turkey remained at over 90% in 2001, unacceptable by any international standard, and on a par with the worst pirate countries in the world. A recent phenomenon has been the growth of digitized forms of piracy of copyrighted works, in all kinds of optical media (media read by a laser, such as CDs, VCDs, DVDs, etc.), much of which is imported into Turkey from Asia (primarily from Malaysia, Hong Kong, Thailand, Taiwan), Ukraine and Bulgaria, as well as some from Russia and Eastern Europe.⁵ IIPA understands that the Ministry of Culture (Copyright and Cinema General Directorate) issued a circular in 1998 banning the mass importation of pirated materials, but this circular has gone largely unheeded since its issuance. Meanwhile, pirates have found many methods to obtain their supply, including by carrying it in personal luggage on airplanes. Pirate product is sold in retail markets, through highly organized and effective distribution networks, and recently, even through the Internet (through online ordering of pirate copies of copyright works in digital formats). The following bullets summarize the problems:

- For the entertainment software industry, numerous pirate videogame titles in all formats, including PC (personal computer) and CD (console-based) games, are available in Turkey at retail stores (for as little as US\$6 per title), through street vendors (that had disappeared for a while but reemerged in 2001) and elsewhere (including through the Internet). Most pirate videogames are imported from Asia while some content comes from Eastern Europe. Pirate cartridge-based videogames manufactured in Asia and shipped through Hong Kong also flood the Turkish market. Increasing numbers of “gold” blank CD-Rs that end up being burned with the latest games are also being imported into Turkey, causing a major in-country “burning” (CD-R) problem (which also hurts the motion picture industry).
- For the motion picture industry, VCD piracy is the most significant form of piracy in Turkey, involving counterfeit copies of new movies prior to their release in theaters (so-called “pre-release” titles), almost all imported from Asia (including Malaysia and Thailand). Internally, mostly small-time pirates in Turkey use CD-R (CD recordable) technology to produce and duplicate VCD copies of new titles with Turkish language subtitles, as well as make so-called “back-to-back” copies of legitimate VCD titles with Turkish language dubbing. These kinds of illegal activities, as well as Websites advertising pirate movies on the Internet, occur in small facilities and even in homes. VCDs can be played on computers (Turkey has a base of roughly 500,000-800,000 CD-ROM drives on PCs), modified CD players and videogame consoles, and, of course, VCD players, sales of which (at US\$50-75) are on the rise, and now number roughly 800,000-900,000. The financial crisis and increased unemployment in Turkey have led to more open and blatant street trading (100-300 discs per table) in addition to traditional retail

⁵ Turkey has six “optical media” plants at present (and one which will open in the near future), for which IIPA has little information regarding their operations. The main optical disc problem in Turkey is now the burning of CD-Rs, which may take place in plants (when such devices are “banked”) but we are not aware of this phenomenon in the currently operating plants.

sales (stores generally stocked with 20-50 copies) of pirate VCDs, especially in major cities and certain tourist locations (although since the passage of the Copyright Law in 2001, the number of stores has fallen, as has the number of copies in stock; whether this will be a permanent improvement is yet to be seen). Pirate copies of motion pictures are also used as masters for producing pirate videos and for unauthorized public performances.

- Other forms of piracy of audiovisual works in Turkey include video piracy, broadcast piracy, and unauthorized public performances. There remain around 100 video rental outlets in Turkey, each holding an average stock of between 20-50 poor-quality pirate copies (generally produced by the shops themselves, often from legitimate videos, imported videocassettes or DVDs, pirate VCDs, or pay-TV broadcasts). Broadcast television piracy is now a declining phenomenon in Turkey, as approximately 10-15% of the 230 local broadcast stations continue to engage in such activities by transmitting videocassettes and pirate VCDs of domestic and foreign films. Unauthorized public performances occur frequently of new and popular films using DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers and unlicensed video theaters. Certain inter city coach bus services also show videocassettes (and VCDs) without authorization during journeys.
- U.S. book publishers continue to report that the book piracy situation in Turkey remains among the worst in the region. Piracy levels as to academic materials remain high, including illegal photocopying and unauthorized translations of science, technical and medical texts. Unauthorized ESL (English as a Second Language) materials continue to flood the markets in Turkey. Copy shops near the universities (and bookstores) thrive in the pirate trade.⁶ There has been a noticeable increase of reprints in bookstores, mixed with legitimate titles, of major U.S. publishers' books intended solely for the India market (so-called "India-only" reprints), and these are apparently being received from the main Indian distributor as well as from other sources. Some booksellers are fighting piracy by denouncing pirates and taking them to court,⁷ but fines are ridiculously low – the new, higher fines in the copyright law have apparently never been implemented.
- According to the recording industry, most pirate audio CDs are locally produced illegal CD-R compilations. Imported pirate CDs from Eastern Europe (mainly Ukraine) still pose problems, and sell on the streets in Turkey for about US\$1 to \$1.50.
- Business software piracy continues to be a significant problem in both the distribution channel and with end users. Illegal CD-ROMs are still being sold openly in street markets and in retail shops. The police usually do not intervene to stop sales of pirated materials, even if such sales take place in the open, unless the relevant right holder files a complaint with the police. Additionally, the illegal loading of software onto the hard drives of PCs prior to their sale continues to be a major problem.

⁶ Overall, public and private universities work in tandem with such photocopy shops, whereby a professor includes whole sections of books in the "bound notes" for a class.

⁷ The bookstore at Koç University is a case in point. It was taken over by new management in 2001, and the new management would not copy books. A storm of protest by students and faculty led to discoveries that such photocopying services, plus Internet downloads of entire books, had been going on there for years.

Turkish Government Condoning Piracy

There are two distinct areas in which we identify the government of Turkey as either being actively involved or tacitly approving piratical activities:

- registrations given to false licensees by the Ministry of Culture; and
- tacit approval of the practice of public universities that encourage students to buy illegal photocopies at shops (some of which have ties to the public institution).

Since 1998, the motion picture and entertainment software industries have been plagued by the issuance by the Ministry of Culture of registrations to unauthorized distributors to deal in their copyrighted works, based on false documentation.⁸ In one case that is still before the highest court on appeal, a company called Planet Electronics relied on bogus letters from U.S. suppliers (purporting to grant it local distribution rights to Zone 1 DVDs, which are destined for sale in North America only) to register hundreds of U.S. motion pictures (and other copyrighted goods as well). By registering the titles for distribution as Zone 1 DVDs, Planet has been able to distribute unauthorized product in Turkey, acquire the local distribution rights to banderoles (stickers) for the Zone 1 DVDs, and even issue cease and desist letters and raid local DVD outlets, all with the government's imprimatur.

The motion picture industry brought administrative litigation against Planet seeking the de-registration of titles, which was decided in favor of the copyright owners in March 2001, and affirmed on appeal in July 2001. The three-member appeals court panel ruled that the Ministry of Culture should not have registered the titles without submission of a contract between Planet and the rights holder, and that Planet had no right to import the DVDs without a valid contract between it and the right holders.⁹ While this was an extremely positive development, both Planet and, somewhat extraordinarily, the Ministry of Culture, appealed the appellate court affirmance of the lower court ruling (on August 18, 2001). The Ministry in its appeal is arguing that:

- the registration process is under the General Directorate of Copyright and Cinema Office's purview (under the Minister), not the court's;
- according to Turkish law,¹⁰ the Ministry has no responsibility to de-register titles registered based on the declarations of a manufacturer or importer; and

⁸ Under the 1986 Cinema, Video and Musical Works of Art Law, an operating certificate is issued by the Ministry of Culture (MOC) for the distribution and exhibition of protected works; the holder of this operating certificate is then responsible for placing banderoles (stickers) on the copies of the products. A similar registration and banderole system is also codified in the revised Copyright Law.

⁹ In addition to the decision on the merits, the court also awarded the plaintiffs TL27,840,000 for attorneys' fees and costs a total of approximately US\$20 (exchange rate as of August 2001). IIPA has noted in the past, and notes here, the totally unacceptable cost/fee awards in Turkey (see TRIPS Article 45). For example, 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. However, the Turkish courts award attorney's fees based on the fees fixed by the Turkish Bar, not based on the amounts actually paid to attorneys – and the former is always much lower than the latter, as demonstrated in the award in the Planet case.

¹⁰ Law No. 3257, art. 5.

- the Ministry should not be responsible for determining who owns copyright in the titles, but that issue should be resolved between the plaintiffs (or their local distributors) and Planet in a commercial case.

If the high court affirms the decision of the lower courts, the practical effect of the ruling (even though the decision applies only to those titles already registered with the MOC) would be to prevent Planet from continuing its practice of registering IIPA member titles without right holders' authorization. Also, MOC would invariably be required to seek production from the prospective registrant of a contract between it and the legitimate right holder before registering any title. As a practical matter, MOC has stopped registering Zone 1 DVDs.

In the book publishing area, increasingly, professors at public universities endorse the practice of having students purchase "bound notes" for their classes containing unauthorized copies of entire sections of books. This phenomenon demonstrates that the legitimate education market is growing in Turkey, and new private universities have also opened to serve the growing demand, but the photocopy-shop abuses cut at the heart of the market (note that these shops sit just outside the gates of the universities). Endorsement by the professors of the purchase of illegal photocopy course-packs, especially at public universities, amounts to tacit government approval of such piracy, and the government should work with the universities to deal with this problem immediately.

COPYRIGHT ENFORCEMENT IN TURKEY

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE (PLAYSTATION)
Number of raids conducted	109	35	69
Number of cases commenced	93	26	58
Number of defendants convicted (including guilty pleas)	93	5	58
Acquittals and dismissals	1	2	
Number of cases pending ¹¹	130	19	103
Total number of cases resulting in jail time	1		4
Suspended Prison Terms			1
Maximum 6 months			1
Over 6 months			
Over 1 year			
Total Suspended Prison Terms		15 months	1
Prison Terms Served (not suspended)			3
Maximum 6 months	1		2
Over 6 months			
Over 1 year			1
Total Prison Terms Served (not suspended)	1		3
Number of cases resulting in criminal fines	10		10
Up to \$1,000	2		8
\$1,000 to \$5,000	8		2
Over \$5,000			
Total amount of fines levied ¹²	4	\$600	3

¹¹ For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2000.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE (PLAYSTATION)
Number of raids conducted	160	50	70
Number of cases commenced	133	26	65
Number of defendants convicted (including guilty pleas)	133	6	65
Acquittals and dismissals	2	7	
Number of cases pending ¹³	235	21	151
Total number of cases resulting in jail time	1	3	6
Suspended Prison Terms			3
Maximum 6 months			
Over 6 months		9 months	
Over 1 year			3
Total Suspended Prison Terms			6
Prison Terms Served (not suspended)	1		3
Maximum 6 months			
Over 6 months			
Over 1 year	1		3
Total Prison Terms Served (not suspended)			3
Number of cases resulting in criminal fines	25	3	9
Up to \$1,000	4	3	1
\$1,000 to \$5,000	20		8
Over \$5,000	1		
Total amount of fines levied ¹⁴	5	\$1000	2

The key issues that the government of Turkey must tackle in 2002 include:

- the drastic reform and improvement of the enforcement of the banderole (sticker) program;
- increased deterrence in criminal cases;
- more *ex officio* action against egregious piracy;
- decreased burdens and costs placed on right holders in civil cases, including in obtaining *ex parte* civil searches;
- increased civil damages that are a deterrent to further infringements in Turkey, and reasonable awards of costs and attorney's fees;
- improvements in customs' ability to track imports (and where applicable, exports), and to set into place effective mechanisms for right holders to seek out seizures, and where warranted, forfeiture and destruction of pirated product heading into Turkey at the borders;

¹² For motion pictures and entertainment software, this number denotes number of cases in which a fine was levied; in other cases, fines were suspended.

¹³ For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2001.

¹⁴ For motion pictures and entertainment software, this number denotes number of cases in which a fine was levied; in other cases, fines were suspended.

- improvements within the court system, including remedying the lengthy delays and protracted proceedings that hinder effective copyright enforcement; decreasing the reliance of courts on experts who do not have the requisite experience in copyright law; improving the recovery of costs in legal proceedings; addressing the understaffing problem within the judiciary; and providing training in copyright law for judges and personnel involved in copyright practice; and
- amendment of the Cinema, Video and Music Works Law to bring it up to the standards of the Copyright Law.

It is hoped that the establishment of specialized intellectual property courts by the Ministry of Justice, in line with the amended Copyright Law, will assist in solving some of the problems encountered by right holders seeking to enforce their copyright through the courts, including more expeditious prosecutions and deterrent judgments.

Banderole System Not Working to Curtail Piracy

The banderole system has not worked to stem piracy, and even though strengthened provisions were introduced in the latest copyright law revisions (including the possibility of criminal penalties for unauthorized uses of banderoles or dealing in works without banderoles), those provisions have remained largely untested in 2001. Fraud and abuse mar the system. For example, in 2001 over 5 million stickers were unaccounted for and probably made their way into unauthorized users' hands and onto unauthorized product, making them look "legal."¹⁵ In addition, proceeds from the banderole allocation are neither being collected nor used for anti-piracy purposes.¹⁶ The Turkish government must take all necessary and appropriate steps, including instituting procedures to eliminate fake applications for banderoles from being processed and to prevent banderoles from being handed to unauthorized persons.

As with the Planet case described above, increasing numbers of banderoles are issued to those holding false licenses to deal in copyright works, which defeats the purpose of the program, namely, to ensure that only persons engaging in authorized exploitation of works receive banderoles (indeed, Article 81(3) of the amended copyright law makes subject to criminal penalties one who obtains banderoles from the Ministry of Culture through "false deeds or documents" or by otherwise misleading the Ministry). As noted above, de-registration of false licensees, which would necessitate surrender of banderoles from the unlawful registrant, has not been easy to achieve, resulting in many more illegal products on the markets that contain banderoles. This phenomenon makes enforcement exceedingly difficult, and results in barriers to legitimate right holders' trade in their own products (as they are competing with unauthorized distributors, and sometimes even being turned away from the government upon application for banderoles for legitimate product).

¹⁵ IIPA has heard that a suspect was detained in connection with this disappearance, who was an employee of the Istanbul Copyright Office, and that he was actually jailed for a few months, and later banned from public service.

¹⁶ For example, the entertainment software industry reports that banderoles for game software are being obtained falsely by pirates supplying false documentation to the Ministry of Culture, which does not take steps to ascertain whether documentation presented is legitimate. Sometimes game pirates are obtaining banderoles intended for music that are then used on pirate game software. Banderole are reportedly appearing in upper-tier retail stores on pirated videogames. This phenomenon demonstrates another way the Turkish government is aware of and condones piracy.

If the government decides to keep the banderole system, it must take immediate steps to ensure that those who are caught dealing in copyrighted works without banderoles, or using banderoles without authorization, are prosecuted to the full extent of the copyright law (Article 81 as amended provides for fines and imprisonments for such offences).¹⁷ In addition, the government of Turkey must prosecute those found dealing in or otherwise illegally allocating banderoles (it is unclear that this activity is covered under the current statute, but the activity may already be covered under fraud or other statutes). Such a prohibition would deter those who have caused banderoles conveniently to “disappear.”

Some Enforcement Results in 2001, But Actions Generally Fail to Lead to the Imposition of Deterrent Penalties

IIPA members continue to report that most raids leading to criminal actions result in non-deterrent results or, in cases where sentences have been meted out, suspended sentences. In addition to codification of commutations of sentences to non-deterrent fines,¹⁸ the current copyright law also lacks provisions to increase the severity of penalties for repeat offenders, to withdraw business licenses, and to order the closure of pirate businesses.

Largely through self-help, the copyright industries’ active anti-piracy operations have continued to run raids, leading to some indictments and even convictions for piracy. The motion picture industry reports, for example, that in 2001, approximately 160 raids were carried out, and 133 legal actions were commenced. Along with other raids throughout the country against retail stores, street vendors and wholesale distributors, seizures in 2001 included nearly 135,000 pirated VCDs and smaller numbers of pirated DVDs and videocassettes (the Financial Police were also active taking *ex officio* actions under the smuggling law, seizing an additional 400,000 VCDs).¹⁹ Decisions were reached in 28 criminal cases in 2001, with convictions in 26 cases. In 27 cases filed prior to the new Copyright Law, prison terms were commuted to fines, and the fines were generally suspended. However, in one case filed under the new law, the pirate was sentenced to four years imprisonment and to a TL50 billion (approximately \$38,500) fine. The pirate has appealed, but if confirmed, the sentence will likely not be suspended.

The business software industry has experienced similar results: in 2001, a total of 50 pirate resellers and end-users were raided, with a total of six people convicted in the criminal courts.²⁰

¹⁷ The Ministry of Culture has reportedly issued a circular to activate “Provincial Inspection Committees” to fight piracy as per the amended Article 81 of the Copyright Law, and implementing the Procedures and Principles Concerning the Banderole Implementation of November 8, 2001. This circular was published on January 27, 2002 in the Official Gazette and took immediate effect. Proper and effective employment of these official task forces will be important to the overall success of the fight against piracy.

¹⁸ In fact, non-deterrence is codified in Turkish law. According to Law No. 647 for the implementation of criminal sentences, judges are required to commute automatically sentences of year (or less) into a fine. Fines can even be paid in installments.

¹⁹ The VCDs seized in *ex officio* raids by the Financial Police in 2001 far exceed those seized in 2000 (200,000), indicating continued good activity by that force, but also indicating the increasing severity of VCD piracy in Turkey.

²⁰ In terms of the number of raids undertaken, criminal enforcement in the business software sector in 2001 compares favorably with that in 2000. In 2001, the business software industry filed criminal complaints which resulted in raids of approximately 35 resellers and unauthorized users of business software in a business setting (so-called pirate “end users” of software).

Defendants were sentenced to jail terms of nine months each in three cases; however, these sentences were converted to suspended sentences in each of those cases. The sum of criminal fines meted out by the courts in 2001 totaled US\$1000. These figures were affected to some extent by the general amnesty proclaimed in Turkey in 2001, which decreased the total amount of criminal punishment ordered by Turkish courts in cases involving piracy of software. According to the recording industry, 103 raids were conducted in 2001, in 18 districts in Istanbul and 23 other cities in Turkey. Seizures include 23,485 audiocassettes, 41,384 CDs, 14 pieces of CD-R or audiocassette recording equipment, and 40,400 CD and audiocassette inlay cards. Legal proceedings have been initiated against 380 persons for copyright infringement. The local recording industry enforcement group brought lawsuits against 74 defendants with 54 different files at the Intellectual Properties Courts in five different cities.

However, most cases in the courts for all the industries remain in court.²¹ Procedures are still unacceptably slow and the incompatibility of the new and old criminal copyright provisions (Law Nos. 3257 and 5846) result in confusion, and often, the imposition of the old, non-deterrent fines by judges, instead of deterrent prison sentences, as in the law adopted in 2001.

Difficulties in Obtaining *Ex Parte* Searches Curtail Effectiveness of Civil Enforcement

In the area of civil enforcement, two issues continue to plague right holders seeking effective enforcement: the difficulty of obtaining *ex parte* civil searches, a TRIPS requirement; and the unavailability of reasonable costs and fees in civil and administrative actions. The business software industry in particular relies on civil *ex parte* searches in order to carry out enforcement against unauthorized uses of software in a business (i.e., end-user piracy), and it remains unclear whether Turkish law provides for such searches in line with Turkey's TRIPS obligations. It is thought that the 2001 amendments to the Copyright Law allow for *ex parte* civil searches, in addition to searches pursuant to the court's authority, for obtaining evidence of copyright infringements. However, it is not yet known whether in practice the courts will interpret these provisions in this manner, because practice and precedent with respect to *ex parte* civil searches have not yet been established. The Ministry of Justice has stated that civil *ex parte* searches are available under Turkish law without citing any specific provisions.

Additionally, it is possible that Articles 368 and 369 of the Turkish Civil Procedure Law (TCPL), which provide for the collection of evidence by a plaintiff (through a court order 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), read in conjunction with Article 372 of the TCPL, which provides that the court may dispense with the notification of the opposing party, could be applied in a TRIPS-compatible way. However, such an interpretation has not yet been accepted and acted upon by any court in Turkey.

Under the previous legal regime, once an alleged infringer refused to allow the search of its premises under a civil *ex parte* search order, neither the applicant nor the court was allowed to enter the premises under any circumstances. Although the 2001 amendments fixed this problem as it appeared on the books, for example, specifying imprisonment for up to three months for a

²¹ For example, there are a reported 500 music piracy cases still languishing in the courts.

suspected infringer's refusal to allow its premises to be searched pursuant to a court order, the business software industry's experience is that courts have never indicated they would be more likely to grant applications for civil *ex parte* searches as a result of the stricter provisions. A positive step with respect to this problem would be for the Ministry of Justice to ensure that judges receive adequate training in this area regarding the recent changes in the law. IIPA is unaware of a single instance in which the search and seizure provisions have been successfully used in Turkey.²²

Ineffective Border Measures in Turkey

Since a significant portion of the pirate trade in Turkey is imported, greater resolve on the part of customs in 2002 will be essential to improving the overall piracy situation in Turkey. IIPA has heard that the official government position has been to prohibit mass importations of pirate product, and yet, this position has not resulted in action against such imports. Pirates have found many methods of obtaining their supplies, including by carrying them in personal luggage on airplanes. Therefore, Customs must work to fully implement the recently amended customs law, which was revised in part to harmonize with the mechanisms in the European Union system. In 2002, we seek improvements in Customs' ability to track imports (and where applicable, exports), and to set into place effective mechanisms for right holders to seek out seizures, and where warranted, forfeiture and destruction of pirated product heading into Turkey at the borders.

Although it appears that Customs may now act *ex officio* in seizing pirated and counterfeit goods entering Turkey, Customs seldom uses that power. Border enforcement is cumbersome in that in most cases the intellectual property rights owner must locate the offending import and advise Customs of the place, date and other particulars of the illegal importation. There is no means for "posting" the ports of entry in a manner similar to that used in the United States.²³

Establishment of Specialized Courts to Improve Judicial Efficiency, Decrease Court Delays a Positive Sign

A recurring problem in Turkey has been the judiciary's general lack of expertise and knowledge with respect to copyright cases. Therefore, IIPA was pleased that Article 76 of the amended copyright law calls for the establishment of specialized intellectual property courts to handle cases involving copyright law. On March 26, 2001, the Ministry of Justice issued the Resolution of Supreme Board of Judges and Prosecutors (Resolution No. 335), establishing the Civil Court on Intellectual and Industrial Rights within the Province of Istanbul for civil lawsuits and the Criminal Court on Intellectual and Industrial Rights for criminal lawsuits, and other specialized courts outside of the jurisdiction of Istanbul Province. IIPA hopes these newly established courts will result in the following:

²² Although efforts to use certain sections of the Civil Procedure Law (e.g. current Articles 368, 369 and 372) have been ineffective in obtaining *ex parte* seizures, some reports indicate that judges can be convinced to issue reasonably prompt seizure orders (e.g., under Article 100 of the Civil Procedure Law). However, that provision, unless it is applied by the judiciary with regularity to permit surprise searches carried out swiftly, will not go to providing effective enforcement, and meeting Turkey's TRIPS obligation under TRIPS Article 50.

²³ In one instance reported in 2001, a large container containing counterfeit products was seized in Customs in Istanbul after Customs was provided with detailed arrival data pertaining to the ship carrying the container. While this is promising, it does not substitute for results by Turkish customs in suspending pirated goods from release into the channels of commerce, as required by TRIPS.

- Less reliance by courts than in the past on outside experts in cases involving copyright. In the past, courts have called upon experts to answer questions 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.²⁴ Court-appointed experts often do not have the necessary expertise in copyright law and have in the past issued reports stating, for example, that they cannot determine if unauthorized loading of software on the hard disk of a computer is a copyright infringement. The business software industry has had several cases over the past few years acquitted on the basis of such “expert” reports.
- Clamping down on defendants’ use of expert reports to prolong proceedings. Defendants have stalled cases literally for years by objecting to expert reports repeatedly without having to show any reasonable grounds for such objections. It has often taken up at least two months for the court-appointed experts to issue a straightforward report, and if the issues are complicated or if there is a large number of works involved, the reports can take up to a year to be issued. In one case filed in 1998, the defendant 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 in that case ordered the plaintiff (a business software industry representative) to pay the costs of obtaining all three reports, even though the plaintiff had not objected to any of the reports.
- Greater efficiency, fewer delays and higher priority placed on copyright cases. Courts have traditionally considered copyright infringement cases to be a low priority. It is not uncommon for the courts themselves to stall, even taking one to two years to decide a basic copyright infringement case (and an additional eight months to a year to decide appeals).²⁵

IIPA understands that the new specialized IP courts have already begun taking steps to obtain evidence and appoint experts with more urgency than the regular courts had, a very hopeful sign. IIPA also encourages the government of Turkey to proceed with training in intellectual property law for all judges and other personnel who will participate in the specialized court system, and IIPA supports all current and future plans of the Ministry of Culture to train judges and other practitioners in the relevant intellectual property laws.

COPYRIGHT LAW REFORM IN TURKEY

Amendments Adopted in March 2001, Improving Copyright Law in Turkey

IIPA is pleased that amendments to the 1951 copyright law in Turkey (Law No. 5846) were finally passed in March 2001 (effective date March 3, 2001), and we commend the government of Turkey and the Parliament for having taken this crucial first step. The new Copyright Law has brought Turkey’s copyright regime, as it appears on the books, considerably closer to international

²⁴ The problem of over-reliance on court-appointed “experts” is exacerbated by under-staffing of the judiciary (up to 50% more judges are needed in some instances to take the pressure off judges, who are constantly reminded of the need to ease their dockets).

²⁵ The business software industry reports a current average duration of 12-18 months from commencement to judgment for a copyright infringement case in the court of first instance, and an average wait of 8-12 months before judgment in the courts of appeal.

treaties standards, and has even led to some temporary gains in the fight against piracy (as it has been reported that the number of pirate VCDs in retail stores decreased immediately following passage of the new law). Notably, the amended law provides for the establishment of new, specialized intellectual property courts (Article 76), as discussed above. Passage of the new law must not, however, signal the end of Turkey's efforts to modernize its copyright system, but rather, must lead to proper implementation through strict enforcement of the law.

Improvements in Substantive Provisions

The newly adopted law makes a number of notable improvements over the original antiquated law, including:

- TRIPS-compatible retroactive protection for works (life plus 70 years, Supplemental Article 2) and producers of sound recordings (70 years from "first fixation," Article 82);
- a reproduction right (Article 22) for works that includes temporary reproductions;
- a broad distribution right for works that includes rental and importation (including parallel import protection) (Article 23);
- an exclusive right of "public transmission" right for works that appears to include both an exclusive broadcast right (including a Berne Article 11*bis*-compatible right and an exclusive retransmission right) and what attempts to encompass a WIPO-treaties' "making available" right (although the translation refers to the "sale" of a work through a means by which the public can access the work at a time or place designated by them, so it is unclear whether this right amounts to a WIPO-treaties-compatible "making available" right) (Article 25);
- broad rights granted to producers of phonograms (and TRIPS-compatible rights for performers, see Article 80(A)), including exclusive rights of reproduction, distribution, sale, rental, public lending, public transmission (same general language to Article 25), and what attempts to encompass a WIPO-treaties' "making available" right (although the translation refers to the "sale" of a work through a means by which the public can access the work at a time or place designated by them, so it is unclear whether this right amounts to a WIPO-treaties-compatible "making available" right) (Article 80(B)); note that terms such as "reproduction" and "distribution" are not defined in the law, although it might be surmised that the drafters intended that the meanings assigned for those rights as to works in Article 22 (reproduction) and 23 (distribution) apply *mutatis mutandis* to Article 80 (expressly providing for such a reading would be helpful);
- narrowing of exceptions (the previously overbroad exception (Article 33) for nonprofit public performances has been narrowed to be applicable only to educational or instructional purposes and only for face-to-face instructional activities; the exception permitting the quotation to produce a selection or compilation of works for other than educational and instructional purposes has been narrowed to require the permission of the author (Article 34); the exception allowing for reproduction and transmission of passages of works for news or "current events" is limited by the express inclusion of the key language from the Berne Article 9(2) "tri-partite" test (Article 37);

- narrowing of the provision allowing for the expropriation (of the economic rights in a work deemed to be of importance to the culture of the country, by decree and with just remuneration) by the Turkish government, by limiting any expropriation decree to works “created in Turkey or by Turkish nationals outside of Turkey”; such provisions appear to be applied *mutatis mutandis* to the objects of neighboring rights, so that expropriation is similarly limited to objects of neighboring rights “created in Turkey or by Turkish nationals outside of Turkey”;
- TRIPS-compatible protection for compilations of data (Article 6).

Improvements in Enforcement Provisions

The most important achievement in the amended law is the increased criminal penalties for various offences (which should lead to fewer suspended sentences, since sentences of two years imprisonment and above cannot be suspended), although the unequal treatment of works and objects of neighboring rights (which are subject to much lower penalties) is very disappointing and should be fixed. Overall, provisions in the enforcement area include:

- significant increases in criminal penalties for copyright infringements as to works (including significant fines and imprisonments for copyright infringements, i.e., 4-6 years’ imprisonment and a 50-150 billion lira fine, currently about US\$33,300-100,000, and shrinking) (Article 72);
- identical criminal penalties (as above) for violations of the new banderole sticker provisions (Article 81);
- lesser criminal penalties for copyright infringements as to objects of neighboring rights (2-4 years imprisonment and a 10-50 billion lira fine, currently about US\$6,600-33,300, and shrinking) (Article 80);
- criminal penalties for storage of infringing materials for commercial purposes and “storing or, distributing technical devices on computer programs for commercial purposes” (2-4 years imprisonment and a 10-50 billion lira fine, currently about US\$6,600-33,300, and shrinking);
- criminal penalties for removing or tampering with certain “information” placed on copies of works or the objects of neighboring rights (2-4 years imprisonment and a 10-50 billion lira fine, currently about US\$6,600-33,300, and shrinking) (this protection is compatible with the WIPO treaties’ requirement to protect against removal or tampering with “rights management information”);
- doubling of criminal penalties for recidivists (i.e., committing the same offence within a period of two years) as to “the offences stated in this Law” (i.e., as to works, banderole-related offences, offences as to objects of neighboring rights);
- shifting the burden of guilt to the defendant to produce evidence of the legality of the copies being used or possessed;
- increased powers to prosecutors to obtain an order from a court to close a business engaged in illegal reproduction, as well as to order the seizure of pirated copies; in urgent cases,

prosecutors may act *ex officio* (i.e., issue such an order themselves) without applying to the court;

- increased authority to Customs authorities to enjoin the release of goods into the channels of commerce;
- increased authority under the Customs laws with respect to possible importation or exportation of infringing copies.
- authority for quicker action to be taken by the authorities within the criminal system upon the filing of a complaint. Under the new enforcement regime, action by the criminal-enforcement authorities should be obtained within hours of making a filing and establishing facts indicating piracy.

Remaining Ambiguities or Deficiencies

- the copyright law does not include express provisions regarding civil *ex parte* search measures (as required by TRIPS Article 50; *cf.* Article 66, allowing for the court to “order such measures as the circumstances require, and as noted above, Articles 368 and 369 of the Turkish Civil Procedure Law (TCPL), read in conjunction with Article 372 of the TCPL, could but has not been applied in a TRIPS-compatible way). Although IIPA believes articles 76 and 77 of the Copyright Law allow for civil *ex parte* searches, such an interpretation of those provisions has not yet been applied by authorities within the Turkish legal system. IIPA looks to the Turkish government to apply articles 76 and 77 of the Copyright Law to provide for TRIPS-compatible civil *ex parte* searches.
- unlike works, there is no express exclusive importation right (including parallel import protection) for producers of sound recordings;
- the law does not include effective legal remedies against the circumvention of technical measures used by content owners to protect their property from theft (including civil, administrative and criminal penalties in cases of unlawful acts of circumvention of trafficking in circumvention devices);
- provisions requiring the recording and registration of music and films (Article 13) may, if they interfere with the exercise of rights, constitute formalities that violate Article 5(2) of the Berne Convention (and therefore, TRIPS);
- an additional transition article (Supplemental Article 5) regarding the compulsory deposit of five copies of any copyrighted materials may, if it interferes with the exercise of rights, constitute a formality that violates Article 5(2) of the Berne Convention (and therefore, TRIPS); failure to deposit can result in a fine of 5 billion lira (currently about US\$3,300).

Other Regulations to Follow the 2001 Copyright Law Amendments (Including Problematic New Broadcast Compulsory License)

The Ministry of Culture has been tasked under the amended copyright law to prepare and issue the following implementing regulations:

- Regulations on Record and Registration (Article 13);
- Regulations on Right of Dissemination (Article 23);
- Regulations on Intellectual and Artistic Works Broadcast on Radio-TV Institutions (Article 43);
- Regulations on Arrangement and Distribution of Blank Tape Levy (Article 44); and
- Regulations on Banderole Application and Enforcement committees (Article 81).

Troublingly, the Regulations on Intellectual and Artistic Works Broadcast on Radio-TV Institutions were issued by the Minister of Culture on September 15, 2001, and establish a compulsory licensing scheme at least for music that are totally inappropriate. In issuing these regulations, the Ministry of Culture also seems to have exceeded its authority by adopting a regulation that actually alters the copyright law (in that it creates a settlement and arbitration system to settle disputes between parties, and even to determine copyright fees, even though no provision was laid down by the copyright law in this regard). We strongly oppose the introduction of this compulsory license, which conflicts with the copyright law, and which appears to be unconstitutional. IIPA understands that two local professional associations in Turkey are challenging these regulations before the State Council. Its decision is expected in March or April 2002. IIPA supports such a challenge, and will be watching developments closely.

In fact, in early February 2002, a Turkish court, in a case between the recording industry and Turkish national broadcasting company TRT, reportedly decided in favor of the recording industry, holding that the Ministry of Culture Regulation was unconstitutional and, therefore, did not apply to the case. This case decision represents a very welcome development. However, the definitive fate of the regulation lies with the State Council.

Drafting of the other regulations has also commenced at the Ministry of Culture. It will be necessary to monitor all of these regulations closely. In particular, IIPA noted that the blank tape levy has been expanded to include the production or importation of blank DVDs (it already covered audiocassettes, videotapes, computer discs and CDs), but the levy appears to have been lowered to no more than 3% of the production or importation cost. Whereas the distribution had been 75% to the professional associations/collecting societies and 25% to the Ministry of Culture, the distribution of such funds will now be left to regulations.

The Cinema, Video and Music Works Law Remains Inadequate

Now that the copyright law in Turkey has been amended, the 1986 Cinema, Video and Music Works Law (Law No. 3257) ("Cinema Law") must be updated to delete conflicting and confusing provisions and to bring weak penalties up to the new copyright law standards. The amendment process has already begun at the Ministry of Culture, and the local motion picture enforcement group (AMPEC) submitted detailed comments to the Copyright Office in January 2001. The Cinema Law amendments will be important as to piracy cases involving film and music works, since the enforcement authorities tend to rely on this law rather than the copyright law for many actions taken. To the extent that the copyright law amendments constitute improvements (e.g., strengthening of criminal penalties), IIPA hopes that the amendments to the Cinema Law will parallel the provisions found in the copyright law amendments (and Turkish officials have indicated that this is the case). Doubled penalties for recidivists, provisions to withdraw business licenses, and provisions to order the closure of businesses, should also be included. In addition, any effort to revise the Cinema Law must not contain problems that appeared in prior sets of draft amendments (e.g., the last draft which IIPA reviewed in 1995 failed to include jail terms and

contained discriminatory registration fees and tariffs for the recording and registration of films, which would violate Turkey's TRIPS obligations).

Generalized System of Preferences

The U.S. government continues to investigate Turkey's IPR practices under the Generalized System of Preferences (GSP), a U.S. trade benefits program. To qualify for benefits under the GSP Program, namely, duty-free imports of many important Turkish products into the U.S., the United States must be satisfied that Turkey meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." A review of Turkey's eligibility under this program was initiated after IIPA filed a GSP petition against Turkey in June 1993, and Turkey remains under GSP review. In the first eleven months of 2001, \$407.7 million in Turkey's imports to the United States benefited from the GSP program, accounting for 14.3% of its total imports to the U.S.²⁶ While many of the benchmarks noted by IIPA in previous submissions have been accomplished, the key notable failure is in the area of enforcement, namely, taking effective enforcement actions to their conclusions to address widespread piracy. This last standard has obviously not been met, and Turkey should not continue to enjoy benefits of GSP if it fails to take significant action to provide adequate and effective enforcement in 2002.

WIPO Treaties

Turkey's recent amendments to its copyright law implemented many of the requirements of the WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly. While certain key elements still have not been provided satisfactorily in the legislation in Turkey (the most notable deficiency is the failure to prohibit the circumvention of technological protection measures, including the trafficking in circumvention devices), this should not discourage Turkey from seeking immediate ratification of the WCT and WPPT, and swift deposit in Geneva. We note, for example, that the Turkish Criminal Code (Article 525 *et seq.*) at least partially implements that requirement of the treaties, by providing protection against circumvention of computer encryption. Joining the treaties would be a vital step toward Turkey's establishment of an adequate legal framework for electronic commerce.

²⁶ In 2000, \$435 million in Turkey's imports to the United States benefited from the GSP program, accounting for 14.4% of its total imports to the U.S.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

URUGUAY

EXECUTIVE SUMMARY

Because of the long delays in passing much-needed copyright legislation, the continued legislative march to adopt an objectionable bill on computer software and the ineffective criminal and civil enforcement against high levels of copyright piracy, IIPA recommends that Uruguay remain on the Special 301 Priority Watch List this year. Furthermore, IIPA requests that the GSP Subcommittee initiate a review of the GSP country eligibility of Uruguay for its failure to provide adequate and effective copyright protection for U.S. copyright owners. If requisite improvements are not made in Uruguay to remedy these deficiencies in the near future, then IIPA requests that the U.S. suspend its eligibility or withdraw GSP benefits of Uruguay, in whole or in part.

Uruguay has been working 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 of the comprehensive copyright bill represented an improvement over earlier texts, its progress was reversed in 2001, and legislative momentum stalled. To compound matters, the objectionable 2000 version of a software-only bill was amended (solving some objections, but creating new ones) and passed by the Senate in December 2001, and is now pending before the Chamber of Deputies before final adoption.

As a member of the World Trade Organization, Uruguay fails to meet the TRIPS-level standards of both substantive copyright protection and enforcement. Without a new copyright law, it will remain virtually impossible to protect copyrighted materials or provide effective enforcement in Uruguay, especially as technology changes and new market opportunities for the creation and distribution of legitimate copyrighted products appear. Copyright piracy levels in Uruguay 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. The U.S. copyright industries lost at least an estimated \$21 million due to piracy in Uruguay in 2001.

URUGUAY: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	65%	2.0	65%	2.0	65%	2.0	75%	2.0	65%
Sound Recordings / Musical Compositions	4.0	50%	4.0	35%	4.0	35%	3.0	25%	2.0	25%	2.0	25%
Business Software Applications ¹	13.0	74%	7.9	66%	16.0	70%	13.1	72%	11.0	74%	13.9	80%
Entertainment Software	NA	NA	16.3	82%	6.9	70%	7.6	74%	7.0	70%	7.2	73%
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
TOTALS	21.0		32.2		30.9		27.7		24.0		27.1	

In his April 30, 2001 Special 301 announcement, U.S. Trade Representative Zoellick noted: "We have been pressing Uruguay to reform its outdated patent and copyright legislation since 1997, and despite repeated engagement and consultations on the necessary amendments, serious deficiencies remain in its intellectual property rights regime. Uruguay's draft copyright legislation has become entangled in legislative wrangling and currently contains numerous shortcomings even in its draft form, most notably the separation from the comprehensive copyright bill of software protection into a stand-alone bill. Enforcement of both criminal and civil copyright cases is weak and sporadic. The United States urges Uruguay to fix these and other flaws in its intellectual property legislation as soon as possible."²

COPYRIGHT LAW AND LEGAL REFORM

The Copyright Law of 1937 Fails to Satisfy TRIPS Standards and Bilateral Trade IPR Standards of "Adequate and Effective" Protection

Copyright protection in Uruguay is afforded under its 1937 copyright law, Law No. 9739, as amended in 1938.³ Separate but deficient anti-piracy legislation aimed at combating piracy of sound recording producers was passed in the 1980s.⁴ Uruguay has not fulfilled its TRIPS obligations. IIPA repeats below our summary of the key legal, substantive copyright TRIPS deficiencies found in the current 1937 copyright law, which fail to provide adequate and effective protection to U.S. copyright owners:

¹ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$15.4 million at 67% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

² Press Release 01-25, Office of the United States Trade Representative, "USTR Releases Reports Emphasizing Enforcement Priorities," April 30, 2001.

³ IIPA does not have any knowledge or text of any major subsequent amendments made to the law.

⁴ See Law No. 15.289 of 1982; Law No. 541 of 1984.

- Inadequate term of protection for works, phonograms and performances (TRIPS Articles. 9, 12 and 14.5): The term of protection for authors is life plus 40 years, well short of the basic TRIPS minimum of life plus 50 years. There is no specific term of protection for sound recordings in the law, although they are likely considered to be “works.”
- Protection for computer programs (TRIPS Article 10): 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. Despite this deficiency, BSA has been able to conduct anti-piracy operations, albeit with some procedural difficulties. The lack of express protection for software fosters a state of uncertainty and creates a risk of unfavorable court decisions which jeopardize these anti-piracy actions and expose the copyright owners to what otherwise would be baseless damage suits.
- Unclear protection for compilations of data (TRIPS Article 10): It is unclear whether the current copyright law adequately protects “compilations of data or other materials, whether in machine-readable or other form,” as described fully in TRIPS. Such specific language (especially regarding the machine-readable element) does not appear in the 1937 law.
- Incomplete scope of retransmission rights (TRIPS Article 9.1): The “right to disseminate” in Article 2 of the law includes “dissemination by any mechanical means, such as the telephone, radio, television and other like processes.” It is not entirely clear from the law whether this article encompasses the specific retransmission rights found in Article 11*bis* of the Berne Convention. IIPA is not aware whether other Uruguayan laws, such as communications or media laws, elaborate on whether or not such retransmission rights are covered. It is important that this Berne Convention/TRIPS right be afforded in the Uruguayan law.
- No express rental rights (TRIPS Articles 11 and 14.4): The 1937 law does not have an express rental right for computer programs and sound recordings. Article 2 does contain a broad right of “alienation,” along with the specific rights to reproduce, publish, translate, perform and disseminate works “in any form, or to authorize other persons to do so.”⁵ Nonetheless an express rental right for computer programs and sound recordings should be included in Uruguay’s copyright law.
- Overbroad broadcasting compulsory license (TRIPS Article 13): One article in the copyright law describes almost a dozen cases involving acts which are “not deemed to be unlawful reproductions.” In particular, Article 45(10) 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

⁵ It is possible, therefore, for the government of Uruguay to argue that its broader right of “economic exploitation” (as mentioned in Article 33) does encompass a right of rental. MPAA reports that, in the spring of 1999, it finally obtained a judicial decision that the rental of pirate videos was a copyright infringement; the appellate court reportedly expanded the term distribution to include sale or rental. IIPA does not have the text of this case. Our point here is to show that this rental issue remains of timely concern, especially as it applies to computer programs and sound recordings as required by TRIPS.

does this provision mention anything about remuneration, which could have suggested a Berne-compatible outcome. It appears that this compulsory license may not have been invoked to date, but nevertheless, as written, this provision violates TRIPS. This provision also could adversely affect the rights of producers of sound recordings.

- Retroactivity (TRIPS Articles 9.1, 14.5, and 14.6): Given the short terms of protection under the 1937 law (above), IIPA harbors concerns 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.

Efforts to revise the proposed comprehensive copyright legislation in mid-2000 undermined earlier progress so that the proposed copyright law (of March 2001) now contains unacceptable provisions.

Uruguay has been working on copyright legislation reform for over a decade. There have been numerous versions of copyright legislation over the years, starting in the early 1990s, followed by bills in 1995, again in 1996, 1997, 1999 and two in 2000 (and approved by one house in March 2001). 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. Despite these legal deficiencies in the copyright realm, Uruguay has continued to receive benefits under the GSP Program.

Legislative Efforts, 2000-2001: 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 – the 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 adopt instruments of ratification to deposit with WIPO. The Uruguayan government should be encouraged to ratify and deposit as soon as possible. Uruguay should include the basic rights afforded in both treaties in its new legislation (see WIPO update, below).

Legislative efforts on copyright reform took a downhill turn in mid-2000. In May 2000, a comprehensive copyright bill was sent to the Congress,⁶ and was considered by the Education and

⁶ *Derechos de Autor y Derechos Afines, Comisión de Educación y Cultura, Carpeta No. 255 de 2000; Repartido No. 161, Junio de 2000.* On the positive side, many of the amendments in the May 2000 version copyright bill reflect raising the levels of protection up to TRIPS level. For example, improvements included: 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 May 2000 bill provided that a civil or criminal judge could authorize a judicial inspection without advance notice to the target; this is an essential tool for the copyright industries. The May 2000 bill did appear to recapture those works and other "productions" (presumably including phonograms) which fell into the public domain by giving them the longer term of protection set forth under the bill.

Culture Committee of the Chamber of Deputies. This May 2000 copyright bill, like its 1997 and 1999 predecessors, represented an improvement over the current 1937 copyright law (although additional revisions were needed). Industry worked to improve the scope of this legislation. However, further amendments were made to this bill in the fall of 2000 which significantly weakened the scope of protection, especially in that it removed computer programs as protected subject matter entirely and drastically cut key enforcement provisions. The Education and Culture Committee approved the comprehensive copyright bill and forwarded it to the Chamber of Deputies on December 29, 2000.

This December 2000 version of the comprehensive copyright bill was subsequently introduced to the Chamber of Deputies and approved by the full Chamber on March 22, 2001. Copyright industries' representatives again worked to make amendments to this legislation, but most of the proposals were not accepted. The March 2001 bill, however, appears to be almost identical to the TRIPS-deficient and GSP-incompatible December 2000 version. The copyright bill has been forwarded to the Education and Culture Committee of the Senate, where it remains under consideration. It appears that legislative consideration of this bill has been held up due to concerns expressed by numerous industry sectors as well as the U.S. government. Some Uruguayan legislators, upset with the entire copyright reform process, have been reported to be contemplating drafting yet another copyright amendment bill, one which would amend the 1937 law and not be an entirely new piece of legislation. We have heard one report that the comprehensive copyright bill is no longer on the legislative agenda.

The March 2001 Comprehensive Copyright Bill: For illustrative purposes, below is a list of the major issues which IIPA identified in the December 2000 copyright legislation.⁷ A more detailed explanation of these bulleted issues can be found in IIPA's June 2001 GSP IPR Petition against Uruguay:

- **Computer programs:** All provisions affording protection for computer programs were deleted from this comprehensive copyright bill last year. The copyright industries continue to oppose the separate *sui generis* software bill (see discussion below) and assert that protection for computer programs should be fully integrated into the comprehensive copyright reform legislation.
- **Criminal penalties:** The level of criminal penalties was slashed. The 2001 bill has half the number of articles as the May 2000 bill. Many of the criminal penalties were cut from three years to two years of imprisonment. Harmful language requiring "commercial intent" was added, and this element should be removed. Articles in prior legislation which criminalized bootlegging, the interception of a television broadcast, the decoding of encoded satellite signals, or the circumvention of technical protection measures were removed in their entirety. There seems to be a huge gap in penalties for unauthorized acts involving right of communication and performance. The bill continues to reflect

⁷ This discussion is based on an English translation of this December 2000 legislation, which the IIPA received in April 2001. As mentioned above, IIPA has been informed that the March 2001 version closely tracks the December 2000 bill. We do not have any current information on whether additional proposals to amend this legislation have been made and/or are pending. If additional amendments have been made to the pending legislation, IIPA and its members reserve the right to provide additional comments on those proposals.

Uruguay's long silence regarding fines as criminal sanctions; ideally, both jail terms *and* fines should be available for infringement.

- Civil sanctions: The 2001 bill has halved the number of articles affecting civil sanctions present in the May 2000 bill. The article on damages no longer contains provisions giving copyright owners the ability to claim all profits and income earned by the infringer. Also eliminated was a provision resembling a statutory damages provision in which the copyright owner could choose between actual damages and a multiplier of damages in cases of willful misconduct.
- Precautionary measures: The March 2001 bill continues to contain important provisions regarding civil *ex parte* measures which judges can grant without notice to the suspect. However, other amendments resulted in the removal of a provision in the May 2000 bill which would have permitted judges to order the alleged infringer to provide any evidence under its control; the failure to provide such evidence meant that the judge could take action based on available information. Positive amendments to clarify the kinds of injunctive relief have been undercut by a new requirement that judges act based on requests made by the titleholders.
- Border measures: Article 137 on border measures was improved, along the lines of the TRIPS text 10-day provisions on suspension and release of suspect goods. However, customs authority to act *ex officio* or seize and hold suspect shipments is, at best, unclear. Given the amount of pirated and counterfeited product that crosses the Uruguayan border with ease, both for domestic consumption as well as for transshipment to major counterfeit distribution centers such as Ciudad del Este in Paraguay, it is imperative that Uruguay's border measures be at least TRIPS-compliant and vigorously enforced.
- Exclusive rights for authors: In order to properly implement the two WIPO treaties, it is vital that the bill clearly include temporary copying as part of the reproduction right (see Articles 26 and 106). This is critical for owners of copyrights and neighboring rights to enforce their rights in the digital environment. The March 2001 bill revised earlier drafts, which had provided a broad exclusive right of importation. It is possible that parallel import protection could still be provided here; again, clarity on this point is needed.
- Exclusive rights for record producers: The March 2001 bill corrected an omission in earlier drafts and now includes a WPPT "making available" right for producers of phonograms. The bill also eliminated the explicit importation right, although it is arguable that importation could fall within the existing distribution right afforded sound recording producers; clarity on this point is needed. In addition, record companies need to have broad exclusive rights over all forms of communication in recognition of changes in technology that have changed the way in which music consumers get, and will get, access to recorded music.
- Term of protection: The March 2001 bill reflects Uruguay's efforts to shorten terms of protection from life plus 70 years (or 70 years after publication/fixation) found in the 1997 bill, down to life plus 50 years (the TRIPS minimum). IIPA recommends that the 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.

- Work for hire: The March 2001 bill provides that works created under contract will be ruled by the agreement of the parties; an earlier bill had provided that the employee assign its economic rights to the employer.
- Overbroad exceptions to protection: The March 2001 bill does not appear to make any changes to the various objectionable provisions IIPA has identified in prior draft legislation, and adds at least one more overbroad provision.
- Broadcast compulsory license: The May 2000 bill properly removed the TRIPS-incompatible broadcasting compulsory license found in Article 45(10) of the 1937 law. However, a new broadcasting compulsory license proposed (in Article 43) provides that it is legal for a broadcaster, without authorization from the author (copyright owner) but with the previous payment of remuneration, to 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 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. It is imperative, however, that any compulsory licenses follow the terms of Berne Article 11*bis* (and TRIPS).⁸
- Blank tape levy: The bill contains a private copy levy (which is linked to the private copy exception). It remains unclear whether the collection and distribution of the blank tape levies collected for reproduction of works in graphic form, by video and by sound recordings will be based on the principle of national treatment. It will be important to monitor the process for the collection of such levies, which will be established by regulation after the copyright law enters into effect.
- Private copying levy and national treatment: The bill should make clear that the exception for private copying does not apply to copying in digital or high definition analog formats.
- Moral rights: The scope of moral rights of attribution and integrity for performers has been expanded over current law. In IIPA's view, moral rights should be waivable (or said another way, an author should be able to exercise 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. In addition, activities like dubbing or editing a motion picture (which could be considered "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.

⁸ A key concern with this provision is that it must not 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 own cable systems may expand the scope of this compulsory license and use their cable infrastructure to transmit programming to the Internet.

- Administrative remedies: IIPA continues to request clarification from the Uruguayan government on how the “competent administrative authorities” will act in situations involving unauthorized public communication of works.
- Anti-circumvention and rights management information: The March 2001 bill continues to omit provisions for criminal and civil liability involving the protection of technological measures and rights management information, both of which are key elements of the two WIPO treaties. Further work is needed to properly implement the obligations of the WIPO treaties.

This reflects a summary of the key issues which IIPA has highlighted publicly over the past few years. There may be additional comments and suggestions for legislative consideration which we and our member associations reserve the right to advocate.

The *sui generis* software legislation proposed in 2000 was amended and adopted by the Senate in December 2001 over the strong objections of industry and U.S. government representatives.

Because of the difficulty in moving forward with the comprehensive copyright legislation, the Uruguayan government supported the development of a bill which was aimed at establishing copyright protection for computer programs only. The bill was adopted by the Chamber of Deputies by unanimous vote on October 10, 2000.⁹ On October 25, 2000, the bill was forwarded to the Senate, which changed the bill’s name and redrafted several portions of it.¹⁰ Over the past 18 months, local and foreign software industry representatives have, on multiple occasions, expressed their opposition to the software-only bill to both the Chamber of Deputies and the Senate. The software-only bill approved by the Chamber of Deputies contained very troubling provisions. Its enactment would have represented a major setback in copyright protection for the software industries. The Senate’s version of the bill has not improved the situation.

IIPA and BSA objected to that 2000 software-only bill approved by the Chamber of Deputies – and importantly, the entire legislative initiative – for a variety of reasons:

- The bill took a *sui generis* approach to protecting computer software, establishing a separate legal regime from other copyrighted materials. There is a reasonable concern that a separate regime may lead the Supreme Court of Justice of the Republic of Uruguay to overturn the only conviction for software copyright infringement that was obtained in

⁹ *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”).

¹⁰ *Proyecto de Ley sobre Creaciones Informáticas* (Comisión de Educación y Cultura, Carpeta No. 307 de 2000).

Uruguay¹¹ based on the notion that software was not protected under the Copyright Law of 1937.

- The software-only bill was poorly drafted. It lacked clear definitions and used non-standard terms to refer to complicated legal issues. The bill did not establish what the copyright holder's exclusive rights are and it failed to incorporate by reference the rights found in the copyright law now in effect.
- Its proposed remedies and sanctions were inadequate. If approved, the bill would have reduced criminal penalties for copyright infringement and, in some cases, it would have completely decriminalized certain infringing acts such as the unauthorized reproduction of software by end users. In fact, the bill expressly exempted end users from criminal liability for copyright infringement through the use of unauthorized copies of software, unless they then resold those pirated copies.
- It contained very broad exceptions to protection which were clearly TRIPS-incompatible. The bill also failed to include a civil *ex parte* search remedy.
- The bill included onerous consumer protection measures and established compulsory warranty and service provisions. These proposed consumer protection measures went beyond those contained in the Uruguay Consumer Protection Act. Thus, the bill discriminated against the software industries by placing more onerous requirements than those imposed on any other commercial entity.

The copyright industry has been very clear in its representations to Uruguayan government officials that we strongly oppose the concept of creating a separate (*sui generis*) copyright regime for computer programs. However, given that there was a software-only bill pending in the Uruguayan Senate that was moving forward, we advocated that the immediate protection for computer programs could and should be accomplished only by converting the pending software-only bill into a one-article bill declaring that computer programs are protected under the existing copyright law. We opposed any additional articles in a software-only bill which would address issues such as transfer of ownership, burdensome consumer protection measures, or separate

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. That conviction stemmed from a criminal complaint that the BSA filed in 1992 against a software reseller. During a raid at the reseller's place of business, the police found and seized hundreds of diskettes containing illegally reproduced software. During the course of his trial, the reseller admitted that he copied the software without authorization and with the intention to distribute it. In his defense he argued that: (1) software was not a copyrightable work; and (2) 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 software, although not expressly recognized as a protected work in the 1937 copyright law, was a literary work and that its unauthorized reproduction and distribution was a crime. The Court convicted the reseller to eight months of imprisonment for "illegally reproducing a literary work." 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.

criminal penalty structures or interpretations. During the summer of 2001, an 11-article version of this bill was circulating.

Our efforts to minimize the damage caused by *sui generis* legislation on software were not successful. Further amendments were made to this bill, and the Uruguayan Senate adopted a nine-article software-only bill on December 19, 2001.¹² In addition to the general problems with *sui generis* legislation (identified above), the December 2001 software-only bill, as passed by the Senate, also included the following new problems:

- With respect to penalties, the December bill limits criminal copyright infringement to the "for profit" reproduction, distribution and warehousing of illegal copies of software. "For profit" is not defined, thus leaving open a huge gap in judicial interpretation (for the software industry, this could easily mean that end-user piracy would fall outside this provision). In fact, a senator involved in drafting the bill has indicated that his intention was to decriminalize end-user software piracy.
- Articles 1-5 are unchanged (scope of protection, work for hire). The specific article on software licensing has been dropped, and the provision regarding consumer remedies has been redrafted slightly. The article on precautionary measures (now Article 9) appears unchanged. Deleted was the old Article 9 which contained a basic statutory damages provision; it has been revised in an unsatisfactory manner (now in Article 8).
- The criminal penalties section has been rewritten into a new Article 7. While the objectionable language of the old bill (which threatened to undermine penalties for all protected subject matter, not just computer programs) has been deleted, the criminal penalties (which now appear to apply only to computer programs and databases, the subject matter listed in Article 1 of this bill) still do not provide effective deterrence against software piracy (and especially end-user piracy which, if the bill is approved, would carry no criminal penalties).
- This bill sets a more stringent standard for proving infringement of software, both in the criminal and the civil context, than for all other protected works:
 - Article 46 of the 1937 copyright law (as amended) does not require that a profit motive ("fin de lucro") be shown for criminal penalties to attach to an infringement. Article 7 of the software bill, however, requires a "for profit" showing.
 - On the civil side, Article 51 of the 1937 law provides for compensation for damages *and* all the benefits or revenue received by the defendant as a result of the infringement. The new bill limits civil compensation to "adequate" damages and the *discretionary* award of fees and costs if the history of the case merits it. The new bill also creates a civil fine, of up to three times the retail value of the pirated software. It is up to the judge's discretion to impose the fine and the funds obtained through this mechanism are intended for an Elementary Education fund (ANEP).

The software-only bill went back to the Education and Culture Commission of the Chamber of Deputies on December 27, 2001. The bill could possibly be considered on the floor

¹² *Proyecto de Ley sobre Creaciones Informáticas (Comisión de Educación y Cultura, Carpeta No. 307 de 2000).*

of the Chamber of Deputies as early as February 2002. Software industry representatives will again attempt to achieve some changes. The position of both the BSA and the local software associations is that the bill under consideration discriminates against the software industry and represents a step backward in the protection of software. The bill should not create different criminal penalties for different types of protected works. BSA and the local software associations only support a one-article bill that would enact the Judiciary's interpretation that software is a literary work and is protected as such under the copyright law of 1937.

The Uruguayan government has told industry officials that they believe that the industry will not suffer any commercial damage inflicted by this new legislation. That conclusion is, at most, premature considering the business software piracy rate increased to 74% in 2001, which is 8 percentage points higher than those reported for the previous year.

WIPO Treaties

Prompt ratification and implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in as many countries as possible is an essential element in the strategy to foster the growth of global electronic commerce. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly.

Uruguay is a signatory to both of the 1996 WIPO "digital" treaties. On April 2, 1998, Uruguay's Executive Branch submitted documentation for ratification of both treaties to the Chamber of Deputies that initially approved the treaties on December 12, 1998.¹³ A year later, the bills passed to the Senate on March 3, 1999, where they have been under consideration of the Foreign Affairs Commission. President Batlle requested the Commission's prompt consideration of the bills, but they remain pending. The ratification process has slowed as Congress waited for the approval of the new copyright law (which is now off track). Because Uruguay is eager to see itself as a high-tech economic center in the region, joining these two treaties would help foster Uruguay's commitment to modern copyright development. Of course, further amendments to its current law would be needed to fully implement the treaties into national legislation.

COPYRIGHT PIRACY IN URUGUAY

Copyright piracy levels and estimated losses due to piracy have remained consistently high in Uruguay for the last few years. In fact, over the last year, BSA has observed an increase in Internet piracy activity through the offering of illegal software on websites and auction sites. BSA has filed several criminal complaints against these software pirates, but the cases have either been dismissed for "criminal policy reasons" or have been pending for months without resolution (see below).

¹³ *Tratado de la OMPI sobre Interpretación o Ejecución de Fonogramas y las Declaraciones Concertadas relativas al Tratado de la OMPI sobre Interpretación o Ejecución de Fonogramas, Carpeta No. 2506 de 1998) and Tratado de la OMPI sobre Derechos de Autor y Declaraciones Concertadas relativas al Tratado de la OMPI sobre Derechos de Autor, Carpeta No. 2507 de 1998.*

Most 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 a user manual, certificates of authenticity, or other documentation that properly loaded software would include. Despite BSA's efforts to reduce business software piracy during the past year, the estimated piracy levels in Uruguay jumped from 66% in 2000 to 74% in 2001, and estimated losses suffered by the U.S. software industry also rising to \$13.0 million.

The motion picture industry reports that video piracy continues to interfere with the development of a legitimate video market in Uruguay. Back-to-back copying in individual video clubs continues to be the dominant piracy method. MPA Uruguay program investigations have not uncovered evidence of organized pirate video duplication laboratories. Pre-release video piracy appears to originate from the contraband Paraguayan production and distribution structure. The 2001 estimated video piracy rate was 40%, a decline from prior years which may be attributed to improved local distribution of legitimate video product. 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. Losses to the U.S. motion picture industry due to audiovisual piracy in Uruguay are estimated to be \$2 million in 2001.

The recording and music industries report that the unrestricted illegal replication of CD-Rs (recordable CDs) has become its major piracy. The number of CD burners in Uruguay has grown tremendously, as has CD-R piracy. In addition to affecting the Uruguayan market, shipments of pirated products for ultimate delivery in Brazil, were found in Montevideo's Free Zone, known as Florida. After the IFPI's 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 and blank CD-Rs (to be used for piracy purposes) 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. Enforcement by customs authorities continues to be inadequate and weak; in fact, no *ex officio* measures were conducted last year, according to the recording industry. There has been some positive change in the attitude of some police officers and judges, who are becoming convinced of the importance and the need to enforce copyrights. Estimated trade losses and levels of music and recording piracy in Uruguay were \$4.0 million with a 50% piracy level in 2001. The legitimate music market in Uruguay decreased by 33 percent during 2001.

The Interactive Digital Software Association (IDSA) reports that the pirated entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia products) is readily available in Uruguay. Estimated piracy levels and losses are not presently available for 2001.

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. Estimated 2001 trade losses due to book piracy in Uruguay are \$2 million, the same as the prior year.

COPYRIGHT ENFORCEMENT IN URUGUAY

Criminal copyright enforcement in Uruguay remains ineffective and does not deter piracy.

Considering that the Uruguayan copyright legal framework is antiquated, it is somewhat striking to report that there actually is some enforcement of the law in Uruguay. However, much more work needs to be accomplished by Uruguayan law enforcement authorities.

Criminal Code In Effect

Amendments to the Criminal Procedures 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 either by 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. BSA has witnessed an incremental improvement in prosecutorial activity during the second half of 2001 against street vendors of illegal software. This activity, however, is very recent and may be nothing more than a token effort to show that the government of Uruguay is doing something to fight piracy. To date, there have been no convictions in these cases. Increased attention by the police and prosecutors is needed to ensure that this is a long-term, positive change that provides an effective deterrent against piracy under current Uruguayan laws.

Police Actions Taken, But Few Prosecutions and Sentences

In 2001, BSA conducted 20 raids, which resulted in the initiation of 29 cases. In 2000, BSA filed eight criminal complaints against individuals who offered pirated software in the newspapers at a discount. Three of these cases were summarily dismissed by the Court for criminal policy reasons. The Court never explained what the phrase “criminal policy reasons” meant. The dismissals and the lack of explanation for them clearly demonstrate a systemic failure to provide “adequate protection” under GSP, and are also a violation of TRIPS Article 41.3, which

requires member nations to issue “[d]ecisions on the merits of a case [that are] reasoned.” The rest of these cases have been pending since their filing in 2000 without any progress in the investigations. During 2001, BSA filed eight criminal complaints against resellers of illegal software. Four of these cases were summarily dismissed by the Court for criminal policy reasons, and the remaining four have been pending. The Prosecutor’s Office has not even requested a search warrant. By the time the Prosecutor requests that the Court issue a warrant search, the evidence may have disappeared. One of these pending cases was filed over a year ago, in February 2001.

In another case, one BSA member company filed a criminal complaint against a reseller for hard disk loading (HDL) in June 1999. BSA submitted as evidence of the crime two PCs that were purchased from the reseller loaded with illegal software. Despite several requests from BSA, the Prosecutor’s Office took almost two years to request the Court to issue an order to analyze the hard disks offered as evidence of the crime. To BSA’s surprise, on September 10, 2001, the Court issued an order stating that there were no expert witnesses available in Uruguay to analyze whether there was any software loaded on the hard disks. BSA even submitted a list of expert witnesses that the Court appoints in civil copyright infringement cases, but the Court ruled that the expert witnesses were not sufficiently qualified for the job and dismissed the case.

In 2001, the recording industry exerted much effort to bring criminal cases. The police have not been formally instructed or motivated to take action 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, in recent months, the Ministry of Interior, the *Fiscal de Corte*, some police departments (such as the Director of Police of Montevideo) and a few other units began cooperating individually to conduct the first anti-piracy cases. This does not mean, however, that an overall official attitudinal change has been made by the Uruguayan government. Cooperation from police departments depends more on personal attitudes than a central plan from the government to attack the problem.

The recording industry has invested heavily in building an anti-piracy program in Uruguay. It initiated 174 actions in 2001, and relative progress continued to be achieved during the year. This represents an initial positive trend, but is still far away from the overall official attitude that is needed to deter 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 174 cases conducted in 2001, 119 were against street vendors, 39 against small laboratories reproducing CD-Rs, 11 against warehouses and five cases were conducted with customs. Almost 102,000 pirate CDs and CD-Rs were seized, as well as 16,000 cassettes. The bad news is that the above-mentioned figures represent a drop in the ocean of piracy that can easily increase in Uruguay unless the government takes this problem seriously and commits to prosecute pirates, enforcing the laws and implementing stricter laws, which protect the investments of legitimate businesses.

MPA intends to restructure its anti-piracy program in Uruguay to focus primarily on retail piracy in Montevideo. In 2000, MPA discontinued its entire program because of the inability to effectively address piracy. The Uruguayan market continues to be important to the audiovisual industry.

CRIMINAL COPYRIGHT ACTIONS: URUGUAY (2001)

CRIMINAL ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	20	174
Number of cases commenced	29	102
Number of defendants convicted (including guilty pleas)	0	9
Acquittals and Dismissals	0	13
Number of Cases Pending	25	89
Total number of cases resulting in jail time		9
Suspended Prison Terms	N/A	0
Maximum 6 months	N/A	0
Over 6 months	N/A	0
Over 1 year	N/A	
Total Suspended Prison Terms	N/A	0
Prison Terms Served (not suspended)	N/A	9
Maximum 6 months	N/A	5
Over 6 months	N/A	4
Over 1 year	N/A	0
Total Prison Terms Served (not suspended)	N/A	9
Number of cases resulting in criminal fines	N/A	0
Up to \$1,000	N/A	N/A
\$1,000 to \$5,000	N/A	N/A
Over \$5,000	N/A	N/A
Total amount of fines levied	N/A	N/A

Customs measures are ineffective in controlling piracy at the border.

With its proximity to Paraguay and Brazil and the growing problem of pirated and counterfeited goods crossing its borders, Uruguay is faced with a major challenge to improve its border measures. In fact, recent customs seizures of presumably counterfeit goods in Paraguay have identified Uruguay as one of the countries through which these goods enter Latin America. Uruguay is also serving as a transshipment center to send infringing products into Brazil via Rio Grande Do Sul/Santa Catarina. Customs is a key element in the effort to control the contraband of legal and illegal product. Enforcement at the Uruguayan borders and in Zona Florida needs to be significantly improved, especially given the growth of optical media piracy in the Mercosur region.

Civil enforcement in Uruguay is ineffective because of substantial procedural delays, lack of clarity regarding unannounced civil *ex parte* searches, and high bond requirements for copyright litigation.

In addition to criminal cases, BSA also conducts civil actions. 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 copyright enforcement and, if anything, the legal situation has deteriorated over the last few years.

Substantial Delays: The Uruguayan courts to continue incur substantial delays in copyright enforcement actions. In a typical case, after uncovering evidence of software piracy, the 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 action 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 a disadvantage when they try to enforce their rights in Uruguayan courts. BSA filed 14 civil complaints in 2000, of which it obtained search orders in only seven cases; the other seven still await action. During 2001, BSA filed 14 civil complaints and conducted 20 civil raids. Seven of these civil raids were cases filed back in 2000 and have been waiting for the Court to issue a civil warrant search for several months. Seven cases were settled during 2001, while the rest are pending.

Expert Witnesses Availability and Cost: BSA has also encountered some problems with expert witness availability. In criminal cases, for instance, the *Fiscalía* currently does not have expert witnesses available to analyze the evidence found in the raids. The *Fiscalía* usually relies on the expert witnesses proposed by the parties. The fees for the services of these expert witnesses are determined by the Court and usually are prohibitive. In civil cases, courts require an aggrieved party to deposit the fees for the expert witness in a bank account before issuing the order for a search warrant. It is not uncommon to wait from four to eight weeks until the expert witness submits his report to the court. In a civil case against an end user, a search warrant was executed on July 31, 2001; as of the date of this writing (mid-February 2002), the expert witness has not submitted his report to the Court, although he has already collected the money that BSA paid for his services. Such a cumbersome and costly procedure runs afoul of Uruguay's TRIPS obligations.

Expensive Bond Requirements: 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 enforce 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.

Evidentiary Burdens: Other obstacles are also routinely encountered. 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 the 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. 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. BSA faced a similar situation in a case filed in May 2001.

CIVIL COPYRIGHT ENFORCEMENT ACTIONS: URUGUAY

CIVIL ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2000	BUSINESS APPLICATIONS SOFTWARE 2001
Number of civil raids conducted	12	20
Post -Search Action	N/A	N/A
Cases Pending	0	2
Cases Dropped	2	4
Cases Settled or Adjudicated	6	7
Value of loss as determined by Rightholder (\$USD)	75,000	70,000
Settlement/Judgment Amount (\$USD)	33,340	45,632

WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

BOLIVIA

EXECUTIVE SUMMARY

IIPA recommends that Bolivia remain on the Special 301 [Watch List](#).

Despite promises and rogue efforts from the Bolivian government, the levels of copyright piracy in Bolivia have remained high across most industry sectors for too many years. Bolivia fails to meet basic TRIPS standards. The lack of civil *ex parte* measures remains the biggest problem in enforcing IPR in Bolivia, as well as the lack of resources and directions to investigate and fight this matter from its sources. 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. The Bolivian Congress has not even started reviewing the bill, despite several requests from the Industry. There are reports that the bill will not be considered during the 2002 legislature either. Interestingly, the Bolivian IPR industries and culture have been the most affected in this process. Multinational companies continue reducing investments down to basic expenses. Bolivia is losing the ability to create new talent and export it in several fields.

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. One of the discretionary criteria of these programs is that Bolivia provide "adequate and effective protection of intellectual property rights."¹

¹ In 2000, \$5.8 million of goods from Bolivia entered the U.S. under the duty-free GSP code, accounting for 3.1% of its total imports to the U.S. Another \$61.5 million of Bolivia's imports to the U.S. received benefits under the ATPA program, accounting for 33.4% of its total imports that year. For the first 11 months of 2001, \$6.2 million of Bolivian goods (or 4.1% of Bolivia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 26.4% increase over the same time period last year. Another \$52.4 million of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2001, representing a decrease of 5.8% from the same period last year. For a full history of Bolivia's Special 301 placements, see appendices D and E of IIPA's 2002 Special 301 submission.

BOLIVIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	3.0	79%	2.8	81%	4.1	85%	4.0	88%	3.1	88%	3.0	88%
Sound Recordings / Musical Compositions	15.0	85%	15.0	85%	15.0	85%	20.0	85%	18.0	85%	15.0	85%
Motion Pictures	2.0	100%	2.0	100%	2.0	100%	2.0	100%	2.0	100%	2.0	100%
Entertainment Software	NA	NA	1.5	NA	NA	NA	3.9	93%	3.8	94%	3.9	93%
Books	5.5	NA	5.5	NA	5.0	NA	5.0	NA	5.0	NA	5.0	NA
TOTALS	25.5		26.8		26.1		34.9		31.9		28.9	

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 2001 were \$3.0 million. The level of business software piracy in that country remained at a high 79% level. Piracy levels in the government remain extremely high despite efforts by BSA member companies 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 2001. In comparison, the legitimate industry decreased significantly. Current figures are difficult to come by, as most of the formal companies had to close down operations due to piracy. The estimated level of audio piracy in the Bolivian market is 85% because every hit is pirated after two to three weeks of initial release. In fact, the legitimate recording and music industries have accounted for no more than 15% of the total market for the last six years. To compound matters, the market is being threatened by digital piracy, and has – as predicted – shifted into a pirate CD-R (recordable CD) market. These high losses are due primarily to the total 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. In addition, 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. Yacuiba is also known as a center for illegal traffic of raw materials for piracy. Street vendors of pirate product in La Paz, Cochabamba, Sucre and Potosi are common. Bolivian authorities do not assist in conducting investigations; actions only happen after the local industry presses the bureaucracy and the local industry is close to disappearing completely.

²BSA estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$4.1 million at 84% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and the revised estimates are reflected above.

The level of book piracy in Bolivia has seen no improvement. It appears that Bolivian pirates are now printing their own books, and there are reports that they exchange these copied books with pirate publishers/printers in Peru. As a result, there are fewer book imports from Peru than before. Estimated losses due to book piracy amounted to \$5.5 million in 2001.

The Interactive Digital Software Association (IDSA) reports Bolivia continues to have pirated interactive entertainment CD-ROMs and cartridges that are shipped from Paraguay by Chinese manufacturers, many of whom have Taiwanese connections. Estimated 2001 trade losses and videogame piracy levels are not available.

COPYRIGHT ENFORCEMENT IN BOLIVIA

Lack of Commitment from the Bolivian Government to Protect IPR

During 2001, the Bolivian government showed its lack of commitment to protect IPR within its borders on numerous occasions.

In March 2001, the BSA launched a massive legalization campaign in Bolivia. Throughout the campaign, which was originally sponsored by the Ministry of Foreign Trade, several TV, radio and printed press commercials communicated to the Bolivian companies the legal consequences of using illegal software. During the campaign, some companies and a trade association complained to the Bolivian government that they should not be obligated to license the illegal software they were using because of the economic situation the country was going through. Mr. Ronald McLean, then Minister of Sustainable Development, without consulting with BSA decided to take a stance on the matter. He called a press conference and stated that the BSA did not have the right to operate in Bolivia. In addition, he indicated that any software publisher needed to have its copyrights registered in Bolivia to enforce them. Both statements were in clear contradiction with Bolivian and international law. After several meetings, document productions and negotiations with Mr. McLean, the minister indicated that he was satisfied with the evidence submitted to demonstrate BSA's legal status and the member companies' ability to enforce their intellectual property rights in Bolivia. The Ministry of Sustainable Development then issued a press release correcting the minister's previous statements. The minister's public comments, however, caused the BSA and its member companies extensive damage to their image and credibility in Bolivia and other neighboring countries in Latin America. His remarks sent a dangerous message to the Bolivian business community and the public in general that computer software piracy will be tolerated by the Government.

In addition, during the period of the legalization campaign, the Minister of Justice ordered the suspension of any investigations submitted to the Prosecutor's Office by the BSA. Several criminal complaints that were filed against resellers of illegal software were put unduly on hold for over four months. No written decision explaining the reasons for the order was ever issued.

Software piracy in government agencies and ministries remains both blatant and rampant. On March 2001, President Banzer issued a *Decreto Supremo* creating a committee to supervise the legalization of all government agencies and ministries. Up to date, the Committee has only issued a directive mandating all ministries and agencies to stop purchasing legal software until the government prepares a legalization strategy. The effect of this order was to paralyze the few

legalization processes that were taking place at the time. Despite its rhetoric, the Bolivian government has not shown any sign that it will start its legalization process any time soon.

The music industry continuously requested the assistance of the government at all levels. The National Recording Industry Association (ASBOPROFON) has basically disappeared. There are just a few reminders of what it used to be — a mature and vibrant industry. All the multinational companies have left the country with the exception of one, and the one that has remained left a small representative office. The local industry is starving and the legitimate trade has been reduced to the minimum. The damage will be irreversible, yet the Bolivian government contemplates the situation with passivity.

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, however, is seriously under-funded, 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 its 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 even before it 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 12 civil complaints against end users, but the courts granted search orders in only six of them. 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.

During 2001, BSA conducted 22 civil inspections. In all of these cases, the BSA had the obligation to notify the defendants at least 24 hours prior to the inspection. In many cases the only evidence that the BSA found was the traces of software that was previously installed but deleted a few hours before the inspection. BSA settled seven of these 22 cases. The rest are pending.

Unwarranted Delays in Civil and Criminal 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 or simply disappeared. 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."

Depending on the city in which the civil complaint is filed, it could take up to four to five weeks to obtain a warrant 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 a copyright, 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.

BSA filed a criminal complaint against a software reseller for hard disk loading ("HDL") 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. It took the Prosecutor's Office and the Court an additional two months until the warrant search was finally issued.

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.³ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁴ BSA is encouraged that the

³ Ley de Derechos de Autor, No. 9610, Article 103.

⁴ 17 U.S.C § 504 (c)

overhaul of the intellectual property laws submitted to the Bolivian Congress adds a statutory damages provision of between three to five times the retail value of the protected work⁵.

Inadequate and Ineffective Criminal Enforcement

Enforcing copyrights through the Bolivian criminal system has proven to be totally ineffective.

BSA filed two criminal complaints in 2000 against software resellers for hard disk loading (“HDL”) in the city of Santa Cruz. Although these cases were filed in September 2000, the Judicial Technical Police (*Policía Técnica Judicial*) took over four months to prepare the investigative reports of the cases and request the issuance of a search and seizure order. The order granting the search in one of these cases was finally issued in February 2001. During the raid, the prosecutor and the Judicial Technical Police seized extensive evidence of copyright infringement. Among other items, they seized six burned CDs loaded with software from BSA member companies, and a PC loaded with unlicensed software. Two expert witness reports were submitted to the file, one of them from the Judicial Technical Police. Both reports indicated, among other things, that the six burned CDs had been loaded with illegal software, and that the seized PC also had unlicensed software installed in its hard disk.

After the raid, local counsel for BSA visited the Prosecutor’s Office and the Court several times to have access to the file. Under Bolivian law, a party who files a criminal complaint has the right to review the file and status of a case. In both places, he was denied access to the file every single time because the file was under “review.” When local counsel finally examined the file a few weeks later, he learned that the Prosecutor’s Office and the Court had both summarily dismissed the case for lack of evidence. To make matters worse, local counsel noticed that the decision was dated several days before, and that the time to appeal the decision had already expired. BSA was never served with a copy of the judge’s decision, although the Court was required to do so under Bolivian law.

TRIPS and the basic principles of due process mandate that “[...]decisions on the merits of a case [...] shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard” (TRIPS Articles 41.1 and 2). Needless to say, the Court did not observe any of these formalities in the above-mentioned case.

During 2001, BSA conducted four criminal raids against resellers of illegal software. In three of these cases, it took an average of five months from the time the criminal complaint was submitted with the investigation until the Court issued a search warrant. One of the cases was totally frustrated because the reseller relocated his business before the raid.

The recording industry reports that a few small raids were conducted in Bolivia in 2000 and 2001. Only 3,500 pirate cassettes were seized representing less than 1% of the problem. 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.

⁵ Anteproyecto de Código de Propiedad Intelectual, Article 175 I.

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.⁶ 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 was 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 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 rights holder.

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

⁶ 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.

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 time frame.

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. 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 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 (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). 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.

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 appears 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.

BOLIVIA ENFORCEMENT CHARTS: 2000 and 2001

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	4	N/A
Number of cases commenced	4	N/A
Number of defendants convicted (including guilty pleas)		N/A
Acquittals and Dismissals		N/A
Number of Cases Pending	4	N/A
Total number of cases resulting in jail time		N/A
Suspended Prison Terms		N/A
Maximum 6 months		-
Over 6 months		-
Over 1 year		-
Total Suspended Prison Terms		-
Prison Terms Served (not suspended)		NONE
Maximum 6 months		-
Over 6 months		-
Over 1 year		-
Total Prison Terms Served (not suspended)		NONE
Number of cases resulting in criminal fines		-
Up to \$1,000		-
\$1,000 to \$5,000		-
Over \$5,000		-
Total amount of fines levied		NONE

CIVIL COPYRIGHT ENFORCEMENT STATISTICS		
ACTIONS	2001 BUSINESS APPLICATIONS SOFTWARE	2000 BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	22	8
Post Search Action		0
Cases Pending		0
Cases Dropped	2	5
Cases Settled or Adjudicated	7 (settled)	1(settled)
Value of loss as determined by Rightholder (\$USD)	243,782	135,558
Settlement/Judgment Amount (\$USD)	73,387.81	10,000

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

BULGARIA

EXECUTIVE SUMMARY

IIPA recommends that Bulgaria be added to the Special 301 Watch List in 2002. Certain copyright sectors report resurging problems with the production, distribution, and importation of optical disc media, which requires heightened bilateral attention. By not providing effective enforcement against this piracy, Bulgaria is in breach of its TRIPS enforcement obligations and of the two bilateral agreements with the United States.

Bulgaria made important strides in 1998 regarding the enforcement of its plant-licensing regime in order to curb its major piracy production, distribution and export problem that was threatening markets throughout Europe. During the mid-1990s, Bulgaria was one of the world's leading exporters of pirated goods, especially optical media products of music and software (CDs and compilations on CD-ROMs containing business and entertainment software). In response to mounting international pressure, legal reforms were adopted to regulate the production and distribution of optical disk media to prevent the spread of illegal material. The Bulgarian government acted to reduce illegal production, permanently closing several plants and temporarily shutting down others.

It is true that Bulgaria has accomplished many legislative reforms to amend its copyright law and criminal laws and adopt new legislation on CD plant verification. On a positive note, Bulgaria has deposited its instruments of ratification for both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The copyright law amendments of 2000 went far toward implementing many of these WIPO obligations. Nevertheless, the practical enforcement situation in Bulgaria is worse than ever and needs substantial improvement.

BULGARIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	3.0	20%	3.0	25%	4.0	25%	4.0	35%	5.0	80%	9.7	80%
Sound Recordings / Musical Compositions	3.0	65%	NA	NA	NA	NA	125.0	90%	95.0	85%	105.0	80%
Business Software Applications ¹	9.4	81%	8.1	78%	9.1	80%	10.7	93%	8.4	87%	12.9	94%
Entertainment Software	NA	84%	NA	NA	NA	NA	66.5	99%	62.0	94%	58.2	95%
Books	0.3	NA	NA	NA	NA	NA	0.5	NA	0.5	NA	0.4	NA
TOTALS	15.7		8.1		NA		207.7		13.0		9.7	

SUMMARY OF BILATERAL IPR ENGAGEMENT²

In April 1991, the U.S. and Bulgaria signed a bilateral trade agreement, under which Bulgaria agreed to provide “adequate and effective protection and enforcement” for copyrights and other intellectual property. That bilateral provided clear and explicit enforcement obligations for Bulgaria to adopt, including procedures and remedies against copyright infringement, and a commitment to join the Geneva Phonograms Convention by the end of 1992. Bulgaria adopted a new copyright law effective August 1, 1993, but the law was deficient when compared with the bilateral obligations. Neither it nor the Bulgarian penal code authorized the imposition of significant criminal sanctions such as imprisonment of copyright pirates or appropriate confiscation provisions; and it failed to protect foreign sound recordings, thus rendering Bulgaria ineligible to join the Geneva Phonograms Convention as it had promised.

Given the devastating problem of Bulgarian CD production and exports, in February 1995 IIPA asked USTR to designate Bulgaria as a Priority Foreign Country and to withdraw Bulgaria's preferential trade benefits under the Generalized System of Preferences (GSP) program. Faced with the prospect of sanctions under Special 301, and aided by a change in government in Sofia, Bulgaria moved quickly to address the issues highlighted in IIPA's filing. On the eve of USTR's 1995 Special 301 decision, the U.S. and Bulgaria exchanged letters in which Bulgaria promised to accede to the Geneva Phonograms Convention “on a priority basis” and to protect U.S. sound recordings published in the last 50 years; to establish a title verification system to prevent piracy of compact discs, laser discs, CD-ROMs and videos; and to enact deterrent criminal penalties, applicable to a broad range of infringements, including inflation-adjusted fines and mandatory destruction of pirate product.

¹ BSA loss numbers for 2001 are preliminary.

² For further details on the history of Bulgaria's appearance in the Special 301 context, please refer to appendices D and E of this filing.

As a result, this second bilateral agreement, the 1995 Title Verification Agreement, provided for specific enforcement obligations on the part of the Bulgarian government to implement plant licensing and title verification systems. In April 1996, the Bulgarian government passed Decree 87/96 (the Title Verification Decree/TVD). This decree provides for a verification procedure in regard to the reproduction and distribution (including exportation) rights of sound and video recordings, as well as for an obligatory registration at the Ministry of Culture's Copyright Department of all applications for the manufacturing of sound and video carriers containing protected material. The TVD was further amended in 1997 to explicitly cover the registration of CD-ROM manufacturing. However, the adopted measures proved insufficient in reducing the illegal manufacturing of pirated optical media. Due to this, in February 1998, new amendments to the TVD were passed by the Bulgarian government and new plant licensing procedures of operation were introduced. Later in the same year the decree was once again amended to cover not only the licensing of CD manufacturers, but those who manufacture matrices/stampers for CD production. In February 1998, the Council of Ministers adopted more amendments to Decree 87/96 to stop all CD production at each plant until such plants could be licensed under new procedures of operation.

Piracy and export problems remained severe, and IIPA again recommended in February 1998 that Bulgaria be designated a Priority Foreign Country under Special 301. With the possibility looming of a PFC designation in April, the Bulgarian authorities finally took action to enforce the TVD and to start to control the production and distribution of pirate CDs by Bulgarian plants by first closing all of them and re-opening them only upon compliance with the newly introduced TVD plant licensing system. USTR decided to keep Bulgaria on the Priority Watch List in April, and conducted a six-month out-of-cycle review later that year to monitor the progress and success of these production controls. Satisfied that progress was being made, USTR announced in November 1998 that it was moving Bulgaria to the Watch List, a placement supported, albeit cautiously, by IIPA. At the time of that announcement, both USTR and IIPA agreed that title verification had to be significantly improved, and that additional controls on optical media production were required. In USTR's April 1999 Special 301 announcement, progress in Bulgaria was noted, and in recognition of its "firm commitment to effective enforcement" of its IPR laws and its roles as serving as "a model for other economies which are at risk of developing unwanted production capacity of pirated optical media," Bulgaria was removed from all Special 301 lists.

Bulgaria also participates in the U.S. trade program, the Generalized System of Preferences (GSP), which contains a criterion that eligible countries must provide "adequate and effective" IPR protection to U.S. copyright owners. In 2000, \$15.3 million of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 6.6% of its total imports to the U.S. For the first 11 months of 2001, \$18.6 million of Bulgarian goods (or 5.8% of Bulgaria's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 33.5% increase over the same time period last year.

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Optical Media Developments

For four years leading up to March 1998, the principal piracy problem in Bulgaria was the

escalating pirate production and export of copyrighted material – principally sound recordings and computer software – on compact disks. By March 1998, CD manufacturing capacity had grown from a few million to almost 70 million units per annum. Copyright piracy in Bulgaria completely paralyzed the domestic market and export of pirated optical disks seriously disrupted markets throughout the world. The introduction of the TVDs plant licensing system in February 1998 had a significant impact on the situation in Bulgaria and its main export markets. As a result, pirate production was limited, CD plants were put under surveillance by economic police officers, and the main offending plant (UNISON, Botevgrad) was closed.

As a result, most of the plants received a production license and were at least temporarily operational. However, today there are only two licensed CD plants still in operation: CHSL located in Sofia (Boyana residential area) and the Hemus Group, also located in Sofia. Both plants have one line each and a total annual production capacity of approximately 12.5 million units.

With an annual optical disk production capacity much higher than the demand of the local market and growing production of gold CDs (recordable CDRs), Bulgaria remains a potential source of CD and CD-ROM based piracy in Europe. At the end of 2001, Bulgaria still had one mastering facility. Apparently as a result, however, of the identification of a consignment being exported by the plant which indicated its involvement in the production of unauthorized stampers, this mastering facility has left the country and its license has been revoked. Unfortunately, the export of these mastering facilities was unimpeded by the Bulgarian authorities, despite the clear involvement in illegal replication activity. As a result, there are currently no licensed CD mastering facilities operational in Bulgaria.

Traditional Piracy and Internet Piracy in Bulgaria

The piracy of U.S. sound recordings and music remains unacceptably high in Bulgaria even with the significant progress made in 1998. Until mid-1998, Bulgarian-made pirate CDs (an estimated 90% of the output of Bulgarian plants) were being exported, with impunity Worldwide. Since 1998, Bulgaria has become an import market swamped with illegal CDs from Ukraine, Russia and Montenegro. In addition, there is a large and fast growing pirate CD-R market. And, as indicated above, the Bulgarian mastering facility has been involved in the production and export of illegal masters). Piracy of foreign recording is estimated to have hit on all-time high in 2001 with 95% of all foreign sound recording sold being illegal copies. The overall piracy level in Bulgaria for all repertoire is 65%. Estimated trade losses to U.S. companies due to recording piracy in Bulgaria is placed at \$3.0 million in 2001.

The motion picture industry reports that video piracy in Bulgaria was substantially curtailed in 2001. MPA reports an optical disc piracy rate of 15%; optical disc retail piracy at the moment can be found at flea markets and in the streets. Broadcast and cable piracy, though in sharp decline, are also an issue. Web-based piracy is only beginning to emerge. Pre-theatrical and pre-video release piracy has been curtailed, but still requires attention. There are no large illegal duplicators based in Bulgaria. Pirate product is sold by a small number of street vendors, flea markets and retailers. The rental of back-to-back copies can still be found in approximately 8-10% of all retail outlets, particularly smaller ones dispersed throughout the country. Small video retail stores are constantly in the process of merging with each other. Such consolidation has had a positive effect on piracy levels. The copying of VCD masters imported from Asia and Ukraine onto videocassettes and CD-ROMs is also a problem. The quality of counterfeit products is becoming so high that it is almost impossible to distinguish them

from originals. The vast majority of pirate VCDs seized (5,868 in 2001) was imported or was passing through the country. The shipments come from or are destined to neighboring countries – Turkey, Yugoslavia, Romania and Macedonia. There is some home production of CD-ROMs containing films, but most illegal optical discs are imported.

Since 1996, Bulgarian film licensees have been obliged to present agreements under which they have acquired the rights to reproduce and distribute films to the Copyright Department and to complete a declaration affirming these rights. Production orders for video carriers and duplication facilities must be registered at the Copyright Department and the Ministry of Industry. The Decree, as amended in 1997, also requires the registration of broadcasting and cable rights.

Due to the efforts of BullACT, the local anti-piracy organization, and the enactment of a 1998 Radio and Television Law providing for the licensing of broadcasters and cable operators, the level of television piracy has fallen dramatically, to about 10%. The illegal transmission of television programs is no longer present in larger cities, but can still be found in smaller, remote towns where some cable operators transmit nonencrypted television programs that include foreign motion pictures. Finally, three cases of pirated hard goods (VCDs) being marketed on Bulgarian Websites have been uncovered in 2001. Internet penetration is still at a low level but increasing. Most pirate cases concern music and computer games. The program has also raided two computer clubs where movies were downloaded from the Internet and offered for public viewing. BullACT views Internet piracy as an increasing problem that will grow once Internet connections improve. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Bulgaria are estimated to be \$3 million in 2001.

Software piracy remains pervasive throughout Bulgaria, and criminal enforcement is wholly inadequate. The Business Software Alliance (BSA) estimates losses to U.S. producers of business applications at \$9.4 million for 2001, with a piracy rate of 81%. All the CD production facilities in Bulgaria have the capability to produce high quality (silver disc) CD-ROMs loaded either with unauthorized compilations of pirate copies of business applications and entertainment software or single company counterfeit programs. The local market cannot absorb more than a small quantity of this product, and nearly all of it is exported. In the past, pirate software compilations from Bulgaria have been seized in Russia and elsewhere in Central and Eastern Europe. Material has also been found in Western European markets, such as Germany, Belgium and the U.K. In addition, the domestic software market is flooded with illegal CD-ROMs, both silver and gold, containing a full range of different business software applications published.

The illegal production of optical media containing business software is only a part of the problem. The definition of software piracy also extends to the widespread use of unlicensed software in both the corporate and private sectors (EU/end-user piracy). In addition, the distribution of illegal software copies on the hard disks of sold computers is still a common practice among Bulgarian resellers (HDL/hard disk loading piracy). Finally, the Internet is increasingly used for the distribution of illegal software (Internet/online piracy). The business software industry reports that despite the broad legislative reform in the IPR field that has taken place in Bulgaria, the software piracy problem has not diminished. Ineffective implementation and enforcement of the new laws has kept the piracy rate at an unacceptably high level. As a result, within the last three years, out of over 90 criminal prosecutions filed, only one has produced a court sentence and the others, despite BSA's efforts, are not likely to be brought to court in the foreseeable future. There are clear signs of increased illegal activities, both with regard to the local manufacturing of pirated optical discs and to the use and distribution of unlicensed

software.

For the entertainment software industry, market stalls and regular retail outlets selling pirate videogame products are a key problem. Burn-to-order shops are commonplace. Internet piracy is growing and Internet burn operations are increasing too. Newspaper advertisements also flaunt CD burning of game software. The Interactive Digital Software Association (IDSA) reports that illegal entertainment software, in all formats, assembled in Bulgaria is continuing to be exported and sold throughout Eastern Europe. Reports indicate that all of industrially produced pirate CD-ROMs (silver discs) are being imported from Russia. Local CD-burning operations (using gold discs) range to up to 35-40% of the market, depending on the platform. IDSA estimates that the 2001 videogame piracy level in Bulgaria is 84%. Estimated trade losses due to videogame piracy are not available.

The book publishing industry indicates that Bulgaria, like other Eastern European countries, has experienced pirating of American books, especially popular fiction and textbooks, for years. Estimated trade losses due to book piracy for 2001 are \$300,000.

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In summary, the key elements for effective action are: (1) continued vigilance by the Ministry of Interior in enforcing the plant licensing decrees; (2) effective implementation of title verification; (3) the application of raw material (polycarbonate) monitoring both at the plants and by customs officials, in compliance with the decree of March 1998; (4) effective, expeditious criminal prosecutions and the imposition of deterrent penalties for all forms of piracy; and (5) implementation of effective anti-corruption measures within the enforcement authorities and the judiciary; and (6) more active and regular involvement of policy forces in cooperation with rightholders to conduct targeted raids throughout the country.

In 1997, an Inter-Ministerial Council for the Protection of Copyright and Neighboring Rights was organized to better coordinate and direct Bulgaria's anti-piracy enforcement efforts. The Council, headed by the Deputy Prime Minister, is broadly based and includes the Secretary of the Interior, the Deputy Ministers of Foreign Affairs, Industry, and Foreign Trade, the Chief of the Customs Service, and representatives from the Chief Prosecutor's Office, National Investigation Agency, Directorate of the National Police and National Security Service. Despite the high expectations of the IP industries, the council has failed to achieve the goal it was established to obtain. In the past four years of operation, none of its motions have brought any concrete results; its sessions have not been attended by the designated top officials; and its lack of cooperation with IP industry representatives has prevented it from becoming an efficient tool in fighting the Bulgarian piracy problem.

Additional agencies also concerned with IPR protection, in one way or another, include: the National Radio and Television Council, the Ministry of Culture, the Ministry of the Interior, the Ministry of Finance, the Ministry of Justice and European Legal Integration, the Ministry of Education and Science, the Ministry of Public Health, and the General Tax Administration Directorate.

Finally, although the Council for Protection of Copyright and Neighboring Rights established a task force to fight software crimes and offenses in June 2001 to increase the efficiency of the prosecution of software crimes, the task force had only two sessions in 2001 without any result.

whatsoever. The newly elected government is supposed to pass a decree designating the new members of the council and the task force, which has not yet happened.

Title Verification and CD Plant Licensing

To review, Bulgaria adopted a title verification system in 1996 to crack down on illegal production (Decree 87/96). The major statutory deficiency in the title verification system at that time was corrected in April 1997, when the decree was amended to include the registration of CD-ROM manufacturing (even though it was limited to manufacturing, not distribution orders). With 1998 amendments to Decree 87/96, a plant licensing system was introduced, and provided that only plants with a production license are allowed actually to start CD production after having obtained the necessary license from the Ministry of Economy.

Beginning with the March 1998 crackdown, the Ministry of Interior was quite successful in implementing the TVDs plant licensing system.³ This implementation included a plant surveillance system undertaken by economic police officers working under the Ministry of Interior. Effective in July 1998, Decree 87/96 was further amended to regulate stampers under the same procedures (licensing and title verification), which combined with regulations on raw material imports should improve the regulation of the plants if properly enforced.

The recording industry reports that the plant licensing regulations are still implemented. The licenses are issued by the Minister of Economy upon a motivated proposal made by a special Licensing Commission composed of equal number of representatives from the Ministry of Culture, the Ministry of Interior and the Ministry of Economy. (The Ministry of Industry does not exist separately any more). The plant surveillance system is undertaken by economic police within the Ministry of Interior and its units. Here is a summary regarding the CD plants:

- The state-owned DZU plant in Stara Zagora has been sold to the Hungarian company VIDEOTON. One of the two production lines is inoperable the other is not licensed and does not operate. There is one mastering facility – not licensed and not operational.
- CHSL plant in Sofia has moved from the premises belonging to the state recording company (Balkanton) to its own premises in Sofia. It has one licensed production line, operational, with an annual capacity of about 5,5 million disks.
- SMC plant in Veliko Turnovo as well as the second SMC in Sofia have been liquidated and the lines exported.
- PUL CD in Plovdiv is not licensed, the line has been exported.
- UNISON CDM in Botevgrad with two lines is not licensed and not operational.
- HEMUS GROUP in Sofia is a production line, which appeared mid last year and was licensed in October 2001, operational, with a capacity of 7 million disks annually.
- OPTICAL DISC is a CD-R production line operating in Botevgrad, with a production capacity of about 7million blank CD-Rs annually.

All statistics on the number of orders for CD manufacturing can be obtained from the public register that the Copyright Dept. is obliged to keep. If correctly implemented no illegal orders should move forward. Unfortunately, the Ministry of Culture does not properly carry out the obligatory title

³ At that time, the 5 Bulgarian CD plants were temporarily closed, pending compliance with the licensing regulations. In early 1999, there were 5 known CD production facilities in Bulgaria that had been licensed since March 1998. Those licensed plants had a total of 11 CD production lines (7 mono-lines and 2 twin-lines) with a potential annual production capacity of over 40 million units.

verifications. As a result production orders have been incorrectly licensed for unauthorized material. It still happens too often that the Ministry of Culture issues licenses for the production of CDs, based on false documents and without having carried out any investigation prior to granting the production license. The practice of granting specific production licenses without proper investigation and the backlog at the Ministry of Culture remain the biggest loopholes in the plant licensing scheme. Further, there are no effective sanctions for noncompliance with title verification; there are only very small administrative fines.

But plant licensing and surveillance of licensed facilities alone cannot stop plants from illegal production. Plant licensing will only work if combined with effective title verification, general application of SID-codes, polycarbonate (raw material) monitoring, deterrent criminal prosecutions of individuals engaged in commercial piracy, seizures and distribution of equipment used in the course of pirate activity. The government needs to use its authority to make proper title verification and post-production controls by the Ministry of Culture as high a priority as plant surveillance, so that product is not "licensed" without any serious investigation into the ownership of the copyright as required by the TVD and its title verification regulations. Plants which take advantage of the lax title verification system should be permanently closed, and parties presenting fake licenses should be prosecuted. The Bulgarian Government needs to work closely with the industries to make the title verification system one that is efficient and effective.

Polycarbonate Monitoring and SID Codes

In 1998, Bulgaria adopted legislation to monitor the trafficking of polycarbonate, the material used to make compact discs. Decree 271/98 amended 1977 legislation regarding export and import-related trade policies. This 1998 Decree requires, in pertinent part, that every deal whereby the goods listed in its Appendix 1 are brought, imported, exported or re-exported from Bulgaria is subject to registration. Polycarbonate material (as well as computer software on CD-ROMs, audio and video carriers and stampers) was added to this appendix. Industry reports indicate that it is not possible for an individual to place a direct order for polycarbonate for delivery to Bulgaria. Those who place legitimate orders have their shipments examined by customs officials and must show their required permit from the Ministry of Economy's Trade Division. The raw materials for the CD plants are being closely monitored.

Criminal Enforcement in Bulgaria Needs Substantial Improvement

Police Actions: Some cooperation, some problems

The recording industry reports that in 2001, 410 police raids were conducted against pirate retail outlets, during which 954 points were checked. Over 100 of those raids have been carried out together with BAMP/IFPI Sofia. Some 172,098 pirate units were seized in these actions.

The motion picture industry reports that, despite high crime rates and Bulgaria's challenging transition to a free market economy, BullACT's activities against video piracy remain strong. Most of the notorious pirate video shops have been closed following joint raids by the police and BullACT. Nevertheless, raids and checkups are continuing to be performed in order to keep piracy rates low. For example, in mid-December 2000, BullACT and police conducted a series of raids against a popular market in Slaveykov Square in Sofia in which over 800 pirate optical discs containing movies were seized, along with other counterfeit products. In 2001, BullACT conducted 197 raids against markets,

Internet sites, duplication labs, and VCD/DVD retailers. The percentage of rental piracy product is now about 20%, and more video stores than ever before are stocking only legal product. BullACT has also begun to see home production of CD-ROMs containing movies. Cable piracy substantially decreased in 2001. Continuing cooperation between the police and BullACT gives reason to believe that the Bulgarian authorities will continue to take the enforcement measures needed in the fight against piracy.

The BSA rejuvenated its enforcement program in Bulgaria in September 1999. At that time the software piracy rate in Bulgaria was over 90%. The software industry's enforcement activities have been focused against companies using illegal software in their daily business as well as distribution of software by resellers and hard disk loading and software crimes committed on the Internet. From 1999 till the end of 2001, the police, with the substantial assistance of the BSA, have conducted 98 raids. Of these, 74 cases involved end users, 11 involved CD resellers, 11 involved hard disk loaders and 2 involved firms pirating via the Internet. The ongoing good cooperation between the police and the BSA still gives hope that Bulgaria will make progress in the fight against software crimes, start prioritizing larger targets and improve the collecting and preserving of valuable evidence during raids.

BSA and RIAA report that, although the police are generally cooperative, they systematically refuse to focus their enforcement efforts on larger targets and only agree to raid small companies and, in case of software, computer game clubs or Internet cafes. The slow and ineffective criminal procedure, the many instances of corruption among both executive authorities and the judiciary establishment, as well as the lack of knowledge and experience in the field of computer software and IT crimes lead to groundless delays in police investigations and court proceedings. In the area of music piracy it is the unacceptable delays in the expert reports that have to be prepared by the Ministry of Culture that cause a huge backlog in prosecution cases.

Prosecutions and judicial sentencing are ineffective and non-deterrent

MPA reports that no defendant has received an actual jail sentence. However, every criminal case results in a suspended sentence being imposed as part of the probationary period. The sentences continue to be rather light, with fines less than \$500. Judicial reform is required if Bulgaria is going to meet its accession requirements to the EU. In addition, problems with the judiciary have allowed cases to be dismissed. It is important that this process be made quicker and that the courts impose stiffer penalties.

BSA reports that Bulgarian prosecutors and judges undermine software infringement prosecutions through perverse decisions and motions by returning critical evidence, such as seized computers and hard drives, to defendants, or refusing to accept such items as evidence, although properly seized. In a number of cases, prosecutions have been abandoned altogether without any apparent cause. As an illustration, out of 98 software raids conducted and criminal prosecutions initiated, only one has generated a criminal sentence. The sentence itself is quite insufficient, amounting to a fine of 700 leva for each person found guilty (about U.S. \$350) and confiscation and destruction of the illegal software.

The recording industry reports that of the 410 raids conducted, the police filed 116 cases. Six people were sentenced to prison terms. Administration sanctions were imposed on 14 people, for a total of 3650 leva. In other cases, 8 people received criminal fines in the amount of 5050 leva.

Unwarranted delays in criminal actions

Criminal enforcement actions which could deter piracy are not being used effectively. BSA, MPA, and the RIAA report unwarranted delays in criminal enforcement actions, in large part because of the time it takes to move a case from the police, through the magistrate investigator, and on to the prosecutor's office to the court. During this time, seized pirate product may deteriorate (creating evidentiary problems if seized materials are no longer in their original condition) and caseloads can become unmanageable.

Although the Penal Proceedings Code provides for relatively short terms within which the investigation should be completed (the longest period could be 9 months)⁴, cases are usually delayed for a much longer time due to the incompetence, corruption and underestimation of the importance of the prosecution of IP crimes. It is important that this process be made quicker and that the courts start imposing stiffer penalties. It is reported that the cause of the delay is usually the investigation provided for in the Bulgarian law.

There are many reasons for delay, including imperfections in the procedural legislation, the low priority given IPR cases, the inexperience of police and magistrate investigators, and a heavy workload on the part of investigative services. After the initial "check" stage of the criminal proceedings, the second stage (preliminary investigation/decision to prosecute phase) also requires an expert opinion including a description of each copyrighted work that has been pirated. The only body authorized to provide such opinions is the Copyright Department of the Ministry of Culture, which lacks the resources and staff to move cases to the court stage. One proposed solution to the resources shortage would permit copyright owners to assist in the preparation of the expert report, but if the Penal Proceedings Code is not respectively amended, prosecutors and judges will not accept such opinions as valid evidence. The requirement necessitating an expert opinion for each pirated work is unworkable, inefficient, unduly burdensome and too expensive. Besides this problem, the Penal Proceedings Code contains a number of gaps and other discrepancies that create prerequisites for prosecutors and courts to drop cases on procedural grounds. This law should be amended to provide for a fast, uncomplicated and smooth development of the IPR cases that would lead to sentences having the adequate deterring effect.

⁴ Under the Bulgarian criminal law, an investigation is supposed to be completed in two months, although the regional prosecutor may prolong the term for an additional four months (and a general prosecutor in very rare instances for three additional months).

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	197	
By Police		50
By Customs		
Number of cases commenced	30	47
Number of defendants convicted (including guilty pleas)	24	2
Acquittals and Dismissals	0	
Number of Cases Pending	12	83
Total number of cases resulting in jail time	0	0
Suspended Prison Terms	24	
Maximum 6 months	0	
Over 6 months	24	
Over 1 year	0	
Total Suspended Prison Terms		
Prison Terms Served (not suspended)	0	
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Prison Terms Served (not suspended)		
Number of cases resulting in criminal fines	24	1
Up to \$1,000	24	1
\$1,000 to \$5,000	0	
Over \$5,000	0	
Total amount of fines levied		700

Border Measures

Before 1998, the border control problem was one of illegal material flowing out of Bulgaria. Now that production levels have been reduced in Bulgaria, the Bulgarian market is being flooded with imports from Ukraine, Russia, Moldova, Montenegro and the Czech Republic. Therefore, border controls should also be significantly improved. An import license should only be granted after proper inspection of the optical discs in question. In addition, the Ministry of Culture should not automatically issue export licenses in connection with production permits. BullACT feels that Bulgaria is being used as a transshipment point for pirate materials as they move throughout Europe.

Although the 2000 amendments to the copyright law introduced TRIPS border control measures to the Bulgarian legal system, problems remain in implementation. Industry representatives report that the legislation delegated to implement these provisions, namely the Decree on the Implementation of the Border Control, failed to establish a fast and effective procedure for preventing the movement of infringing goods across the national borders. The decree contains grave discrepancies compared with the TRIPS and the Copyright Law provisions, which in practice make border control unenforceable.⁵

⁵ IIPA does not have the text of this decree.

Civil Cases

Although the Bulgarian legislation provides for adequate civil remedies against software infringements such as civil searches, claims for compensation of damages and civil injunctions against the offenders, in practice it can be very difficult to enforce them and have a civil case. As a result, the BSA has not yet filed separate civil claims before the civil courts in Bulgaria. In contrast, IDSA reports that one of its member companies has 10 civil cases pending in Bulgaria, using a cease-and-desist campaign. Civil claims are filed within the criminal proceedings initiated after police raids. BSA reports several distinct problems with civil litigation in Bulgaria:

- Collecting valuable evidence to prove the infringement and the size of the damage so as to initiate a separate civil case is very difficult because the *inaudita altera parte* (civil) searches which were introduced to the copyright law in 2000 have not yet been tested in practice. High guarantee fees, instances of corruption, leaks of information, unpredictability of the results, and the reluctance of the courts to allow such searches are the main obstacles to the rightholders using this legal option.
- Civil cases do not reach court hearings on the merits, as the claims are rejected by the courts on procedural grounds. The rightholders are required to prove their active identification by presenting a bulk of documents most of which are impossible to obtain as they are not known to the foreign legal systems (in most of the cases, the plaintiffs are international corporations).
- The Bulgarian judiciary is notoriously slow and the procedures are to a greater extent formalized. Judges are rather inexperienced in adjudication of IPR cases and prefer to drop them on procedural grounds rather than further move the hearings.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE
Number of civil raids conducted		10
Post-Search Action		
Cases Pending		
Cases Dropped		
Cases Settled or Adjudicated		
Value of loss as determined by Rightholder (\$USD)*	USD 1,209,521	
Settlement/Judgment Amount (\$USD)	USD 6,113	

* The civil claims are filed within the criminal proceedings initiated upon police/BSA raids.

COPYRIGHT LAW AND RELATED ISSUES

1993 Law on Copyright and Neighboring Rights, as Amended

On August 1, 1993, Bulgaria's Law on Copyright and Neighboring Rights entered into force, replacing its antiquated 1951 copyright law. Four years after it promised the U.S. it would do so,

Bulgaria adhered to the Geneva Phonograms Convention (in September 1995), thus affording protection to U.S. sound recordings. Further amendments to the copyright law were made in 1994, 1998 and 2000 (see discussion below).

Copyright Law Amendments (1998): On a positive note, amendments to the copyright law which were adopted in January 14, 1998 increased administrative fines imposed by the Ministry of Culture tenfold. However, these 1998 amendments also contained two serious problems: (1) They require the placement of holograms on blank audio and video tapes, CDs and CD-ROMs; and (2) they change the procedures for confiscation of infringing copies. These problems were resolved, with the 2000 amendments.

Copyright Law Amendments (2000): Further amendments to the Bulgarian copyright law were accomplished in 2000, apparently as part of Bulgaria's efforts to comply with European Union Directives and TRIPS. Industry reports indicate that these amendments provided for a longer term of copyright protection, a new communication right, provisional measures, and border control measures. In addition, these amendments provide administrative sanctions for tampering with rights management information and for the manufacturing and distribution of decoding devices without the consent of the copyright holder. Amendments also were made which prohibiting circumvention devices and the possession of pirate product.

Future Legislation Coming: A working group was created in 2001 to assist in the drafting of amendments to legislation so that Bulgaria will be in compliance with the EU's directives on copyright, e-commerce, and conditional access. This group included representatives from local anti-piracy groups such as IFPI, BullACT, and BSA. A draft law to amend the 1993 Law on Copyright and Neighboring Rights was expected to be adopted by the Cabinet before Christmas, after which it will be send to the parliamentary media commission

Penalties in the Criminal Code (1995)

The fine levels for piracy were established in the 1995 penal legislation. In 1997, the fines provided for in the Penal Code⁶ were increased by amendment to Article 172(a), so that the fines for a first offense range from a minimum of \$454 (1000 BGN) to a maximum of \$1,363 (3000 BGN), and for a second offense from a \$1,363 (3000 BGN) minimum to a \$2,272 (5000 BGN) maximum. The fines for administrative remedies (provided for in the 1993 copyright act) were also too low, ranging from \$12 to \$112 for a first offense, \$56 to \$280 for a second offense. They too were amended (in January 1998), raising the administrative sanctions (fines) to \$909 (2000 BGN) for a first infringement, and to \$2,272 (5000 BGN) for a second infringement. Although these amendments are improvements, the penalty levels are still too low to act as deterrents to commercial crimes. A major impediment to the imposition of criminal penalties was eliminated in 1997, when the element of proof that an infringer committed a crime with a "commercial purpose" was deleted from Article 172(a).

WIPO Treaties

On March 29, 2001, Bulgaria deposited its instruments of access to both the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. IIPA applauds Bulgaria for taking this

⁶ Since 1997, the Bulgarian lev has been fixed to the Deutschmark at the rate of 1:1, and as a result, inflation rates are more predictable. The current exchange rate of the lev to the U.S. dollar is 1 USD = 2.2 BGN.

action, which will raise the minimum standards of copyright protection, particularly with respect to network based delivery of copyrighted materials. Implementation of the appropriate laws will protect against Internet and other forms of digital piracy, and encourage e-commerce, so these efforts are strongly encouraged by IIPA and its members. The 2000 copyright law amendments appear to go far toward implementing these obligations.

Title Verification Decree (1996, as Amended)

The Title Verification Decree (Decree No. 87/96) was amended in 1997 to install the plant licensing system, and again in July 1998 (by Decree No. 162/98) to regulate stampers under the same licensing and title verification procedures. As an overview, the TVD as amended provides the following:

- Title verification system. This system contains three levels of verification with the Copyright Department of the Ministry of Culture.
 1. The first level of verification requires the obligatory registration of the rights for reproduction and distribution of sound and video recordings. Each person (physical or legal entity) who has acquired such rights should file an application for registration together with a copy of the license agreement under which the rights have been granted or copies of the contracts with the authors and the performers whose works and performances are embodied in the sound or video recordings. Sound and video recordings cannot be reproduced and distributed in any form prior to registration. This system for verification does not apply to software, only to sound recording and audiovisual works (video recordings).
 2. The second level of verification requires the obligatory registration of all orders for manufacturing of matrices (stampers), recorded CDs and other sound and video carriers embodying subject matter of copyright and neighboring rights, including software. Under this registration system, the manufacturer should obligatorily submit an application for verification of the legitimacy of the order to the copyright department. The application should be accompanied by a copy of the contract for placing the order, information on the titles, and a copy of the plant license. Again, the plants are not allowed to manufacture any units prior to receiving permission from the Ministry of Culture.
 3. The third level of verification requires the obligatory registration of all facilities for manufacturing of sound and video carriers embodying subject matter of copyright and neighboring rights excluding the CD manufacturing facilities, which are subject to licensing under the plant licensing system.
- Plant licensing system. This system provides that each CD and/or stamper manufacturer should obtain a government license to operate as such. The license is granted by order of the Minister of Economy upon approval of an interministerial licensing committee including representatives of the Ministry of Culture, Ministry of the Interior and the Ministry of Economy. The application for obtaining such license should be accompanied by documents for the company's incorporation, tax registration, the Ministry of Culture's certificate for the installation of SID code, etc. The CD or stamper manufacturing license is valid for one year and cannot be

extended.

There are still some improvements that need to be adopted to make the TVD more effective. First, it should consolidate the jurisdiction and authority in one agency (Interior) to effectively implement title verification and the plant licensing system. Second, it should be clarified to apply to all audio and video CDs, CD-ROMs and software works (and all other variations, such as CD-R, CD-T, DVD, etc.), as well as to videocassettes and laser disks. Third, it should clarify the application of customs authorities and export licenses to the title verification and plant licensing systems. Last, it should provide for criminal penalties for violations of the plant manufacturing authority.

Government Software Management

For four years, the Bulgarian government has refused to pass and implement a government Software Assets Management (SAM) executive order to introduce an effective system for control over the acquisition and the use of computer programs by the Bulgarian state administration. Although as early as 1999, the Interministerial Council for Protection of Copyright and Neighboring Rights decided that such a legal act should be passed by the government and the draft order was prepared, today this issue is still pending.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

CHILE

EXECUTIVE SUMMARY

Copyright piracy in Chile has increased dramatically in certain sectors, notably music CDs, and constitutes a serious problem for such a developed market. Piracy flourishes under a regime that focuses so little attention on the issue, and is exacerbated by deficiencies in the Chilean enforcement system, which fails to meet international and bilateral standards. For example, Chile does not provide for deterrent criminal penalties and civil damages that would help prevent further infringements. Chile has failed to set up and implement effective, TRIPS-compliant border control mechanisms. The critical TRIPS-mandated remedy of *inaudita altera parte* (civil *ex parte*) searches and seizures is also missing from its law. Chile is known for slow prosecution of infringement cases and the usually low, nondeterrent criminal sentences imposed upon defendants. Chile must take immediate action to elevate the attention of its police and civil authorities to heighten the priority of anti-piracy enforcement. On the legislative front, Chile's bill to upgrade its current copyright law to TRIPS standards falls far short in accomplishing the TRIPS-plus standards of protection which are being discussed in both the U.S.–Chile Free Trade Agreement (FTA) and the Free Trade Area of the Americas (FTAA). Further refinement of Chilean legislation is necessary. Lastly, more progress must be made on completing a comprehensive IPR chapter in the FTA negotiations. IIPA recommends that Chile remain on the Watch List for 2001, but warns that it will take a very dim view of promoting an FTA in the absence of clear improvements in the enforcement situation.

CHILE: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1999 - 2001

INDUSTRY	2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.5	25%
Sound Recordings / Musical Compositions	12.2	35%	5.0	30%	NA	NA
Business Software Applications ¹	35.0	49%	33.1	49%	47.7	51%
Entertainment Software	NA	NA	41.0	80%	NA	78%
Books	110	NA	1.0	NA	NA	NA
TOTALS	50.3		82.1		50.2	

¹ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$47.0 million at 50% were identified as preliminary. In mid-2001, BSA released its final 2000 figures, and those revised figures are reflected here.

IPR Negotiations in the U.S.–Chile FTA

IIPA has provided public 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.² IIPA supports a U.S. position which, at a minimum, must: (a) be TRIPS- and NAFTA-plus; (b) include, on a technologically neutral basis, the obligations in the soon-to-enter-into-force WIPO Copyright and Performances and Phonograms treaties (WCT and WPPT); and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities.

Much more progress must be made in the FTA IPR Negotiating Group. Issues related to both the scope of substantive rights and enforcement measures have not been resolved (see IIPA recommendations for the FTA IPR obligations, below). IIPA believes it would be unfathomable for an FTA to be negotiated and approved by the U.S. Congress that does not provide effective protection for the copyright-based industries. Furthermore, Chilean officials must effectively and promptly address the growing piracy problem in Chile *now*, or this risks becoming an impediment to U.S. approval of the FTA itself.

It is important to keep in mind that 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."³

COPYRIGHT PIRACY IN CHILE

Sadly, the level of attention given to copyright theft by Chilean authorities is diminishing, not increasing. As a result, piracy is flourishing.

Pirate CD-Rs (recordable CDs) can be found all around the major cities (mainly Santiago) and in *ferias* around the country. Most of the recording piracy found in Chile is actually produced in Chile. For example, blank CD-Rs enter Chile (as contraband, undervalued items or even legally), but the unauthorized reproduction of music takes places locally with CD-R burners. Points of entry for the CD-Rs include the seaports of Valparaíso and Iquique, and the airport in Santiago. Iquique continues to be considered as a center for traffic materials destined for pirate replicators around the country and, in some cases, connected to operations in Peru and Paraguay. The number of street vendors selling pirate product continues to expand on a daily basis in many cities, including Santiago, Valparaíso, Vina del Mar and Concepción. Vendors hawking their pirate goods can even

² 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, as well as Letter of the International Intellectual Property Alliance to the International Trade Commission on the Proposed U.S.–Chile Free Trade Agreement, December 12, 2001, available at: http://www.iipa.com/rbi/2001_Jan29_Chile_FTA.PDF and http://www.iipa.com/pdf/2001_Dec12_ChileFTA.pdf respectively.

³ In 2000, \$419.3 million in Chilean imports to the United States benefited from the GSP program, accounting for 12.9% of Chile's total imports to the U.S. For the first 11 months of 2001, \$451.9 million in Chilean imports to the United States benefited from the GSP program, or 15.1% of Chile's total imports to the U.S. between January and November.

be found within 100 meters of the Presidential Palace. The mayor of Santiago has openly protected the street vendors selling piratical product, and has opposed police operations against the vendors. More recently, political pressure is being exerted on municipal mayors in Santiago to better supervise the issuance of permits to street vendors.

The dramatic decline in the legal market for music and recordings that began in 2000 continued into 2001: sales for the full year decreased by 23 percent. As a result of this decrease, most of the record companies in Chile had to reduce their staff by approximately 25 percent. The *carabineros* (police) are trying to be helpful by concentrating in Santiago; however, deficiencies in the law and the delays in the courts greatly exacerbate the situation. Moreover, the *carabineros* cannot enforce the law in the municipal flea markets where the local mayors control licensing procedures. Chile's border measures are also ineffective. The retail trade started to close dozens of stores countrywide. The level of piracy has increased over the past year, from 30% in 2000 to 35% in 2001, mostly due to the shift from cassette piracy to CD-Rs. As a result of the growing pirate CD-Rs, estimated losses due to audio piracy in Chile more than doubled to \$12.2 million in 2001.

For the audiovisual industry, the main piracy concern in Chile remains video piracy. Although back-to-back duplication in video stores forms a large part of the overall pirate video system in Chile, the more organized reproduction and distribution of counterfeit videos is of primary concern. These counterfeit videos (and CD-R copies) are found throughout the country in flea markets, street sales and even video stores. In addition, 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 continuing concern, especially as their numbers grow due to the highest rate of unemployment in a decade. 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. Parallel imports of original, unauthorized Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) are a growing cause of concern to the legitimate home video industry in Chile. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Chile remain at an estimated \$2 million in 2001.

The book publishing industry reports that its main problem in Chile involves photocopies of medical texts and reference books, mostly at the university level. Most of these copies 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 commercial piracy, which affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors. For example, some of the most pirated authors in Chile include Isabel Allende, Marcela Serrano, Paulo Coelho, and Pablo Neruda.⁴ 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. Estimated trade losses due to book piracy in Chile are \$1.1 million for 2001.

Business software piracy rates in Chile were estimated at 49% in 2001, with estimated trade losses due to piracy amounting to \$35.0 million.

⁴ "Chile holds the record for literary piracy in Latin America," Agencia EFE S.A., November 3, 2001.

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 rose to 80% in 2000. Estimated 2001 trade losses and piracy levels due to videogame piracy in Chile are not available.

COPYRIGHT ENFORCEMENT IN CHILE

Several deficiencies in the Chilean enforcement system fail to satisfy Chile's TRIPS obligations. 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 indications of infringement.

In addition, 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

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. Chilean police are among the more honest police forces in all of Latin America. However, municipal inspectors responsible for supervising the flea markets have fallen to corruption. Chilean courts do not apply the penalties for infringement currently available under the law. Although distribution of pirated material is theoretically punishable by incarceration up to 540 days (1½ years, a low term compared to the rest of the region), it is difficult to secure prosecutions, convictions or adequate sentencing. 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.

The Chilean Congress passed a new set of rules on criminal procedure (*Código de Procedimiento Penal*) in 2000. 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 this 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 workload of the judges and to lead to increased procedural efficiency. However, the law is still not operative in the entire country. It is currently

being applied only in 2 out of 13 Chilean regions. Therefore, it is too early to assess whether this law will bring more efficiency to the system.

Actions in 2001: The recording industry initiated anti-piracy actions in Chile for the first time during 2000, in which 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. In 2001, IFPI/Chile (the industry's anti-piracy association) conducted 162 "street" raids. A total of 308,627 CDs, CD-Rs and audiocassettes were seized from these actions. Fourteen hundred and twenty three (1,423) persons were arrested but only twenty-six (26) were processed through the judicial system. A total of seven persons from the 26 processed are in pre-trial prison detention. Three of the 26 were convicted or pled guilty but all received suspended sentences. Two cases resulted in fines of \$1,000. Most of these operations were conducted as a result of the individual interest from some officials within the *carabineros* force. The actions were not directed by an overall government plan to fight piracy.

The local recording industry (IFPI/Chile) has teamed up with the Chilean *carabineros* by issuing a "Zero Tolerance Piracy Decree," in which both groups maintain a visible public presence in the greater Santiago area during nighttime hours, Monday through Saturday. However, the *carabineros* terminate their operations at noon Saturday, which leaves the rest of Saturday and all-day Sunday for the pirates to hawk their products with total impunity. During the weekends, most of the pirate activity takes place in the municipal flea markets, where the *carabineros* seldom take action, due to political ramifications with the local mayors. With respect to the end-of-2001 holiday season, the *carabineros* did conduct a successful anti-piracy street campaign, but this only took place in the major downtown areas of Santiago; little or no action was taken against the municipal flea markets.

With respect to business software actions, BSA brought one criminal case in 2001, which is still pending decision.

The book industry conducted raids last year, but reports there is little government sensitivity to copyright infringements involving book piracy. The industry, led by La Cámara Chilena del Libro, intends to focus its efforts even more in all areas, including enforcement, legislative efforts, judicial training and public communications.

IDSA reports that in 2001, there were several Customs seizures that resulted in the initiation of investigations and the filing of criminal complaints against the importers of pirate Nintendo® videogames. The Talcahuano Customs Office seized a 20-foot container loaded with counterfeit videogame consoles and cartridges. A total of 2,280 consoles were confiscated. Each console included a counterfeit cartridge with 600 videogames. Two additional raids were conducted by the San Antonio Customs Office. One container carrying 9,880 counterfeit consoles was seized, with 76 built-in videogames. The second container had a total of 6,480 counterfeit consoles, all with built-in videogames. In August 2001, two separate seizures of counterfeit Nintendo® videogame products was made at the Santiago airport. Nintendo's local representatives discovered pirate merchandise imported via courier from Hong Kong, resulting in the seizure of 400 printed circuit boards containing printed Nintendo® videogames. In a separate action, Customs seized over 100 counterfeit Game Boy and Game Boy Color videogames. The products were shipped from Ciudad del Este, Paraguay to the Santiago Airport. These cases have yet to be resolved.

Possible Actions for Chilean Authorities to Take: Several immediate actions could be taken by Chilean authorities to counter this piracy problem, for example:

- The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Concepción, and Valparaíso.
- The police should investigate pirate manufacturing and distribution centers and operations. Similarly, street vendors should be arrested and prosecuted so that this pervasive problem is tackled.
- The civil police and administrative authorities should also act to prohibit the sale of pirated materials in the streets.
- The police should coordinate their investigations and actions with customs officials as well as finance ministry officials, given the problems with piratical materials entering Chile and persons avoiding tax collections.

Lack of an 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.

Slow Civil Process and No Administrative Alternative

Chile's civil courts are relatively slow in issuing relief to copyright holders. Civil copyright infringement cases can take two or more years before being adjudicated. For example, the BSA conducted 12 actions against end-user defendants in 2001, of which seven cases were settled through private negotiation. However, the BSA could not reach an agreement with the other five defendants, and consequently resorted to civil actions against them.

In addition, Chilean copyright law does not provide for statutory damages. 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. Certain copyright holders, 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

Chile fails to establish effective border measures through its customs regulations. For example, there is no provision by which a rightsholder can prevent the entrance of suspect merchandise into Chile, even when there are indicia of intellectual property rights violations. 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.

For example, IDSA reports that in September 2001, a shipment of 20,000 pirate PlayStation® products left Malaysia destined for Santiago, Chile. Although the shipment was stopped in Switzerland, the Swiss customs authorities refused to hold the goods and released them for shipment. Chile continues to allow the entry of such clearly pirate products at its borders. Other IDSA member companies worked with Chilean customs, and criminal cases have been brought (see discussion above).

COPYRIGHT LEGAL ISSUES IN CHILE

WIPO Treaties

Chile deposited its instruments of ratification to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty with WIPO April 11, 2001. IIPA believes that it is critical that Chile amend its law to implement the obligations of both these treaties, treaties which respond to today's digital and Internet piracy realities. In fact, the U.S. and Chile have a Joint Statement on Electronic Commerce, signed on February 18, 2001 by the U.S. Secretary of Commerce and Chile's Acting Minister of Economy, which states, in relevant part: "The protection of copyright will be assisted by the prompt signing, ratification, and implementation of the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty."

Copyright Law of 1970, as Amended

IIPA members have identified several deficiencies and/or ambiguities in the Chilean Law on Copyright (Law No. 17.336 of 1970, as amended) which do not meet the threshold of TRIPS/NAFTA compliance. For example, protection for compilations of unprotected facts is unclear. The law fails to grant record companies and performers with necessary exclusive rights to control digital transmissions of their phonograms and performances, whether through interactive or noninteractive means. In addition, while the present law creates a right in the producer of a sound recording to publicly perform, broadcast and communicate its work, the law, at least in theory, subjugates this right to the exercise of the right to the author of the underlying musical composition. The rights of the record producer must be independent or parallel to the author's right, as contemplated in Article 1 of the WPPT, which Chile has already ratified. 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. 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 adopted in the early 1990s, comprehensive reforms of the copyright law which were presented to the Chilean Congress in the mid-1990s were not adopted.

WTO Bill and Copyrights and Neighboring Rights

On October 11, 1999, the government presented a bill to Congress with the stated purpose of updating copyright legislation to comply with WTO TRIPS as well as the Chile–Canada and Chile–Mexico Free Trade Agreements. In mid-2001, the industries were able to review a copy of the then-latest version of that bill only to discover that it does not even come close to implementing Chile’s current TRIPS requirements, let alone implementing the obligations of the WIPO treaties (of which Chile has already deposited its instruments). For example, while the proposed amendments would protect computer programs, they fail to expressly protect such as literary works. The revised reproduction right does not cover clearly temporary copies. The bill does add rental rights, affords protection for databases, and has a section addressing border measures. However, the bill does not increase the level of criminal penalties for infringement. There are no provisions regarding the WIPO treaties’ “right of making available” as applied to producers of phonograms, or the provision of exclusive rights of communication with respect to non-interactive digital transmissions. Chile’s WPPT/TRIPS inconsistent provision establishing a hierarchy of rights as between authors on the one hand and neighboring-rights holders on the other is also left unaddressed. Nor are there any provisions on technological protection measures or rights management information. Clarification and/or further amendments are needed to address industry concerns regarding statutory damages, the availability of expeditious civil *ex parte* searches, and clarification that criminal actions are “public” actions (initiated by the government).⁵ We understand that this bill is still pending in Congress, with low priority.

Government Software Management

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 May 2001, President Lagos issued an executive order called “Instructions for the Development of the Electronic Government” (Decree No. 905 of 11 May 2001), which included a guideline for the executive branch to properly license software. While this decree sounded promising, it does not provide practical or specific guidelines for its own implementation. It fails to impose a system of compliance, such as tracking software registrations. There are no specific mechanisms on how to achieve full and effective management of software in government agencies. It only covers the executive branch of government, not other branches. BSA reports there was an August 2001 deadline for the heads of the various agencies to report on how they were going to implement this project; we do not have any specific information as to whether such reports were filed. Despite this executive order, software piracy in the government sector continues to be high; there has been little compliance with the Executive Order.

⁵ IIPA and its members reserve the right to propose additional amendments to this legislation.

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. 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

COMMONWEALTH OF INDEPENDENT STATES (C.I.S.)

SUMMARY OF ISSUES IN TEN OF THE COUNTRIES OF THE C.I.S.

This report encompasses separate but similar reports on the following 10 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 10 countries of the C.I.S. be individually retained, or in a few cases placed, on the Watch List in 2002.

In 2001, IIPA recommended that all ten countries of the C.I.S. be placed on the Watch List. Seven countries were named to the Watch List by USTR in 2001: Armenia, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan. Two countries were left off the Watch List but were subjected to an out-of-cycle (OCR) review conducted late in 2001: Georgia and the Kyrgyz Republic. USTR announced the results of those OCR reviews on February 12, 2002, announcing that though it was not placing either country on any list, the U.S. government remained “concerned with the key gaps in the legal regimes of both countries” and that these gaps “must be corrected to ensure the effective enforcement of intellectual property rights.” Moldova was left off of all lists.

As in years past, IIPA has grouped these 10 (of 12) countries of the C.I.S. under a single heading (Special 301 report) only for the convenience of reporting on the problems in these countries. This is due to the numerous similarities of the issues, including the legal reform and enforcement problems, confronting the copyright industries in each of these countries.

In the remaining two countries of the C.I.S. not covered by this report, namely **Ukraine** and **Russia**, much more serious piracy problems confront the copyright industries, in particular optical media production and distribution. The problems in those two countries warrant separate attention, so IIPA has filed separate reports on Ukraine and Russia, recommending that Ukraine be retained as a Priority Foreign Country in 2002, and that Russia be retained on the Priority Watch List.

After a few issues are treated collectively in the introduction to this report, each of the 10 countries of the C.I.S. listed above is then treated separately in alphabetical order.

There are common deficiencies in the legal regimes of every one of these countries. These include: (1) the failure to fully adopt the legal reforms and enforcement 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, implement, and enforce the 1996 digital treaties of WIPO – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Perhaps the most glaring legal shortcoming in almost half of the countries in the C.I.S. is the absence of any protection for foreign sound recordings. That is so because many of these countries are neither members of the Geneva Phonograms Convention nor the World Trade Organization TRIPS Agreement (and, the WPPT is not yet in force).

Thus, there is no point of attachment for American or other foreign sound recordings in five of the 12 countries of the C.I.S. This is so even though these countries were obligated by the bilateral trade agreements to provide this over seven, and in some cases, over eight years ago. In fact, the obligation was to make “best efforts” to join the Geneva Phonograms Convention in most cases by the end of 1993 – an obligation that has been flaunted by the delinquency of these countries.

It is very important that the U.S. government insist that each of these countries cure all of the current violations of these trade agreements. The IPR obligations in these early 1990s agreements were the then-minimal international standards for IPR protection and enforcement, pre-TRIPS. There is no excuse why for nine years these countries have not been even providing a point of attachment or national treatment for American works and sound recordings while the countries are themselves enjoying Normal Trade Relations (NTR). Without an effective legal and enforcement regime, the stakes (and obligations) have gotten even higher, especially with the growth of moveable optical media production and distribution operations, and with Internet piracy.

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 they are found mostly in Russia and Ukraine; but at any time, the production facilities could easily move, for example to Belarus, Georgia or Uzbekistan. Providing the necessary legal framework, especially an effective criminal enforcement regime, will go a long way toward dissuading this type of movement, or to effectively confronting it when does exist.

In almost all cases, even where legal reforms have been adopted, there is virtually no on-the-ground enforcement. That is, there are neither effective civil, administrative, criminal, nor border enforcement measures taking place. In a few countries, there are reports of sporadic police activity at the street level, but little else. With the growth of organized criminal syndicates in this region, the countries must adopt effective criminal enforcement regimes to combat this piracy by going beyond raids and seizures to the imposition of criminal penalties.

Instead, the lack of an effective enforcement regime 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. The organized criminal enterprises operating within the region are mainly running the production and distribution apparatus. This is not only hampering the development of legal markets in the countries of the C.I.S., hurting domestic authors, musicians, publishers, producers, software developers and the like, 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 and sound recordings must enjoy protection consistent with the WTO TRIPS requirements – i.e., including materials released within the past 50 years (at a minimum – the U.S., for example is much more generous); (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, and deterrent criminal actions, and judges must impose criminal sanctions; and (4) effective border enforcement must be implemented to prevent the widespread flow of material, including the optical media production facilities and product, 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. This latter obligation secured protection for pre-existing works (but not sound recordings) that were created on or after May 27, 1973.

All 12 of the former republics of the Soviet Union signed 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, and these agreements have been regularly renewed. 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 these identical 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 12 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, and are not providing any protection for works in their countries.

Sound Recording Protection (Geneva Phonograms Convention and/or WTO TRIPS Agreement): Only seven of 12 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 seven countries that do protect foreign sound recordings are: the Russian Federation (1995), the Kyrgyz Republic (1998), Georgia (1999), Ukraine (2000), Moldova (2000), Kazakhstan (August 2001) and Azerbaijan (September 2001).

Only five of 12 countries are members of the Geneva Phonograms Convention: the Russian Federation (1995), Ukraine (2000), Moldova (2000), Kazakhstan (August 2001) and Azerbaijan (September 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 (and Moldova can use either Geneva Phonograms, or its WTO membership effective July 26, 2001).

So, five of 12 countries provide no protection for foreign sound recordings over seven, or in some cases, over eight years after they obligated themselves to do so. They are: Armenia, Belarus, Tajikistan, Turkmenistan, and Uzbekistan.

In one case, Belarus, the WIPO digital treaty for neighboring rights, the WIPO Performances and Phonograms Treaty (WPPT), could provide a point of attachment for sound recordings when that treaty goes into force, hopefully sometime in 2002. In the meantime, to meet its obligations under the bilateral trade agreement and to avoid any confusion, Belarus should accede to the Geneva Phonograms Convention.

So, seven of 12 countries in the C.I.S. are in breach of the bilateral trade agreement obligation to join Geneva Phonograms. They are: Armenia, Belarus, Georgia, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan.

Pre-Existing Works and Sound Recordings: The Russian Federation explicitly *does not* provide protection for pre-existing works or sound recordings; as it pertains to works, this provision is 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).

This absence of protection was also an issue in Ukraine until the passage in 2001 (effective September 5, 2001) of the copyright law amendments aimed at fixing the bar on such protection for pre-existing works and sound recordings. In fact, the provision in the Ukraine law of 1993 was nearly identical to that found in the Russian law. The Ukraine drafters clearly intended to provide protection for pre-existing works and sound recordings that are less than 50 years old. Although the provisions are a bit unclear, it is likely officials and courts will properly enforce them.

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. Some of the countries, like the Kyrgyz Republic, probably intended to provide such protection, though the provisions are unclear; they should be clarified by copyright law amendment, by regulation, or by some other administrative means. Other countries of the C.I.S. are probably not providing protection for pre-existing works and sound recordings. They must be urged to do so to avoid breaching the bilateral agreement, and if they wish to be members of the WTO.

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.

This problem of protection for pre-existing material, especially for sound recordings, is a regional problem because such protection has only recently (in the past year or two) been provided in neighboring countries such as Ukraine, Poland and the Czech Republic, thereby creating a region haven for the production and widespread distribution of back-catalog material. That back-catalog material competes with any new product and prevents the development of legitimate markets for musical recordings.

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. In the few cases where criminal codes have been adopted, while this first step should be lauded, it must be followed with actual imposition of criminal penalties especially aimed at the organized syndicates.

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. At present, border measures are probably the weakest part of enforcement in this region.

Enforcement: None of these countries is providing “adequate and effective” enforcement on the ground as required by the bilateral agreements or the WTO TRIPS Agreement. There must be real engagement by the police, prosecutors, judges and customs officials to effectively enforce copyright and neighboring rights in this region to stop commercial piracy.

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 WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

World Trade Organization (WTO TRIPS Agreement): Only three of 12 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), Georgia (June 14, 2000), and Moldova (July 26, 2001).

Seven 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 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. These obligations must also be further bolstered by accession and implementation of the WIPO digital treaties of 1996 to effectively enforce against Internet and other digital piracy.

WCT and WPPT: Five countries are members of the new WIPO Copyright Treaty (WCT). They are: Moldova (March 1998), Belarus (July 1998), the Kyrgyz Republic (September 1998), Georgia (July 2001), and Ukraine (November 2001).

Four countries are members of the WIPO Performances and Phonograms Treaty (WPPT). They are: Moldova (March 1998), Belarus (July 1998), Georgia (July 2001) and Ukraine (November 2001). Unfortunately, the Kyrgyz Republic bifurcated its membership in these important digital treaties and only joined the WIPO Copyright Treaty in 1998. It is hoped that they will accede to the neighboring rights (WPPT) treaty as well, early in 2002. The United States deposited its instrument of accession to the WCT and WPPT in September 1999. On March 6, 2002 the WCT will go into force and hopefully, soon after in 2002, the WPPT as well.

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. This is an important step within the C.I.S. and one that should be encouraged by the U.S. government because of the rise of Internet and other digital piracy.

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 1995).

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

and Ukraine. This is the comprehensive reform of the civil codes with the inclusion of competing copyright provisions; such reform is underway in several of these.² In most cases, the efforts to revise the civil code is likely to result in the addition to that code of new and confusing 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.

In 1996, the C.I.S. Interparliamentary Assembly in St. Petersburg adopted a so-called Model Civil Code for the countries of the C.I.S. Detailed provisions on copyright and neighboring rights were included that were contradictory to existing international standards of protection for copyrights. In Russia in 2001, drafts of the Civil Code reform that were circulated continued to include IPR provisions completely incompatible with the bilateral trade agreement, the Berne Convention, and TRIPS. In Ukraine in December 2001, the latest draft of Chapter IV of the Civil Code had been reduced to 14 articles; this is certainly an improvement over earlier drafts that contained over 140 articles (and then 50 in a subsequent draft), many which would have undercut the copyright law. However, even the shorted version could, if enacted, cause confusion because it overlaps the copyright provisions. And because it makes reference to over 90 other laws, it could make the civil code provisions obsolete if and when any of the other laws referred to is amended. IIPA continues to urge that the civil code should not be adopted in Ukraine or any of the other countries of the C.I.S., certainly not in a manner that would in any way weaken the copyright law or its enforcement.

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;

²Prior to the breakup of the Soviet Union, the text of the law of the U.S.S.R. (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.

Ukraine: December 23,1993, effective February 23, 1994; amended July 11, 2001, effective date September 5, 2001;

Uzbekistan: August 30, 1996; effective September 17,1996.

Turkmenistan has, for almost 10 years, been in the process of drafting new copyright legislation, so far without success. Until it is adopted, the Civil Code (Chapter IV, 1961) from the former Soviet era is still the operational law there. This is a very obsolete law that needs modernization.

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 that 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 provides “adequate and effective protection of intellectual property rights...” which includes copyright protection and enforcement. Georgia was added to the list of countries eligible for GSP benefits in June 2001.

In 2000 (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	\$10,155,000 45%
Azerbaijan	\$0 0
Belarus	Suspended in 2000 --
Georgia	\$0 0
Kazakhstan	\$325,636,000 75.5%
Kyrgyz	\$133,000 6.8%
Moldova	\$257,000 0.2%
Russia	\$514,664,000 6.6%
Tajikistan	\$0 0
Turkmenistan	\$0 0
Ukraine	\$40,033,000 (suspended in 2001) 4.6%
Uzbekistan	\$166,000 0.5%

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. On January 10, 2001, the United States government accepted that action and the GSP review of the Republic of Moldova was formally ended.

At the other end of the spectrum, Ukraine has completely failed to comply with the Joint Action Plan signed by President Kuchma and then-President Clinton in June 2000 to address the optical media piracy problems in Ukraine and to adopt an effective regime of copyright protection and enforcement. As a result of this failure, the U.S. government announced the complete suspension of trade benefits to Ukraine under the General System of Preferences program; that decision was announced on August 10, 2001, effective August 24, 2001. In addition, trade sanctions were imposed against Ukraine by the U.S. government, effective January 23, 2002.

In 2001, the IIPA attempted to work directly with the governments of Kazakhstan and Uzbekistan to resolve the legal reform deficiencies that resulted in the filing of the IIPA's GSP petition. Unfortunately, neither country made the legal reforms necessary to fix the deficiencies detailed in this report and in the GSP proceedings that might result in the withdrawal of those petitions. It is hoped that in 2002, these countries and Armenia will adopt the necessary legal and enforcement reforms to resolve these issues. In the meantime, the United States government has not decided whether to withdraw or suspend GSP benefits in Armenia, Kazakhstan and/or Uzbekistan.

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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That 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.

The National Assembly of Armenia adopted a new Law on Copyright and Neighboring Rights on December 8, 1999 to replace the 1996 law. The President signed the new copyright law on January 12, 2000; it went into force on February 12, 2000. In addition, the Civil Code of Armenia (effective February 1, 1999) includes one article on copyright (Article 63) and one on neighboring rights (Article 64). These two articles provide only general provisions pertaining to the subject matter and terms of protection.

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 eight years after the bilateral trade agreement required such protection. The government of Armenia indicated in 2000 discussions with United States government officials that Armenia might join the Geneva Phonograms Convention in 2001, but that never occurred.

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). The Copyright Law of 2000 is silent on this matter in the relevant provisions for both works and sound recordings, and efforts either to amend that provision or clarify it by regulatory or other means have proven unsuccessful. Several times in 2000 and in 2001, IIPA provided the government of Armenia with suggested language to clarify the point of attachment and protection for pre-existing foreign works and sound recordings. Armenia must be encouraged to clearly provide such protection for pre-existing works and sound recordings for a minimum of 50 years, to meet its bilateral and multilateral obligations, and in order to create an environment for the development of the copyright industries there.

The Armenian Copyright Law of 2000 does provide enumerated protection for computer programs and databases as required under the bilateral trade agreement. The Civil Procedure Code was revised in 1998, effective January 1, 1999, but there are no provisions providing for civil *ex parte* search procedures.

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 140 of the Armenian Criminal Code provides for fines of 10-20 times the minimum monthly wage for copyright violations, and (“obligatory social”) corrective labor of up to two years. However, there have not been any convictions under this law. There is no criminal or administrative liability for violations of neighboring rights in Armenia. Amendments to the criminal code, first drafted in 1997, have yet to be enacted. It is essential that Armenia establish an enforcement regime with strong criminal sanctions, if it is going to effectively stop the type of piracy, especially optical media production and distribution, that is rampant in this region.

The existing criminal code and the criminal procedures code do not provide police with the proper *ex officio* authority to commence criminal copyright cases. Armenian copyright officials have 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. If it does already appear in the law, the criminal investigators should immediately begin to use this authority against the commercial piracy present in Armenia.

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; 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. There are reports that Armenia may accede to these treaties early in 2002. The Armenian government should be encouraged to accede to and then fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These treaties are essential to policing against Internet and other forms of digital piracy.

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. It was hoped in 2001 that the then-new customs code (effective January 1, 2001) would energize the customs authorities to take appropriate actions. Unfortunately, this did not occur. 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 in Armenia, but there are at least two cassette manufacturing plants. Although most of the music piracy is in the form of audio cassettes, CDs are becoming more popular – both legal and pirate material. The level of music piracy is estimated at about 85%; trade losses for foreign rightholders in 2001 are estimated at \$4.5 million. It is estimated that in 2001, almost 645,000 CDs and 3.7 million cassettes were sold in Armenia; it is further estimated that of these figures, 525,000 CDs and 3.13 million cassettes were pirated copies.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That 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 adhered to the Berne Convention, effective June 4, 1999. Finally, in 2001, Azerbaijan began to provide a point of attachment for foreign sound recordings when it joined the Geneva Phonograms Convention, effective September 1, 2001 (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 *ex parte* search provisions; these are necessary to provide for effective enforcement against end-user pirates.

Article 158 of the “new” Azerbaijani Criminal Code (in force on September 1, 2000) provides liability for copyright and patent infringements if they result in “significant damage” to the rightholder concerned. The “significant damage” standard creates an unwarranted threshold in the fight against copyright piracy because it sets a vague standard for police and prosecutors to commence action. The law should be amended to include a low and clear threshold to instigate a criminal action, for example, 50 times the minimum daily wage. 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. Article 158.1 of the Criminal Code provides for fines up to 200 times the minimum monthly wage for copyright and neighboring rights violations, or corrective labor for up to two years. Article 158.2 deals with repeat violations and actions committed by a group of persons based on collusion or agreement (conspiracy). In such cases, sentences of up to five years or fines up to 5,000 times the minimum monthly wage are available. There have been no known 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 and fully implement 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 (Article 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 10 times the minimum monthly wages. None of the copyright industries report that these administrative sanctions, or 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 audiocassettes. The level of music piracy is estimated at about 85%; trade losses for foreign rightholders in 2001 is estimated at \$13 million, an increase from 1999, when it was \$10 million. It is estimated by the industry that in total, 8.9 million cassettes and 1.6 million CDs were sold in Azerbaijan in 2001; of these, 7.6 million cassettes and 1.3 million CDs were pirated copies.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That 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. However, Belarus still has not joined the Geneva Phonograms Convention and therefore is not providing any protection for U.S. or other foreign sound recordings – two obligations it pledged to make “best efforts” to conclude over eight years ago.

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 1998 amendments added: (1) a rental right consistent with TRIPS for computer programs and audiovisual works (Article 16.1) and for sound recordings (Article 32.2); (2) a right of communication to the public with definitions of “communication to the public” and “broadcasting” (Article 16.1 and Article 4, respectively) – but absent a clear right of making available; (3) provisions pertaining to “rights management information” (Article 4); (4) a limited right of archival backup copying for computer programs plus a narrow exception for decompilation (Article 21); (5) a point of attachment for sound recordings – by creation, and first or simultaneous publication in Belarus (Article 30); and (6) making available rights for sound recordings (Article 32.2) (but maintaining a compulsory license for the public performance, broadcasting, communication to the public [including interactive use] of sound recordings [Article 33]).

These amendments were adopted not only for eventual WTO TRIPS compliance, but also to comply with the 1996 WIPO “digital” treaties. Belarus is not yet a member of the WTO. Belarus did deposit 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 though Belarus ratified the WIPO Performances and Phonograms Treaty (WPPT), that treaty is not in force because 30 members have not yet ratified it. So, Belarus cannot rely on the WPPT to provide a point of attachment for American or other foreign sound recordings, which is why even with all of the other important legal reforms in place, Belarus must be urged to protect foreign sound recordings by acceding immediately to the Geneva Phonograms Convention.

The August 1998 Copyright Law added in the remedies section provisions relating to anticircumvention devices and services, and the removal or alteration of rights management

information (Article 39.5). The remedies for anticircumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices.

Criminal code provisions were adopted in 1999 and went into force on January 1, 2000. Those 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.

Even though customs code amendments were adopted 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.

The Copyright law, as amended in 1998, does not clearly provide protection for pre-existing works. The protection for pre-existing sound recordings is less clear. Belarus is 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) to provide protection for pre-existing works and sound recordings, and should be urged to clarify its law immediately.

Belarussian officials insist this protection does currently exist, at least for works. The officials insist that since 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, absent any legislative action to the contrary, Article 18 of Berne should currently provide protection for pre-existing foreign works. While this may be a correct reading of the law, it should be clarified by amendment to the law to avoid any confusion on the part of police, prosecutors and judges tasked with enforcement of these rights. Further, the provisions cited (Article 18 of Berne), apply only to "works," not sound recordings; Belarus is not a WTO member. So, even though Belarussian officials believe that protection for pre-existing sound recordings is provided in the copyright law, absent membership in the relevant treaties, there is no point of attachment. Belarus should clarify that this protection is provided for both 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 are no known available civil *ex parte* search procedures; these are needed for effective enforcement against end-user pirates.

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 essential rights to protect copyright material against Internet and other digital piracy.

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Levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. This piracy and the lack of effective enforcement in Belarus is preventing entry by U.S. creative industries into the country. One additional change in the enforcement regime in 2001 was the disbandment of the Committee on Copyright and Neighboring Right and its incorporation into the State Patent Office. This does not bode well for the development of specialized enforcement entities to deal with the growing problem of piracy, especially the considerable growth in optical media production and distribution in Belarus and the region.

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 disc 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. In fact, one of the Ukrainian CD plants was able to migrate to Brest on the Belarus-Poland border due to the lax enforcement regime in Belarus (and Ukraine). The plant and product migration is also a result of ineffective border enforcement measures that allow materials to flow freely in the region; in particular, illegal materials flow through Belarus to Ukraine, Poland, Russia, the Czech Republic, and a number of other countries.

The environment and infrastructure is ripe for additional illegal optical media production facilities. The one plant already there could be the start of other CD plants moving some of their production facilities. These optical disc plants are capable of producing thousands of CDs, DVDs, CD-ROMs, and even VCDs. The Belarussian authorities must act quickly to close the one illegal plant and to prevent other 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 a major regional problem. Adopting measures quickly will prevent the rapid growth of this problem in Belarus.

The growth of illegal musical cassette plants for the production and distribution of musical works in Belarus and the rise of optical media production 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.

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 nine cases were reported where the shipment of CDs (about 14,100 total) were stopped by customs; obviously, much more needs to be done to stop the heavy trafficking of illegal material into and out of Belarus.

In 2001, the IFPI continued to coordinate its anti-piracy actions against retailers and illegal manufacturers, seizing over 22,000 tapes, over 36,000 CDs, and over 30 recording devices, with a total value of US\$405,000. The recording industry considers this a modest figure, taking into account the huge Belarussian markets, and notes that much more enforcement activity is needed to successfully deter the pirates.

The music industry has endemic piracy problems: The recording industry estimates total trade losses for foreign rightholders in Belarus at \$20 million in 2001 (this figure was \$25 million in 1999); the piracy rate was estimated at 75% (ranging from 65% for the Russian and "local" repertoire to over 90% for foreign repertoire). In 2001, more than 3.6 million CDs and 10.8 million cassettes were sold in Belarus, of these 2.7 million CDs and 8 million cassettes were pirated copies.

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. Only in 2001 were the first criminal cases instigated (a total of three cases); charges were filed against infringers of copyright and neighboring rights, but these cases have not reached final disposition.

The Interactive Digital Software Association (IDSA) reports that the scale of piracy in Belarus of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) has grown continually worse. Piracy operations have been completely taken over by organized crime syndicates, which have ties with the Russian crime groups. Although most of the material is produced elsewhere in the region (specifically Russia, and the Ukraine), Belarus serves as a major distribution point for pirate material that is then shipped to other parts of Eastern Europe, particularly Estonia and Poland, and throughout the C.I.S. There are reports that a CD plant, formerly located in Ukraine, has now been relocated to Belarus and may be producing both entertainment software and music material. The existence, location, and production output and capacity of this plant have not yet been fully substantiated. What is quite clear is the fact that Belarus is the source of a large amount of pirate 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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

The Motion Picture Association (MPA) reports that video and other forms of piracy remain rampant in 2001. Almost all videocassettes in Belarus' open markets are pirate Russian-language copies imported from Russia. 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. There was no enforcement activity reported by MPA, that is, the local authorities permit sales of pirate goods at open marketplaces. There is virtually no border enforcement. And pirate video dealers sell their wares at rock-bottom prices in the huge open markets; 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 Russia and 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, 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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That agreement entered into force on August 13, 1993. Until adoption of a separate (specialized) copyright law in 1999, the operating law in Georgia 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, eight years after it pledged to make “best efforts” to accede to that treaty in 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 as a result of its WTO membership.

On July 4, 2001, Georgia deposited its instrument of ratification for both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The Georgian Copyright Law now needs to be amended to fully implement those important digital treaties to fight against Internet and other forms of digital piracy, and to create an environment for the future growth of e-commerce.

Also in June 2001, Georgia was added to the list of beneficiary countries under the Generalized System of Preferences (GSP) program by the U.S. government. One key component of the discretionary criteria of the GSP program under U.S. law is that the country provides “adequate and effective protection of intellectual property rights...” which includes copyright protection and enforcement. Georgia must improve its levels of protection and enforcement of copyright and neighboring rights in order to enjoy these GSP benefits.

The Georgian Copyright Law does not provide protection for pre-existing works as required by the clear obligation in its bilateral trade agreement, nor does it provide such protection for pre-existing sound recordings. 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. It is presumed that since international treaties are granted supremacy under Georgian law that the TRIPS obligations are self-executing, and therefore this protection is afforded works and sound recordings. Since the Georgian Copyright Law is contrary to the international obligations, the copyright law should be amended to clearly provide for protection for pre-existing works and sound recordings (for a minimum of 50 years).

Georgia does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement.

There are no known civil *ex parte* search procedures under Georgian law; these are needed to provide for effective enforcement against end-user pirates.

In June 1999, Georgia adopted Criminal Code amendments; these amendments 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 are no known provisions in the criminal code or the criminal procedures code to provide police with the proper *ex officio* authority to commence criminal copyright cases. This is an essential tool for copyright enforcement and an obligation to meet the WTO TRIPS standards of adequate and effective enforcement.

Customs code amendments were adopted on June 23, 1999. IIPA has never been 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 1999 amendments explicitly provided for border enforcement 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, one provision that significantly weakens the effectiveness of these provisions requires that an application be submitted by the rightholder before such action can commence.

Several years ago, Georgia was considering major revisions to its civil code. The proposal would have incorporated an extensively reworked copyright law into the civil 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, which is fortunate.

On April 30, 2001, Ambassador Zoellick announced that although not listed on the Watch or Priority Watch Lists, Georgia would be the subject of an out-of-cycle review in 2001 by the U.S. government for enforcement and legal reform deficiencies. On February 12, 2002, Ambassador Zoellick announced the completion of that review, noting that the U.S. government “is concerned with key gaps in the legal regime” of Georgia and that these deficiencies “must be corrected to ensure the effective enforcement of intellectual property rights, such as the lack of *ex officio* authority (the authority to undertake action without a right holder’s complaint) for customs and criminal authorities, as well as the lack of civil *ex parte* search and seizure procedures conducted without notice to the alleged infringers.” The U.S. government pledged to continue monitoring the situation in Georgia until these deficiencies are corrected, something that the IIPA strongly encourages.

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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.

The copyright industries report that there is still 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. The administrative codes should be revised and used so that administrative remedies are utilized to close retail (including kiosk) establishments, by removing business licenses from pirate shops. At present, the administrative code doesn’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 yet 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 audiocassettes. The recording industry estimates that trade losses for foreign rights holders in Georgia in 2001 were \$6 million; the piracy rate was estimated at 86%. In 2001, about 825,000 CDs and 4.7 million cassettes were sold in Georgia; of these, 725,000 CDs and 4 million cassettes were pirated copies.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That 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 1996 law for the first time protected computer programs and sound recordings. The 1996 law provided copyright owners with the exclusive rights of: (1) reproduction; (2) distribution including importation, rental, and public lending; (3) public display and public performance; (4) communication to the public; (5) broadcasting; and (6) 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 August 3, 2001, Kazakhstan 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.

Kazakhstan was a signatory to both of the WIPO digital treaties. The Kazakh government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), early in 2002, and to adopt the appropriate legislation to fully implement these treaties to effectively fight against Internet and other forms of digital piracy, and to create an environment for the future growth of e-commerce.

In 2001, IIPA met several times with officials from the government of Kazakhstan to try to resolve the legal reform and enforcement issues that have persisted in Kazakhstan detailed in this report. It was hoped that if these revisions, including accession to the digital copyright treaties, were undertaken, Kazakhstan could develop into a successful marketplace for the copyright industries as a result of its transformation into an effective copyright enforcement regime; in exchange, it was hoped that the threatened suspension or withdrawal of GSP benefits instigated by the IIPA would be lifted. Those GSP benefits in 2000 (the last full year of available statistics) resulted in over \$325 million in trade benefits to Kazakhstan. But unfortunately, the needed legal reforms including treaty accessions and the adoption of a stronger, more effective, and enforced copyright, customs (regulations), criminal, and criminal procedure codes, did not materialize in 2001. On September 26, 2001, the government of Kazakhstan issued a resolution (#1249) instructing the appropriate government ministries to draft laws and regulations that would fix the acknowledged deficiencies in the Kazakh enforcement regime. Perhaps these revisions can be completed early in 2002.

The Kazakh Copyright Law even after the 1996 “modernization” contains several deficiencies. Perhaps most fundamentally, the copyright law does not contain a provision that

clearly provides protection for pre-existing works and sound recordings as required by the obligation in the bilateral trade agreement as well as by Berne (Article 18), under national treatment obligations, and under 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 how or if it was complying with its obligations under Article 18 (for works) and would thereby provide full protection for older works. And, there is no equivalent treaty provision for the protection of pre-existing sound recordings (that is, it is not found in the Geneva Phonograms Convention). That is why the Kazakh law must be amended to clearly provide such protection for pre-existing works and sound recordings (at a minimum of 50 years) to meet its international obligations. Proposals to amend the Copyright Law in 2002 are reportedly being prepared; they should include these changes for pre-existing works and sound recordings, as well as full and proper implementation of the digital treaties.

The Kazakh Copyright Law does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement.

There are no known civil *ex parte* search procedures under Kazakh law; these are needed to provide for effective enforcement against end-user pirates.

On July 16, 1997, Kazakhstan adopted criminal code amendments; these amendments went into force on January 1, 1998. Pursuant to the bilateral agreement obligations, the criminal code revisions in 1997 included important sanctions for copyright and neighboring violations. Article 184 of the Criminal Code includes substantial fines of between 100 and 800 times the statutory minimum monthly wage; detention (arrest) of up to six months; and imprisonment up to five years for repeat offenders.

There is one major shortcoming in these provisions: They are limited to actions committed for the purposes of "deriving profits" and which cause "considerable harm." The imposition of unclear 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. Proposed amendments to fix the considerable harm threshold at 500 times the minimum monthly wage were considered but not adopted in 2001. The IIPA recommends that such a threshold is too high for copyright piracy, and should be much lower to commence a criminal case. A low threshold is important not only for identifying infringing acts under the criminal law but also for providing critical guidance for the police when they are conducting the initial raids, and they must assess the situation and determine whether the case should be brought under the criminal code or the administrative code. IIPA

would recommend (as it has been considered in other countries) that the threshold be lowered to 50 times the daily minimum wage.

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 contained five articles on IP border control (Articles 218-1 to 5). Effective February 15, 2001, the customs code was further revised. According to Kazakh officials, the 2001 customs code revisions did, for the first time, provide customs officials with 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 will implement these changes some time in 2002, so they have not yet been put to use. IIPA urges the Kazakh government to quickly adopt these regulations to provide Customs officials with the proper authority to effectively enforce against IPR violations at the border, at present, a very serious problem for the copyright industries.

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 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).

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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 very weak, especially at the border.

Kazakh government officials reported significant improvements in 2001 in the amount of pirated product that was seized and destroyed by the police (over 112,600 copies valued at 20.6 million tenge (US\$135,000)). Further, Kazakh officials pointed to a newly adopted licensing law (Article 22) for businesses that, it is hoped, will be used as an effective administrative tool against copyright pirates. IIPA suggests that such police and administrative activity would be a very positive first step and that stepped up seizure and confiscation of illegal copyright materials should be undertaken, as well as the closure of shops and businesses conducting illegal business using the licensing law. The next step should be imposition of the criminal penalties against large commercial pirates, especially those involved in the criminal syndicates working with the region.

In 2000, the Kazakh government employed a structural change to enhance IPR enforcement when the Copyright Agency was moved into and under the direction of the Ministry of Justice. So far, that has not proven to be as successful as was hoped, in the stepping up of enforcement operations, especially against criminal piracy operations.

To date, none of the copyright industries report any cases that have moved forward and utilized the “new” (1997) criminal penalties, now four years after their adoption. IIPA again urges

the government of Kazakhstan to direct prosecutors to utilize these new penalties scaled to multiples of the monthly salary or income of individuals convicted, so that they can be imposed in a way that they actually deter piracy. The availability and application of criminal penalties at levels sufficient to deter piracy are necessary for effective copyright protection, and are required under the bilateral agreement, as well as the WTO TRIPS Agreement.

In addition, as already noted, the customs law must be fully implemented with the necessary regulations and then put to use to stop the flow of materials across the region, a particular problem region-wide to stem the flow of material being imported from or exported to 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) continue to be imported, particularly from Russia and China. The music industry (International Federation of the Phonographic Industry, IFPI) reported 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 trade losses for foreign rights holders in Kazakhstan were \$25 million in 2000 (up from \$20 million for all rightsholders in 1999). The piracy rate was estimated at 78% (but considerably higher for the international repertoire segment of the music market). It is estimated that in 2001, more than 2.87 million CDs and 12.4 million pirated cassettes were sold in Kazakhstan. The recording industry reports that more than 190 raids were run in 2001, but only about 13,600 CDs, 13,600 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 still 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, which 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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

Copyright piracy continues to threaten not only foreign investment but also 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 and use 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, and 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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That 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 is a problem that needs repair to clarify that the copyright law provisions take precedent over the civil code amendments, so that Kyrgyz copyright law 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 the rights of 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 law should be further amended to provide producers with a broader public performance (or making available) right, at a minimum, for digital transmissions.

The Kyrgyz Republic joined the Berne Convention, effective July 8, 1999. The Kyrgyz Republic is still not a member of the Geneva Phonograms Convention as it was required (to make “best efforts” to accede) in the bilateral agreement over eight years ago. Kyrgyz copyright officials reported that the Kyrgyz Republic would likely consider acceding to the Rome Convention and the Geneva Phonograms Convention sometime in 2001, but that never transpired. On September 10, 1998 the Kyrgyz Republic deposited its instrument of ratification of the new WIPO Copyright Treaty (WCT); that treaty comes into force on March 6, 2002. Unfortunately, the Kyrgyz Republic did not also ratify the WIPO Performances and Phonograms Treaty (WPPT). This was a major oversight that needs to be corrected to provide protection for digital works and sound recordings to fight on-line piracy and to develop an environment to encourage e-commerce.

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.

In 2001, IIPA met with officials from the government of the Kyrgyz Republic to try to resolve the legal reform and enforcement issues that have persisted in the Kyrgyz Republic detailed

in this report. But unfortunately, the necessary legal reforms, including accession to treaties (Geneva Phonograms and the WPPT), did not take place in 2001; hopefully these reforms can be undertaken early in 2002.

The Kyrgyz Copyright Law in Article 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 – this would best be done by amendment to the copyright law. 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.

There are no known civil *ex parte* search procedures under Kyrgyz law. These are important for effective enforcement against end-user pirates; if these procedures are not currently available, they must be adopted in the Kyrgyz Republic civil procedure code.

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 (Article 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 (Article 340).

The Customs Code contains a special Chapter IV on customs measures applicable to IP goods; this has been in force since 1998. However, as was acknowledged in meetings and correspondence with IIPA, these provisions do not provide customs officials with *ex officio* authority to seize suspected infringing material at the border. Instead, customs actions can only be instigated by an application from the copyright owner. The *ex officio* authority to seize goods and commence investigations is required by the TRIPS Agreement and is necessary to conduct effective border enforcement; the Kyrgyz Republic should adopt the necessary amendments to fix this deficiency.

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. This is another important tool for enforcement officials that need to be implemented.

The copyright law does contain civil law remedies (Articles 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.

On April 30, 2001, Ambassador Zoellick announced that although not listed on the Watch or Priority Watch lists, the Kyrgyz Republic would be the subject of an out-of-cycle review in 2001 by the U.S. government for enforcement and legal reform deficiencies. On February 12, 2002,

Ambassador Zoellick announced the completion of that review, noting that the U.S. government “is concerned with key gaps in the legal regime” of the Kyrgyz Republic and that these deficiencies “must be corrected to ensure the effective enforcement of intellectual property rights, such as the lack of *ex officio* authority (the authority to undertake action without a right holder’s complaint) for customs and criminal authorities, as well as the lack of civil *ex parte* search and seizure procedures conducted without notice to the alleged infringers.” The U.S. government pledged to continue monitoring the situation in the Kyrgyz Republic until these deficiencies are corrected, something that the IIPA strongly encourages.

COPYRIGHT ENFORCEMENT

In meetings with IIPA officials, Kyrgyz government officials cited statistics about the numerous copyrighted materials that have been seized by enforcement officials in 2000 and throughout 2001. Unfortunately, IIPA members report that the number of items seized, and police activity in general, is still relatively low compared with the high levels of piracy prevalent in the Kyrgyz Republic. In sum, the Kyrgyz Republic enforcement regime is 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.

Illegal copyright material continues to be imported across the border from China, as well as musical material into and from Russia and Ukraine. There remains a woeful lack of 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.

Last year, the government announced it would authorize the State Customs Agency to begin seizing illegal copyright material, especially singling out audio and video pirate product. Further, the government announced a series of decrees and resolutions ordering the enforcement bodies to improve enforcement, and for the government ministries to prepare better enforcement laws. These efforts, however well intentioned, have not yet led to actual on-the-ground police and prosecutorial enforcement, or to 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 still no reports from 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 or cassette plants in the Kyrgyz Republic. Like Kazakhstan, the danger

is that the former military bases are targets to be converted into 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 \$8 million in 2001, with the level of piracy estimated to be about 85%. Out of approximately 490,000 CDs and 4.4 million cassettes sold in the country in 2001, 390,000 CDs and 3.8 million cassettes were pirated copies.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

One provision in the package of 1999 amendments and regulations established a single office with responsibility for intellectual property law enforcement to act as a focal point for interagency activity, bringing together the efforts of the police, customs officials and the judiciary. Now over two years later there are still no reports of the successful progress or activity of this office, other than reports that it has ordered the preparation of "additional" laws; in fact in late 2001, additional decrees were issued for improvements in the IPR legal regime. Legal reforms are certainly needed as detailed above. But, actual enforcement is also needed; clear government strategies and lines of authority should be developed by this office and implemented with effective on-the-ground enforcement by the police, prosecutors, courts, and at the border, by customs officials.

REPUBLIC OF MOLDOVA

LEGAL REFORM AND TREATY ADHERENCE

In June 1992, the Republic of Moldova and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That 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 additional, but mostly minor, amendments were added on May 28, 1998; additional amendments were adopted on July 28, 2000.

The Republic of Moldova is a member of the Berne Convention, effective November 2, 1995. 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, 1955).

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). The Republic of Moldova has not yet adopted additional copyright or neighboring rights provisions to fully implement the WCT or WPPT; it should be encouraged to do so to protect against Internet and other forms of digital piracy and to create an environment for the growth of e-commerce. There has already been one report by the American book publishers of a Moldovan Internet Website offering illegal copies of (English language) published materials; proper implementation of the treaties will give the police the tools they need to stop this form of piracy.

On July 26, 2001, the Republic of Moldova became a member of the World Trade Organization and thus was obligated on that date to all of the substantive and enforcement provisions of the TRIPS Agreement.

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. The law should be further amended to provide producers with a broader public performance (or making available) right, at a minimum, for digital transmissions.

In 2000, the Moldova government clarified that the Moldova Copyright Law does 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) and the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). This clarification came through an exchange of letters between the United States government and the government of the Republic of Moldova (government of Moldova Letter of October 16, 2000) acknowledged that their copyright law provides protection for works and sound recordings that are less than 50 years old. The letter cited Article 3 of the Moldova Parliamentary Decision No. 294/XII of November 23, 1994. The IIPA noted in our report last year that this issue had been resolved as a matter of legal reform; however, IIPA continues to seek actual on-the-ground enforcement by the police (and the courts) that will provide the real proof that this law is working to protect older works and sound recordings.

The Moldova Copyright Law does provide copyright protection for computer programs and databases. The Civil Procedure Code (Articles 31, 135, 136, and 140-142) was cited by the government of Moldova (Letter of October 16, 2000) as clearly providing for the availability of civil *ex parte* searches. Again, the exchange of letters in 2000 resolved the legal reform issue; but unfortunately, in 2001, there were no such searches commenced to put this provision to the test. These procedures, if in fact available, must be implemented by the courts to allow copyright owners to effectively bring enforcement actions against end-user pirates.

The Republic of Moldova introduced criminal sanctions into its Copyright Law (Article 38, Paragraph 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 to include special criminal provisions for IPR violations. IIPA remains 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 are still not strong enough 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 were expected in compliance with the WTO TRIPS Agreement, but IIPA is unaware of any such changes to these codes.

The Republic of Moldova did reportedly amend its customs code to provide *ex officio* authority for customs officials to seize material at the border as required by the WTO TRIPS Agreement in 2001 (but IIPA was unable to obtain a copy of these changes). These provisions are necessary to conduct effective enforcement at the border; this was acknowledged by Moldova authorities in the Letter of October 16, 2000, along with an agreement to fix the then-deficient provisions. If the reports are correct about their adoption, the provisions need to be properly implemented for effective border enforcement.

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.

COPYRIGHT ENFORCEMENT

Even after accession into the WTO, the on-the-ground copyright enforcement regime in the Republic of Moldova is not “adequate and effective” as required by the TRIPS Agreement or the bilateral agreement. That is, although there are signs of stepped-up police activity, there must now be prosecutions and convictions under the criminal law for Moldova to meet its international obligations to provide an effective enforcement regime.

There have been some signs of improvement in Moldova, especially cooperation with the police. For example, Moldovan law enforcement officials raided a warehouse in Kishinev Moldova in January 2001, seizing over 558,000 CDs of international (and Ukraine) repertoire, along with videogames and business software (CD-ROMs). The estimated value of this single warehouse seizure was US\$2 million. Unfortunately, since the warehouse was used as a transshipment point, the police were not able to establish and prove any links between the senders (in Ukraine) and recipients outside of Moldova. The case was closed. But the court did order the destruction of the pirated goods after they were determined to be pirate by expert industry analysis (IFPI). The destruction was undertaken in February 2002. There have been no other instances where violators were charged and convicted under criminal or civil liability in 2001.

Thus, Moldavian enforcement officials must take the next steps to provide and implement adequate civil, criminal, administrative and customs provisions against commercial piracy. Although civil and administrative sanctions exist, they are not being used adequately. These would be most effective against retail (including kiosk) businesses.

To date, the copyright industries report that there has not been any successful administration of the criminal sanctions in a copyright case. Border enforcement remains 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 for foreign rightsholders in the Republic of Moldova was \$5 million in 2001, with the level of piracy estimated to be about 86% out of 660,000 CDs and 3.74 million cassettes sold in Moldova in 2001.

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, 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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That 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 authors’ 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. The law also includes 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. The law should be further amended to provide producers with a broader public performance (or making available) right, at a minimum, for digital transmissions.

Tajikistan 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 agreements it pledged to make “best efforts” to conclude over eight years ago. So U.S. (and other foreign) sound recordings remain completely unprotected in Tajikistan.

Tajikistan *does not* clearly provide protection for pre-existing works or sound recordings in its copyright law as required by the clear obligation in its bilateral trade agreement and the Berne Convention. Tajikistan must amend its law to clearly state its protection for pre-existing works and

sound recordings that are (at a minimum) 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.

There are no known civil *ex parte* search procedures in existence in the Tajik law; these provisions must be adopted and implemented for effective enforcement against end-user pirates.

Tajikistan has not amended its criminal code, following passage of the 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.

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. This is, however, an ineffective tool that must be revised.

Tajikistan was not a signatory to either of the two new WIPO treaties. The Tajik government should be encouraged to ratify and then fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

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The Tajik copyright regime 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 (Article 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 (Article 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 for foreign rights holders in Tajikistan were \$3 million in 2001 (up from \$500,000 in 1999); music piracy levels were estimated to be at about 83%. Of 4 million cassettes, 3.36 million were pirated copies; for CDs the figures were 450,000 total sales, of which 393,000 were pirated copies.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That agreement entered into force on October 25, 1993. For almost nine years 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 a few years ago, but reportedly was never adopted by the Parliament.

Turkmenistan is not a member of the Berne Convention. So, Turkmenistan is not providing any protection for American works—books, films, musical compositions, or software (entertainment or business). Nor is Turkmenistan a member of the Geneva Phonograms Convention, leaving U.S. (and other foreign) sound recordings completely unprotected. These are all obligations of the bilateral agreement that Turkmenistan obligated itself to fulfill more than eight 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 must also adopt explicit copyright protection for computer programs and databases as required under the bilateral trade agreement. Further, the civil procedure code must be amended to include provisions for civil *ex parte* search procedures; these are 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 and then fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

COPYRIGHT ENFORCEMENT

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 international norms.

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 be encouraged to 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 in the absence of substantive legislation granting protection to foreign works and phonograms, it is impossible to distinguish the “pirated” product from the “legitimate” copies. Most of the music sold is in the form of audio cassettes. Because of the flagrant legislative failures, the music industry has decided not to quantify the piracy percentages this year. Rights holders remain very concerned that almost every copy produced and distributed in the country is done so without authorization. The music industry reports that illegal musical cassettes produced in neighboring countries, including Uzbekistan in particular, are entering Turkmenistan as the result of the very poor border enforcement regime (on both sides of the border). The IFPI reports that there are still no known optical media plants in Turkmenistan. The recording industry preliminary estimates trade losses for foreign rights holders in Turkmenistan were (by estimating the possible size of the “legal” market) \$5 million in 2001 (up from \$3 million in 1999). In 2001, a total of 4.25 million cassettes and 750,000 CDs were sold in Turkmenistan.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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 detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That 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 thorough revisions to the copyright act, or to the relevant enforcement laws, even though Uzbekistan obligated itself to undertake important changes in the bilateral agreement over eight years ago. The exception was in December 2000, when two amendments to the copyright law were adopted; however, as noted herein, major deficiencies remain.

Uzbekistan has not acceded to any of the relevant copyright or neighboring rights treaties, as it obligated itself to do in the bilateral agreement over eight years ago. In fact, in discussions with the IIPA and the United States government in 2000, Uzbek government officials stated that they did not expect to join the Berne Convention or the Geneva Phonograms Convention before the end of 2003. As a result of Uzbek reluctance to meet its bilateral obligations, IIPA filed a petition to withdraw the GSP benefits of Uzbekistan in 1999; the U.S. government accepted that petition. IIPA continues to press for the withdrawal or suspension of GSP benefits as the result of the Uzbek government's total failure to adopt the necessary legal reforms, treaty accessions, and enforcement obligations.

The Uzbek Law on Copyright and Neighboring Rights of 1996 established protection for the first time of computer programs, databases, and sound recordings (further amended by the December 2000 provisions). The exclusive economic rights provided to authors (Article 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.

Until 2001, the neighboring rights section of the law did not provide for a basic right of reproduction for producers of sound recordings; one of the two December 2000 amendments added "copying of a record" to the enumerated rights of producers to fix that glaring deficiency. The copyright 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. The law should be further amended to provide producers with a broader public performance (or making available) right, at a minimum, for digital transmissions.

Uzbekistan is not a member of the Berne Convention. Uzbekistan is currently not providing any rights to U.S. or other foreign sound recordings. Nor is Uzbekistan a member of the Geneva Phonograms Convention, so U.S. (and other foreign) 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 eight years ago. Uzbek officials suggested in meetings with IIPA members that a point of attachment could be available for works and sound recordings under the Foreign Investment Law. Since it pledged to join the international copyright and neighboring rights treaties (eight years ago), the Uzbek government should, instead, be urged to clearly provide copyright and neighboring rights protection under these relevant treaties (Berne and Geneva Phonograms) and via its copyright law. The second December 2000 amendment added a broad national treatment obligation into the law (Article 56.3), but not a clear point of attachment for all works and sound recordings.

Uzbek law does not clearly provide protection for pre-existing works (or sound recordings, since it provides no protection for new or old foreign recordings). 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.

There are no known civil *ex parte* search procedures in the Uzbek law; these must be adopted into the civil procedure code in order to commence actions against end-user pirates. These are important enforcement tools that the Uzbek government must be encouraged to implement.

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 (Article 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. Uzbek officials reported that Article 149 would be revised in 2001, but that never transpired. 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.

Resolution 215 of the Cabinet of Ministers (April 19, 1994) established a licensing system for the production, reproduction and sale of records, cassettes and CDs. However, IIPA still has no reports on how (or if) these provisions were implemented, 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 and fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

COPYRIGHT ENFORCEMENT

The Uzbek copyright regime is, at present, among the weakest of all of the countries in the C.I.S. It is not in compliance with the bilateral obligations it made to the United States eight years ago, and woefully is insufficient for any future WTO membership. The legal regime in Uzbekistan must be overhauled to provide 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, as in Turkmenistan, in the absence of substantive legislation granting protection to foreign works and phonograms, it is impossible to distinguish the “pirated” product from the “legitimate” copies. That is why the music industry will not provide piracy rates in Uzbekistan. Rights holders remain very concerned that almost all of the material produced and/or distributed in Uzbekistan is done so without authorization. The recording industry reports that illegal musical cassettes produced in neighboring countries, particularly Russia, are entering Uzbekistan as a result of poor border enforcement (on both sides of the border). 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 preliminary estimates trade losses for foreign rightsholders in Uzbekistan (by calculating the size of the potential legal market) were \$35 million in 2001 (up from \$30 million in 2000). In total, 24 million cassettes and 6 million CDs were sold in Uzbekistan in 2001.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

Colombia continued to fail to take sufficient action on the three key issues identified by USTR almost three years ago: the need to improve copyright enforcement; the need to resolve Colombia's long-standing failure to pursue criminal sentences and administrative (CNTV) actions against unlicensed television operators; and the effective implementation of its TRIPS obligations (which were due January 1, 2000).¹ These goals have not been met, and this has cost the U.S. copyright industries.

Piracy levels in Colombia continue to be high for such an important market. For example, music piracy is rampant and is worsening due to the emergency of illegitimate CD-R replication. In all, estimated losses due to piracy of U.S.- copyrighted materials in Colombia were \$153 million in 2001.

Any positive effects of the inconsistent raids taken by Colombian authorities for some industries stops after the seizure of pirated goods. The Colombian judicial system simply fails to actively prosecute cases, much less issue deterrent penalties. The effort to legitimize the television market has failed because the government's activity, primarily that of the CNTV, is consistently ineffective in enforcement efforts. 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.

IIPA recommends that Colombia remain on the Special 301 Watch List and that an out-of-cycle review be conducted later this year. Actions which could be considered in such a review might include, for example: (a) the steps the government and judiciary take to reduce the amount of time taken by Colombian judges to grant civil *ex parte* search orders; (b) actions taken by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy; (c) specific actions taken by Customs, the Finance Ministry and the tax authorities to combat copyright piracy, at the street level as well as larger distributors of pirated materials; (d) if President Pastrana issues a new legalization decree for business software in the near future, the implementation of such decree within Colombian agencies should be monitored; (e) the effective implementation by the *Superintendencias* and DIAN of Law 603 (a fiscal law which requires Colombian corporations to certify compliance with copyright laws in annual reports which they file with regulatory agencies). In addition, we urge the Colombian Copyright Office to issue a formal written opinion, affirming that copyright ownership by software publishers and other corporate entities is presumed under Colombian copyright law without the need for evidence of a written transfer of rights by the employee or other individual author.

¹ See Press Release 99-41, Office of the U.S. Trade Representative, April 30, 1999.

COLOMBIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	90%	40.0	90%	40.0	55%	38.0	60%	33.0	60%	27.0	75%
Sound Recordings / Musical Compositions	73.0	65%	60.0	60%	60.0	60%	65.0	60%	54.0	60%	18.0	66%
Business Software Applications ²	35.7	53%	33.2	53%	50.5	58%	68.1	60%	52.4	62%	74.3	67%
Entertainment Software	NA	NA	39.0	85%	7.0	75%	7.7	78%	7.2	73%	6.8	62%
Books ³	5.5	NA	5.0	NA	6.0	NA	6.0	NA	5.0	NA	5.0	NA
TOTALS	153.3		177.2		163.5		184.8		151.6		131.1	

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 2001 saw cooperation between the MPA and COLVIDEO, the local video association. This cooperation seems to have forestalled continued growth in piracy rates in some regions, but both groups continue to struggle with an effective pirate market. At least 90% of the video market is pirate.

² BSA loss numbers for 2001 are preliminary. In IIPA’s February 2001 Special 301 filing, BSA’s 2000 estimates of \$48.0 million at 55% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

³ AAP revised its 2000 estimated loss of \$6.0 million to \$5.0 million, which is reflected above.

⁴ In 2000, \$66.2 million of Colombian goods entered the United States under the GSP program, accounting for 1% of its total imports to the U.S. \$826.6 million of Colombian goods entered the U.S. under the ATPA program, accounting for 12% of its total imports to the U.S. For the first 11 months of 2001, \$53.9 million of Colombian goods (or 1% of Colombia’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 13.6% decrease over the same time period last year. \$707.5 million of Colombian goods entered the U.S. under the ATPA program for the same period, accounting for a 7.8% decrease over last year.

The MPA will continue to fight signal theft piracy. Prior to the long-delayed licensing process, MPA estimated that 80% of the television market was pirate, and despite licensing, now estimates that close to 70% of the pay television still receive pirated signals in some form. Many of those formerly pirate stations now have licenses and have legalized their signals. However, this does not mean that these “legal” operators pay for the programming that they transmit. Since 1998, CNTV had promised to take legal action, in coordination with criminal prosecution, against the remaining thousands of non-licensed operators, concurrently attacking piracy and allowing 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 70% 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 2001.

The recording industry reports that in 2001, the estimated level of audio piracy rose to 65%, with estimated losses due to piracy also rising, up to at \$73 million. Piracy of music CDs in Colombia continues to increase, mostly due to local CD-R replication. Hundreds of stalls in the street markets of San Andrecitos continue to openly and brazenly sell and distribute pirate and counterfeit product. Thousands of street vendors sell pirate CDs on the traffic corners in Bogota, Medellin and Cali, and even more vendors sell pirate audiocassettes. The situation is complete anarchic. 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 either by “ant smuggling” through airports around the country or by brining blank CD-Rs by the thousands in order to illegally replicate them inside Colombia. CD-R piracy (recordable CD) is flourishing in Colombia, as a cottage industry of pirate CD-R products has exploded, pirating primarily Colombian repertoire. Most of the music companies are shrinking; the local companies continue to close down their operations and their investments. U.S. repertoire continues to be very much affected due to this situation. There have been certain isolated efforts and lots of programs and public statements, but to no avail.

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. During 2001, the Business Software Alliance (BSA) encountered sophisticated, high-volume software counterfeit production facilities in Bogota. A series of raids by Colombian law enforcement authorities confirmed that the facilities had manufactured several hundreds of counterfeit software licenses and packaging. The authorities arrested 17 pirates in one raid alone, completely dismantling the pirate operation facilities. Estimated trade losses due to business software piracy are an estimated \$35.0 million in 2001, with an estimated 53% piracy level. The educational and legal campaign of the BSA, combined with only modest growth in the legitimate market, resulted in a reduction in the piracy rate and estimated losses in Colombia in 2001, compared to the prior year. BSA is extremely troubled by a February 2002 judicial decision which directly undermines the rights of U.S. software publishers and, if upheld and followed by other courts, could prevent all US copyright-based industries from enforcing their rights against Colombian infringers (see discussion, below). BSA specifically urges the Colombian Copyright Office and Colombian government to denounce the recent court decision involving Carillo Publicidad as contrary to Colombian copyright law and the Berne Convention.

The publishing industry reports the Colombian Book Chamber (which includes U.S. publishers) and the government have been working hard in trying to improve both the “Ley del Libro” itself and its enforcement. Currently there is no enforcement against photocopy shops located either outside universities or those operated inside, where individual chapters of textbooks as well as entire books are reproduced without authorization. There also is some commercial book piracy. When pirated books are found, the publishers report it to the Book Chamber, and they go with law enforcement agents to confiscate the books, which are then burned. Commercial piracy has declined somewhat because of enforcement actions, but not photocopying. Local agents of U.S. publishers say that pirated books and photocopies have a 20% to 25% market share (50% in the English language reference books, which is only a small part of the market). There is a campaign on television, on radio and in the newspapers discussing the problem of using illegal IP products. Estimated trade losses due to book piracy rose slightly to \$5.3 million in 2001.

The Interactive Digital Software Association (IDSA) has reported concerns that Colombia is becoming another destination for pirated product (including videogame CDs and cartridges, personal computer CDs, and multimedia products) out of Southeast Asia. Estimated trade losses and piracy levels for 2001 are not available.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Several Colombian institutions and interagency groups are responsible for anti-piracy activities. Ironically, some enforcement activity has actually improved in the last few 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

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), the Colombian Industrial Software Association and the Sayco Collection Society.

anti-piracy activities. Industry reports on the effectiveness of this agreement are mixed. 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.
- 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 the agency and its commitment to resolve the problem of television piracy.

While all these steps (listed above) seemed to be positive, the reality is that piracy is still increasing and the Colombian marketplace environment for legitimate copyrighted product remains in dire straits.

Police and Prosecutors Are Active in Conducting Criminal Actions But Have Not Been Able to Deter Piracy.

In the last three years, MPA has taken important anti-piracy action in Colombia's home video market, seizing over 40,000 pirate videos in 1999, over 18,000 videos in 2000, and in 2001, MPA seized over 40,000 pirate videos in 36 separate cases. However, the violators face absolutely no sanction, other than the loss of their pirate videos, which they quickly replace. Without government follow-through of 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.

MPA's signal theft campaign continued throughout 2001. MPA does recognize the government's efforts to follow up MPA investigations with raids and recognizes that the raids are well done. However, the lengthy prosecutions continue to favor the pirate. The MPA is faced with the difficult choice of seeking settlements to quickly end the specific incident of piracy, or enduring piracy while cases work their way through the criminal process. MPA took 17 criminal actions against alleged television pirates in 2000, and 16 such cases in 2001. However, MPA's 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 (see discussion, below).

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 was fully staffed and trained to identify sources of piracy and it also trained several units of different enforcement agencies in Colombia. Unfortunately, due to the extremely

low level of attention that the Colombian government gives to piracy and the high levels of piracy affecting the market, the recording industry had to close down the APDIF operation in Colombia since September 2001. This is the first time an APDIF unit has had to close down in any country of Latin America as a result of the lack of effective support from the government and the effects of piracy in the music companies. Unless the Colombian government urgently and dramatically acts in certain markets (Bogota, Medellin and Cali would represent the immediate starting points), the piracy rates will only increase and legitimate companies will suffer even more losses. There has been good will between the industry and the Colombian enforcement authorities but the good will never contribute to decrease the high levels of piracy.

Additionally, Customs, the Colombian Tax Authority and the Judiciary, have not fully understood the need for their involvement. There have been basically no cases that are taken to the very far end in order to condemn pirates significantly to deter piracy. During 2001, there was not one single case that obtained a judgment. The pirates know that seizures of small amounts of CDs and tapes is just another cost of doing business. The battle will be never won without a clear compromise, plan and specific actions-goals from the Government.

The recording industry is trying to continue to conduct an anti-piracy campaign which results in isolated seizures and other actions, but this will not help at all. While cooperation between industry and the authorities is on-going, more profound and active involvement by Customs and the Finance Ministry (*Ministerio de Hacienda*), under the clear direction and specific instruction of the President, is urgently needed to conduct investigations to go after the big pirates that operate under schemes of organized crime. A constant and aggressive policy to face the street vending problem is also required. To this end, the active involvement of the Colombian tax authorities would be instrumental.

For business software piracy, BSA reports that unlike in the year 2000, it received strong support in 2001 from not only the DAS and Fiscalia, but also from other government authorities such as CTI, DIJIN, and SIJIN. These agencies proved critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogota. In 2001, 37 legal actions were conducted against end-user pirates, and more than 35 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, government agencies conducted several criminal raids in Cali, Bogota and Medellin.

There has been some enforcement action in Colombia on commercial book piracy. When informed of suspected problems by the publishers, Colombian authorities will confiscate infringing texts and burn them, but costs of these actions must be borne by the publishers. Currently there is no effective anti-piracy enforcement against copyshops, which operate both in and around universities and copy chapters, or even entire books.

The 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 entered into effect on January 1, 2001. Amendments to the criminal code entered into effect on January 1, 2001, which in one of its provisions increases the imprisonment term from 1 to 3 years to 3 to 5 years.

A very recent case has come to the attention of the business software industry. In a very BSA is extremely troubled by a recent Colombian judicial decision, which directly undermines the rights of U.S. software publishers and, if upheld and followed by other courts, could prevent all US copyright-based industries from enforcing their rights against Colombian infringers. In particular, on February 8, 2002, a Colombian civil court dismissed a BSA civil infringement action against Carillo Publicidad (despite evidence of piracy), solely on the grounds that the plaintiffs had failed to prove copyright ownership. The court ruled that, under Colombian law (which includes the Berne Convention), copyright notices provide prima facie proof of copyright ownership only if the copyright owner is a natural person. However, in the case of software publishers and other corporate entities, the court held that the copyright notice is insufficient to create a presumption of copyright ownership; instead, these corporate entities must show evidence of the transfer of rights between the employee developers and the employer software publisher.

This decision contravenes the Berne Convention and international copyright standards, and establishes a burdensome and unreasonable evidentiary hurdle that cannot be met by US software publishers or other US copyright-based companies. Under U.S. copyright law, ownership of employee-created copyrighted works vests automatically in the employer (absent a written agreement to the contrary), without the need for a written transfer. Accordingly, U.S. software publishers do not need, or as a matter of course obtain, written transfers from employees. Moreover, given the fact that hundreds, or even thousands, of employees may contribute to the development of a computer program, software publishers could not, as a practical matter, document each transfer of rights or provide such evidence to a Colombian court.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS			
2000			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	17(TV), 11(Video)	30	N/A
By Police		16	
By Customs		1	
Number of cases commenced	17 (TV)	9	N/A
Number of defendants convicted (including guilty pleas)	0	7	N/A
Acquittals and Dismissals		1	
Number of Cases Pending	32(TV)		
Total number of cases resulting in jail time			
Suspended Prison Terms	17(TV), 11(Video)		
Maximum 6 months			
Over 6 months			
Over 1 year			
Total Suspended Prison Terms			
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months		3 MONTHS	
Over 1 year			
Total Prison Terms Served (not suspended)			
Number of cases resulting in criminal fines			N/A
Up to \$1,000			
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied			0

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	16 (TV) 36 (Video)	37	561
By Police		21	561
By Customs		0	
Number of cases commenced	16 (TV)	7	70
Number of defendants convicted (including guilty pleas)	0		50
Acquittals and Dismissals		1(El guajiro)	
Number of Cases Pending	44 (TV)		20
Total number of cases resulting in jail time	16 (TV) 36 (Video)		0
Suspended Prison Terms		37	50
Maximum 6 months		21	
Over 6 months	16 (TV)		
Over 1 year			
Total Suspended Prison Terms			50
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total Prison Terms Served (not suspended)			0
Number of cases resulting in criminal fines			50
Up to \$1,000			
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied			N/A

Administrative Enforcement Against Signal Theft Piracy is Ineffective.

Given the legislative attempt to abolish the CNTV in 2001, the arrest of three of its five commissioners in mid-2000, and repeated failure to redeem its pledges of effective enforcement, CNTV has been completely ineffective in addressing the problem of piracy in television. CNTV's only effort in 2000 and 2001 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.

Border Enforcement Measures Must Be Strengthened.

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. During the first half of 2001, BSA conducted a two-day seminar for DIAN's border officials on counterfeit software products.

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 much 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 2001, conducting only a handful of civil end user actions.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2000	BUSINESS APPLICATIONS SOFTWARE 2001
Number of civil raids conducted	7	20
Post Search Action		
Cases Pending	5	18
Cases Dropped	2	2
Cases Settled or Adjudicated		
Value of loss as determined by Right holder (\$USD)		
Settlement/Judgment Amount (\$USD)		

ENFORCEMENT OF LICENSING FOR PAY TV/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.⁶ The need for continued monitoring of the licensing and enforcement

⁶ 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.

processes in 2001 was identified to be of paramount importance in IIPA's 2001 Special 301 submission. 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.

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. 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

In July 2001, Colombia's new Criminal Code entered into effect. It includes copyright infringements as a crime, and significantly increases possible sanctions from a jail term from 1 to 3 years to one of 3 to 5 years.⁷ The Code also contains provisions on violation of technological protection measures and rights managements, both key obligations of the WIPO Treaties. 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: Law 603

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

⁷ IIPA does not have the text of this legislation.

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. During the second half of 2001, BSA as part of its awareness campaign in promoting Law 603, conducted two successful seminars addressed to accountants and attorneys. Likewise, BSA is still working very closely with the *Superintendencias* and DIAN to have them issue implementing guidelines.

Neither of the two agencies supervising implementation of this law have not yet taken action to implement it. Both agencies should take public steps towards implementation, such as for example, issuing implementing regulations, making public announcements to companies within their jurisdiction, training audit staff, and conducting audits.

Government Software Management

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. Therefore, BSA is working closely with representatives of the Pastrana government to issue a new, more effective directive that can be enforced. It is possible that the President could issue such a government legalization decree for software in early 2002.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

CZECH REPUBLIC

EXECUTIVE SUMMARY

The Czech Republic should be added to the Special 301 Watch List this year.

Progress in reforming the legal system occurred in the Czech Republic during 2001. This followed upon the positive steps that had been taken in 2000 with the enactment of the new copyright law. Amendments were enacted into the code of criminal procedure during 2001 that are intended to speed up criminal proceedings, which have historically been very slow. Whether the recent changes in the law will be implemented in practice as intended will be one of the factors determining how well the Czech Republic deals with piracy during 2002. The implementation of recent changes to the laws were negatively affected during 2001 because of the lack of training for public prosecutors, judges and other legal professionals regarding the copyright laws, recent changes to the copyright laws, and procedural matters bearing on copyright enforcement. Such training is needed to make the process of enforcement more efficient, and to reduce the backlog of cases that hampers effective copyright enforcement. Another area indicating continuing legal reform was the Czech's Cabinet's agreement to have the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT) ratified.

There was some improvement in 2001 in the enforcement situation in the Czech Republic. Although criminal sentences were routinely converted into suspended sentences as in previous years, such suspended sentences were of a slightly more deterrent character in 2001. In fact, there was at least one criminal case in 2001 that resulted in a criminal sentence that was not later converted into a suspended sentence. Increased use of criminal sentences that are not later routinely converted into suspended sentences would contribute to improving the enforcement situation in the Czech Republic.

Nonetheless, serious concerns remain regarding enforcement. For example, ineffective border enforcement means that the Czech Republic continues to be a source of, or a transshipment point for, pirate materials.

To correct remaining problems, the Czech Republic must: adopt optical media regulations; improve implementation of the new copyright law and civil code provisions; and continue to take significant and deterrent enforcement activity by police, prosecutors, and in the courts.

The Czech Republic's failure to provide protection for pre-existing 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.

Additionally, the changes to the Czech Code of Civil Procedure that allow for civil *ex parte* searches must be implemented in practice to guarantee the preservation of evidence in software piracy cases. The enforcement situation in the Czech Republic must be improved by continued and increasing activity by the police, prosecutors and the courts. The civil and criminal penalties for piracy must continue to be utilized in order for the improvements in deterrence in 2001 to continue into 2002 and beyond. For all the above reasons, the Czech Republic should be added to the Watch List this year.

CZECH REPUBLIC: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	8.0	10%	8.0	18%	10.0	30%	8.0	35%	10.0	35%	10.0	35%
Sound Recordings / Musical Compositions ¹	8.4	48%	3.4	35%	60.0	8%	62.0	6%	62.5	6%	47.5	6%
Business Software Applications ²	NA	NA	36.2	43%	30.2	42%	39.5	49%	39.7	52%	56.7	61%
Entertainment Software	54.8	90%	45.0	81%	12.0	NA	NA	NA	NA	NA	NA	NA
Books	3.0	NA	4.5	NA	4.5	NA	4.0	NA	4.5	NA	4.5	NA
TOTALS	74.2		97.1		116.7		113.5		116.7		118.7	

¹ The recording industry reevaluated its methodology for the Czech market in 2000 and 2001, taking into account changes based on methodological approaches, new research and market knowledge, including information pertaining to disc capacity, seizures, the activities of pirate organizations and exports. Because there is no present evidence of significant volumes of pirate music product being exported from Czech Republic, the industry's original 2000 estimate of \$35.0 million at 20% has been revised, and the new information is reflected above.

² In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$19.2 million at 39% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

COPYRIGHT LAW AND RELATED ISSUES

The Czech Republic currently has both bilateral³ and multilateral obligations to provide effective copyright protection and enforcement, as discussed in further detail below.

Optical Media Regulations and Additional Digital Copyright Law Amendments Are Needed.

The new Czech copyright law amendments that went into force on December 1, 2000 corrected the most severe legal shortcoming by providing a guarantee of protection for pre-existing sound recordings (and works). Further, the Code of Civil Procedure 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). Additionally, the cabinet of the Czech Republic agreed to accede to both the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty, and formal ratification occurred in the second half of 2001. Before the 2000 amendments were adopted, the Czech Republic had last amended its copyright law in 1996, adding important protections with regard to computer software, in compliance with the European Union Software Directive.

Even with these commendable changes, 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.

³ For details on the Czech Republic’s bilateral experience under Special 301, please see appendices D and E of this 2002 Special 301 submission. 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 2000, \$280.4 million of Czech goods entered the United States under the duty-free GSP code, accounting for 26.2% of its total imports to the U.S. For the first 11 months of 2001, \$330 million of Czech goods entered the U.S. under the duty-free GSP code, representing a 29.9% increase over the same time period last year.

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 anti-circumvention provisions (Article 43) must be deleted. This is 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. We note that the Czech cabinet had already agreed to accede to the WCT and WPPT, and are hopeful that the “economic gain” element of Article 43 will be accordingly deleted. 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 rightholder as prescribed in Article 12.2 of the WCT and Article 19.2 of the WPPT. Nonetheless, although Article 44 does not explicitly mention that rights management information includes information on the author or other rightholder, it is believed such as interpretation would be taken by a Czech court given the language in the provision.

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 among the TV station, the MPA, and the Czech Anti-Piracy Union (CPU), and the station now limits its Internet transmissions to its own indigenous programming.

In 2001, MPA's local anti-piracy organization successfully prosecuted four defendants offering pirate hard goods over the Internet.

In addition to the copyright law amendments, penal code amendments were adopted in 2000 that increased the maximum possible penalties for copyright infringements to five years of imprisonment and a fine of 5 million Crowns (US\$125,000).

The penal code and the code of criminal procedure were significantly amended in 2001 to simplify the structure of the law and render the criminal process more efficient. As a result of these changes, the speed of resolution of criminal proceedings should increase during 2002, when these changes first become effective, assuming the changes are implemented in practice. We are hopeful that once these changes are implemented, the backlog in cases that seriously hampers effective copyright enforcement may be reduced.

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 2 million Crowns (US\$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. Nonetheless, the BSA reports that there have been no cases in 2001 involving the import or export of software.

After two years in place, the law has not resulted in any expected improvement to the already weak customs enforcement regime because, among other things, the law imposes onerous burdens on rightholders (paperwork and a duty to provide a bond for counterclaims that can take years to resolve).

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. 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 Code of Civil Procedure (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. During 2000, amendments to the Code of Civil Procedure 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 cause a search for securing evidence 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. However, the BSA reports that no lower court has yet granted an *ex parte* search application. The continued absence of civil *ex parte* searches despite the changes in law is a factor negatively affecting copyright enforcement in the Czech Republic.

Last, there were additional problems with the copyright law amendments adopted in 2000. The 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 Cabinet of the Czech Republic agreed, 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. Moreover, existing provisions in Czech law must be made consistent with provisions of the WCT and WPPT.

COPYRIGHT PIRACY

The Rise of Optical Media Piracy in the Czech Republic; Production and Distribution in the Czech Republic and Regionally

The Czech Republic is a country where illegal optical media production remains a concern. Steps must be taken to regulate optical disc plants, and to improve border enforcement to contain the problem.

A serious problem in the Czech Republic is the overproduction of optical media (music CDs and CD-Rs, that is, recordable CDs). The manufacturing capacity of the CD plants in the Czech Republic outstrips domestic demand. As a result, the entertainment software industry suffers from the production of compilations of videogames on CD-ROMs. The copyright industries have reported that 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.

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. The willingness of the plants to participate in these procedures is important, as is the government's willingness to enforcement such regulations.⁴

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 through their anti-piracy 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. However, the BSA reports that the enforcement situation improved somewhat in 2001 with increased cooperation by the police and the improved attitude vis-à-vis rightholders of most public prosecutors, and the courts. The BSA reports relatively severe criminal judgments against software pirates in 2001 (although criminal sentences were routinely converted to suspended sentences as in previous years) and reports that the police were generally prepared to address software piracy issues that developed during 2001. On the other hand, the BSA reports that some longstanding problems in enforcement continued in 2001, including long delays in the preparation of expert opinions; long delays in preparations of undertaking a raid; and the widely varying attitudes of public prosecutors towards rightsholders, and piracy across different regions of the country (the latter caused to some extent by the widely varying knowledge and skill of these public prosecutors in connection with issues of intellectual property law.)

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. Although improvements were noted in

⁴ As an historical example, 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 then extant 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) began an investigation into the activities of a second plant suspected of being involved in large-scale piracy. In October 1998, the police investigation department officially charged the plant manager of CDC with copyright law violations. However, 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 example shows a very serious lack of enforcement commitment by the police department; the Czech government and the proper enforcement authorities must reconsider this decision.

2001, the failure of the judiciary to properly apply deterrent penalties in the past has allowed 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 2002.

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.

Although there has been better cooperation on criminal raids by the police and an adequate legal framework has been implemented, lengthy delays in moving cases and incomplete investigations 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, an adequate legal framework and continued interest of courts in matters affecting intellectual property rights; however, law enforcement authorities are unwilling to pursue actions quickly to their conclusion. The problem is twofold: (1) a backlog of cases; and (2) the varying attitude towards intellectual property rights and knowledge of the subject matter of prosecutors and other legal professionals from region to region in the country.

The recent amendments to the code of criminal procedure may partially alleviate the backlog problem in Czech enforcement, if implemented properly. According to these amendments, police investigations must be commenced within either a two- or three- month window, depending on the alleged crime. Further the entire investigation must be completed within a period of six months. However, there is a possibility of extension of these deadlines.

The amendments also provide that a party may submit its own expert opinion in lieu of an official expert opinion, provided the party's expert opinion complies with certain formal requirements set out by law.

These amendments address, to a certain extent, IIPA's recommendations in previous years for an Interior Ministry 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 public prosecutor for prosecution within less than 60 days after the occurrence of a raid. The 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, it is recommended that the Czech Republic 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.

In 2001, some industries, notably the motion picture industry and the business software industry, reported continually improving cooperation with prosecutors and judges in moving current cases forward. But the backlog remains and, more significantly, copyright holders face problems and certain obstacles in cases involving large companies suspected of piracy. The BSA reports that although small companies and medium sized companies are investigated by the police regularly, there has been a noticeable lack of investigations of large companies for piracy. Similarly, IFPI reports that small routine criminal cases are being taken to and adjudicated correctly by the Czech courts; however, they report that 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. 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. However, there have been encouraging developments in the number of formal criminal accusations filed by prosecutors: In 2001, 23 criminal accusations were filed against end-users and against suspected resellers. Police and prosecutors are thus becoming more proactive by conducting raids on and filing criminal accusations against both reseller and end-user infringers, according to the BSA. Unfortunately, the BSA reports that despite this level of activity, during 2001, movement by the police and public prosecutors against suspected infringers was often delayed, because of the relatively long period of time required by the police for preparing for a raid, and the delay caused by waits for official expert opinions, a necessary precursor to the issuance of a criminal accusation against a suspected pirate under Czech law. The BSA hopes that the new amendments to the code of civil procedure allowing a party to submit its own expert opinion to substitute for the official expert opinion will be implemented regularly during 2002 and will result in a more efficient procedure.

The Motion Picture Association (MPA) reports an improvement in the speed with which routine criminal cases were handled by the courts. The procedure regarding case filings has changed. This change is expected to expedite the process.

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 was aware of at least 18 criminal judgments for software infringement in 2001, giving a total of 28 criminal judgments until now of which the BSA has become aware. The most severe criminal judgments to date were (1) the sentencing of an individual to five years' imprisonment (not suspended); the defendant in that case had used pirated software and had committed insurance and other fraud with the help of this software, and (2) the sentencing of an individual to 18 months' imprisonment (suspended) with 2.5 years of probation; the defendant in this case had used pirated software and had distributed music CDs using the pirated software.

With respect to civil enforcement, the Czech government has (as noted already) clarified that *ex parte* searches are available to right holders. The relevant provisions of the civil code became effective January 1, 2001. However, no court has yet granted an application for an *ex parte* search order.

There were continuing signs that the government was committed to the use of only licensed software in its offices. The Czech government, with the support and cooperation of the BSA, issued a resolution on the legal use of software in government offices. The resolution is comprehensive and contains practical and detailed rules regarding the use of the software by the government, rules regarding the training of government employees, and rules on implementation of the resolution, including deadlines for full compliance with the resolution. This resolution, which is effective January 1, 2002, is one of the most comprehensive in Europe. The BSA commends the government for its efforts in issuing the resolution and hopes for its speedy implementation.

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). 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. The flow of pirate products from Russia and the Ukraine into the Czech Republic continues unabated.

The major problem confronting IDSA members is the manufacturing and replication operations, including syndicates producing so-called "gold" recordable disks in the Czech Republic, and prerecorded silver discs that are imported from Russia and the Ukraine. The disc-producing factory formerly located in Bulgaria appears to have moved to Russia, which is now a major supplier of illegal material for the Czech Republic. For 2001, estimated trade losses due to videogame piracy in the Czech Republic are \$54.8 million, with a 90% piracy level. As was previously reported in last year's Special 301 Filing, Internet piracy is still of great concern. For 2001, the Internet piracy level was at 10%, and continues to grow.

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.

Estimated piracy levels and trade losses due to sound recording piracy have risen over the past year, up to a 48% piracy level and \$8.4 million in losses in 2001. The jump is the result of CD-R materials being produced for the public on a commercial basis and 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.

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. 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. Estimated trade losses due to audiovisual piracy in the Czech Republic are \$8.0 million in 2001, with a 10% video piracy rate.

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 2001, the CPU, police and customs conducted 448 investigations, 137 raids, and seized approximately 10,337 pirate videocassettes, 533 pirate CD-ROMs 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 a new police procedure which changed the filing requirements for criminal cases. This change meant that new officers needed to be trained as to the proper method and techniques for filing copyright cases. (This is also true for every other type of criminal activity.) However, the prosecution rate is improving, in that CPU has also begun to use administrative actions. Sixty-two new criminal cases were launched in 2001, and 93 administrative actions.

The book publishing industry 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. Estimated trade losses due to book piracy dropped to \$3.0 million in 2001.

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.

**ENFORCEMENT CHARTS
TAKEN BY THE COPYRIGHT INDUSTRIES
IN THE CZECH REPUBLIC
(2000 and 2001)**

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	86	16
By Police		
By Customs		
Number of cases commenced / administrative	72 / 11	88*
Number of defendants convicted (including guilty pleas)	24 / 2	12
Acquittals and Dismissals	4 / 17	3
Number of Cases Pending	82 / 7	52
Total number of cases resulting in jail time		11
Suspended Prison Terms		11
Maximum 6 months		4
Over 6 months		6
Over 1 year		1
Total Suspended Prison Terms		104 months
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		1
Up to \$1,000		1
\$1,000 to \$5,000		0
Over \$5,000		0
Total amount of fines levied		\$750

* This figure includes all criminal complaints filed by the BSA and its members, as well as any other criminal complaints the BSA and its members are aware of as having been filed, in addition to cases commenced by prosecutors in the courts.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	137	10
By Police		
By Customs		
Number of cases commenced / administrative	62 / 93	112
Number of defendants convicted (including guilty pleas)	22 / 83	18
Acquittals and Dismissals	2 / 10	12
Number of Cases Pending	108	79
Total number of cases resulting in jail time	3	14
Suspended Prison Terms	15	13
Maximum 6 months		5
Over 6 months	15	6
Over 1 year		3
Total Suspended Prison Terms		115 months
Prison Terms Served (not suspended)	3	1
Maximum 6 months		0
Over 6 months	2	0
Over 1 year	1	1
Total Prison Terms Served (not suspended)		5 years
Number of cases resulting in criminal fines	9	4
Up to \$1,000	9	1
\$1,000 to \$5,000		2
Over \$5,000		1
Total amount of fines levied		\$11,597

CIVIL COPYRIGHT ENFORCEMENT STATISTICS		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2000	BUSINESS APPLICATIONS SOFTWARE 2001
Number of civil raids conducted	0	0
Post Search Action		
Cases Pending	3	2
Cases Dropped		
Cases Settled or Adjudicated		
Value of loss as determined by Rightholder (\$USD)		
Settlement/Judgment Amount (\$USD)	\$1,930	\$10,910

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

ECUADOR

EXECUTIVE SUMMARY

Despite an improvement in 2000 as the Courts embraced the new Intellectual Property Law (IPL)¹, enforcement activity has dramatically decreased during 2001 in Ecuador. Some Courts are reluctant to issue *ex parte* warrant searches unless the aggrieved party submits direct evidence of intellectual property infringement. In other cases, the lack of criteria for posting bonds before granting a seizure order has made intellectual property rights owners refrain from looking to the courts for protection. On the regulatory side, BSA is seriously concerned about a provision in the 1999 Education Law which purports to give educational institutions free software licenses. The provision is poorly drafted and generates false expectations among educational institutions. Currently, business software piracy levels in Ecuador are still high at 68%, and estimated 2001 losses due to business software piracy are \$9.5 million.

Ecuador recently appeared on the Special 301 Watch List in 1999 and 2000, before being removed from the list in 2001. In June 2000, Ecuador deposited its instruments of ratification to the two WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

We recommend the return of Ecuador to the Watch List to monitor the implementation and enforcement of Ecuador's copyright legislation in fulfillment of its multilateral obligations and bilateral commitments. If the Ecuadorian government does not take actions to effectively enforce its laws, it will be difficult to stimulate further market entry in Ecuador.

¹ Intellectual Property Law, enacted May 8, 1998, Registro Oficial No. 320, May 19, 1998.

ECUADOR: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2001

INDUSTRY	2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	9.5	68%	8.2	65%	20.5	71%	12.7	73%
Sound Recordings Musical Compositions	18.0	90%	N/A	N/A	N/A	N/A	N/A	N/A
Motion Pictures	N/A	95%	N/A	95%	N/A	95%	N/A	95%
Entertainment Software	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Books	2.3	N/A	N/A	N/A	N/A	N/A	N/A	N/A
TOTALS	29.8		N/A		N/A		N/A	

COPYRIGHT PIRACY IN ECUADOR

Computer software piracy in Ecuador consists primarily of end-user piracy and some hard-disk loading. With hard-disk loading, Ecuadorian resellers load unlicensed software onto computer hardware and sell the package to an end user. End users' piracy rates remain high among Ecuadorian businesses of all sizes, from small family businesses to large financial institutions. Estimated trade losses due to business software piracy in Ecuador were \$9.5 million in 2001, with an estimated piracy level of 68%.

Music piracy in key cities like Guayaquil and Quito is rampant. The authorities do nothing to prevent the piracy market even though it is known that organized crime groups are involved. Municipal markets like "La Bahia" are special venues for selling pirate product despite the licensing requirements established by local authorities to set up an operation. Ecuador also serves as a point of exports for CD-Rs to Colombia of international and Latin product. The local industry is small because of the high level of piracy. We estimate the level of piracy at around 90 percent and losses to the industry of \$18 million. With the growth of illegal CD-Rs the tendency is for piracy to take over the whole market.

The publishing industry reports estimated losses due to book piracy in Ecuador amounted to \$2.3 million in 2001.

² BSA loss numbers for 2001 are preliminary.

COPYRIGHT LAW IN ECUADOR AND RELATED ISSUES

The Intellectual Property Law of 1998

On May 28, 1998, Ecuador enacted an Intellectual Property Law (IPL), which covers all aspects of intellectual property, from copyrights to trademarks to patents. The IPL addresses semiconductor chip protection, plant breeder's rights, industrial designs, utility models and unfair competition. It also provides for a complete set of procedures, including preliminary enforcement measures, border enforcement, statutory damages, and new criminal offenses, including the criminalization of certain acts regarding technical protections against infringement and electronic rights management information. Finally, the IPL declares that the protection and enforcement of IP rights is in the public interest, and it creates the Ecuadorian Intellectual Property Institute (IEPI) to administer all IP registration processes and administrative enforcement measures, including border enforcement.

The IPL also provides for specialized IP courts; however, due to operative, political and financial reasons, these courts have not been created yet by the National Judiciary Council (NJC).

The IPL provisions relating to software works and enforcement are TRIPS-compliant. The IPL fully incorporates the WIPO 1996 treaties on Copyright and Neighboring rights, and creates a powerful set of enforcement mechanisms.

Even though Ecuador's current copyright legislation meets its bilateral (the IPR Agreement with the U.S.), multilateral (TRIPS) and regional (Andean Pact Decision 351) obligations, Ecuador's judiciary is interpreting the law in such a way as to not enforce it. This, in turn, creates an environment of uncertainty for software rights holders.

The 1999 Education Law

Ecuador passed an Education Law in 1999 which includes a poorly drafted provision that purports to grant free software licenses to educational institutions. The law mandates a broad "educational purposes" license to computer software for universities and technical institutes and requires "distribution" companies (there is no reference to the copyright holder) to donate the corresponding licenses to such educational institutions. This provision, known as Article 78, clearly conflicts with Ecuador's constitution as well as its obligations under the Berne Convention, TRIPS, and Decision 351 of the Andean Community regarding copyright compulsory licenses.

Since the law was issued in 1999, BSA has stated repeatedly that it believes that Article 78 is illegal and should be amended. Due to this provision, BSA member companies have experienced cases in which representatives of educational institutions have argued that they are not obliged to buy software licenses and that the software owner should give its software away free of charge. In light of these experiences, BSA has made a public announcement stating its opposition to Article 78 and has sent letters to different academic institutions explaining that these institutions are not entitled to free software licenses. In April 2001, BSA petitioned IEPI for a formal opinion regarding the legality of Article 78. To date, no opinion has been issued.

COPYRIGHT ENFORCEMENT IN ECUADOR

IEPI's administrative actions since its creation reflect a lack of support from the Ecuadorian government.

Although the 1998 copyright law created the IEPI (the National Copyright Office) to implement the country's IP laws, the Ecuadorian government has not provided the IEPI with an adequate budget to fully perform its obligations. IEPI has been functioning with a small staff due to its budgetary constraints. Furthermore, not everyone in Ecuador acknowledges IEPI as the National Copyright Office, and there is no clear understanding of what IEPI's role is with respect to the protection of intellectual property.

With regard to enforcement, IEPI's actions are based on *ex officio* actions as well as *ex parte* actions; however, since its creation IEPI has performed very few piracy software raids based on *ex parte* actions and none based on *ex officio* actions. Consequently, IEPI has very little experience in managing raids, and the few raids performed by IEPI are still in their preliminary stages, so no administrative sanctions have been imposed.

Due to IEPI's lack of knowledge about software piracy issues, BSA started working with IEPI in the second half of 2001, mainly in the area of education. For example, BSA organized a two-day seminar which addressed software piracy and ways to identify counterfeit software. On the enforcement side, BSA has provided some leads to IEPI for raids. We expect IEPI to conduct raids during the first quarter of 2002. BSA believes that IEPI will only be successful if the Ecuadorian government gives IEPI the necessary support and resources to conduct its investigations and raids against pirates.

Judicial action is a weak element in effective enforcement.

After the enactment of the new Intellectual Property Law in 1998, BSA organized a series of judicial seminars both in Quito and Guayaquil to introduce judges to the provisions of the new law.

An effective judicial system is necessary for adequate and effective copyright protection in Ecuador. Even though a few judges have consistently applied the IPL in enforcement procedures with good results, enforcement remains a problem. Since last year, due to generalized court corruption, and, in part, the perception among judges that intellectual property enforcement usually helps multinational companies to the disadvantage of poor Ecuadorians, judges have become reluctant to grant precautionary measures; few copyright infringement cases have made it through the Ecuadorian judicial system.

In general, Ecuadorian judges also have been somewhat slow to grant petitions for civil *ex parte* actions as provided in the IPL. This goes against the rights of intellectual property owners and makes enforcement of the IPL a high priority.

During 2001, BSA filed five civil complaints against end users. Some of the experiences that BSA's local counsel has had with the judiciary while filing these complaints include the following:

- Even though the current IPL provides that precautionary measures can be filed directly before a specific judge without going through a random case assignment process, the majority of judges are rejecting the precautionary measures submitted directly to them, stating that such measures should be submitted to the random assignment process.
- Some judges are imposing bonds before granting a seizure order. The problem with this is that there are no provisions in the IPL that establish how to determine the bond amount; therefore, it is left to the judge's discretion, which, under the current circumstances, discourages judges from granting seizure orders.
- According to the current IPL, a judge shall grant a precautionary measure (such as a search and seizure raid) when a right holder considers that a violation of his/her rights may have occurred and the violation is evidenced by an affidavit signed by a private investigator. Despite the clear wording of the law, in one case a judge stated that an affidavit is insufficient evidence and refused to grant a precautionary measure.

BSA is concerned about these trends in the Ecuadorian courts that amount to the arbitrary application and enforcement of the Ecuadorian copyright law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

EL SALVADOR

EXECUTIVE SUMMARY

Given the continuing 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.

Piracy levels still remain high. For the business software industry, the estimated piracy rate in El Salvador is 80%, 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. This bill would leave copyright holders without any avenue 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, rights holders basically have had to rely on the Salvadoran criminal process to enforce their rights. The courts do not move forward on copyright cases. There simply is no deterrence in the system. Rights holders 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.

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 This problem has not yet been resolved. El Salvador should be placed on the Watch List.

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. For details on El Salvador's bilateral experience under Special 301 and the GSP program, please see appendices D and E of this 2002 Special 301 submission

EL SALVADOR: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2001

INDUSTRY	2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	9.8	78%	9.7	79%	13.6	83%
Motion Pictures	2.0	30%	2.0	50%	2.0	80%
Sound Recordings / Musical Compositions	5.0	40%	5.0	40%	5.0	40%
Entertainment Software	NA	NA	0.1	50%	NA	NA
Books	1.0	NA	1.0	NA	NA	NA
TOTALS	17.8		17.7		20.6	

In October 2000, the U.S. Senate approved the Bilateral Investment Treaty with El Salvador, which was signed in March 1999. El Salvador was required to have in place TRIPS-level protection, both in terms of its substantive intellectual property law requirements and 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 of these programs contain criteria requiring adequate and effective protection for U.S. copyright owners.³ Recently, El Salvador also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA).⁴ 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 and the enforcement text of the TRIPS Agreement.

² BSA estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$13.5 million at 82% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and the revised estimates are reflected above.

³ In 2000, \$20.8 million of Salvadoran goods entered the U.S. under the duty-free GSP code, accounting for 1.1% of its total imports to the U.S. For the first 11 months of 2001, \$10.7 million of Salvadoran goods (or 0.6% of El Salvador's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 46.2% decrease over the same time period last year. In 2000, \$41.9 million of goods entered the U.S. under the CBI. For the first 11 months of 2001, \$52 million entered under the CBI, representing a 23.9% increase over the same period last year. In 2000, \$26 million goods entered under the CBTPA. For the first 11 months of 2001, \$852 million entered under the CBTPA.

⁴ 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 both by resellers and end users is rampant in El Salvador. The estimated level of piracy of U.S. business applications software in El Salvador in 2001 was 78%, one of the highest piracy rates in Latin America. Estimated trade losses in El Salvador due to business software piracy were \$9.8 million.

On a recent visit to El Salvador, the recording industry (led by IFPI) ascertained that the piracy level continues to be high. Few or no enforcement efforts had been made by local authorities to combat piracy. Although impaired by the lack of official market figures, the sound recording and music industry estimates trade losses due to recording piracy in El Salvador amount to \$5.0 million, with a 40% level of piracy in 2001.

The book publishing industry reports book photocopying continues unabated, mainly of college texts published by Mexican subsidiaries of U.S. publishers. A donation of books on medical sciences, economics, and management from an American non-governmental organization resulted in their being sold (by the recipients) at a fraction of the U.S. price in the open market. Efforts are being made to identify the parties involved in this fracas. Annual estimated losses due to book piracy in El Salvador remain at \$1 million.

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. During 2001, the *Fiscalía* conducted, at BSA's request, 11 raids. Eight of these raids were against end users while the rest were against resellers.

Although BSA applauds the outstanding performance of the *Fiscalía* in prosecuting software piracy cases, 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.⁵ 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 May 2001, the *Fiscalía* conducted a raid against a reseller of software at BSA's request. During the raid, the *Fiscalía* found evidence of "Hard Disk Loading" (HDL) piracy. On September 17, 2001 the Court held a preliminary hearing in which the judge found in favor of the defendant. The Court stated that despite the fact that evidence of HDL found during the raid was admissible and relevant, there was no evidence to link the owner of the store with the illegal act of reproducing illegal software in the hard disk of the PC that was offered for sale. In other words, the Court admonished the *Fiscalía* to submit direct evidence, such as a witness of the unauthorized reproduction by the owner of the store. According to the Court's interpretation, circumstantial evidence was not enough. The *Fiscalía* appealed the Court's decision and the Court of Appeals overturned the decision and remanded the case for further proceedings without directly addressing the issue of the sufficiency of the evidence. Because decisions from the Court of Appeals are not binding, there is a risk that a lower court might follow the example of the lower court in this case.

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 each 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

⁵ Ley de Fomento y Protección de la Propiedad Intelectual, Art. 32 *in fine*, and Berne Convention Article 15(1).

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 has also encountered some problems with expert witness availability. The *Fiscalía* currently does not have expert witnesses available to analyze the evidence found in the raids. The *Fiscalía* usually relies on the expert witnesses proposed by the parties.

In addition, the police in El Salvador do not have enough resources. It has become increasingly difficult to summon the police to assist the *Fiscalía* during the raids. Prosecuting copyright pirates without the Police's assistance could be a daunting task for the *Fiscalía*. Often police are needed not only to gain access to places where the evidence is located, but to physically protect the prosecutors and their assistants. In two recent cases, the *Fiscalía* requested the assistance of the police and the police refused, alleging lack of personnel.

Turning toward 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.⁶ 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. For the same reasons, during 2001, BSA did not file any civil suits for copyright infringement.

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

⁶ 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.

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) and Article 53 (high bond 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 equivalent to up to 3,000 times the retail value of the protected work.⁷ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁸ 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).⁹

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 favor¹⁰ 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.

⁷ Ley de Derechos de Autor, No. 9610, Article 103.

⁸ U.S. Copyright Act, 17 U.S.C § 504 (c).

⁹ Anteproyecto de Código de Propiedad Intelectual, Art. 175 I.

¹⁰ Such an initial court finding is called a *dolo*, which means the judge determines that the defendant has the intent to cause harm/damage to the plaintiff.

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 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.
- 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 *Fiscalia* 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.
- Enact legislation to fully implement the WIPO treaties into domestic law.

Government Software Management

The BSA applauds the government of El Salvador in its recent initiative to start a legalization process of its installed software base. On December 2001, the government and the BSA launched a software legalization campaign which includes an audit of all of the government's agencies and ministries and a negotiation of software licenses with BSA member companies. Although this campaign has just been launched, this is clearly a step in the right direction for El Salvador.

ENFORCEMENT STATISTICS FOR EL SALVADOR: 2000 and 2001

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	16	0
Number of cases commenced	18	0
Number of defendants convicted (including guilty pleas)	3	N/A
Acquittals and Dismissals	3	N/A
Number of Cases Pending	2	N/A
Total number of cases resulting in jail time	none	N/A
Suspended Prison Terms		N/A
Maximum 6 months		N/A
Over 6 months		N/A
Over 1 year		
Total Suspended Prison Terms	none	N/A
Prison Terms Served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Prison Terms Served (not suspended)		N/A
Number of cases resulting in criminal fines		
Up to \$1,000		
\$1,000 to \$5,000	2	
Over \$5,000	8	
Total amount of fines levied	145,890.62	N/A

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	11	0
Number of cases commenced	11	0
Number of defendants convicted (including guilty pleas)		N/A
Acquittals and Dismissals	1	N/A
Number of Cases Pending	5	N/A
Total number of cases resulting in jail time	none	N/A
Suspended Prison Terms		N/A
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Suspended Prison Terms	none	N/A
Prison Terms Served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Prison Terms Served (not suspended)		N/A
Number of cases resulting in criminal fines		N/A
Up to \$1,000		
\$1,000 to \$5,000	1	
Over \$5,000	4	
Total amount of fines levied	76,812.57	N/A

CIVIL COPYRIGHT ENFORCEMENT STATISTICS				
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2000	BUSINESS APPLICATIONS SOFTWARE 2001	SOUND RECORDINGS 2000	SOUND RECORDINGS 2001
Number of civil raids conducted	1	NONE	0	0
Post-Search Action			0	N/A
Cases Pending	1		N/A	N/A
Cases Dropped			N/A	N/A
Cases Settled or Adjudicated			N/A	N/A
Value of loss as determined by Rightholder (\$USD)			N/A	N/A
Settlement/Judgment Amount (\$USD)	9400		N/A	N/A

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

ESTONIA

EXECUTIVE SUMMARY

IIPA recommends that Estonia be added to the Special 301 Watch List. While Estonia has instituted a number of significant legal reforms and the legal authorities have undertaken important anti-piracy efforts in the past, in 2001 the piracy situation and the absence of deterrent penalties resulted in a situation serious enough to warrant placement on the Special 301 lists.

Estonian officials, working with industry, must act to stop the Internet, hand-to-hand piracy, large-scale operations in the markets, and the collectively large-scale losses at the border. While the government of Estonia in the past correctly identified and agreed to crack down on open-air markets and to effectively enforce its borders, these problems remain at the forefront of the copyright industries' ongoing concerns. Over a year ago, Estonian police acted to reduce the severe amount of piracy in the Kadaka market. Unfortunately, as a consequence, the pirates simply moved to other markets and turned to Web-based piracy distribution. Plus, several stalls selling pirate product still exist in the Kadaka and Merekeskus markets. Similar aggressive anti-piracy actions must be taken against other distribution channels. Specifically, pirated goods are distributed widely via the Internet, and hand-to-hand (the "suitcase" problem and in small shops.) in and outside of Tallinn. Although some Estonian officials have cooperated with the copyright industries, recent efforts have been sporadic and inconsistent. Effective enforcement includes expeditious prosecution and deterrent sentencing, and this has not occurred. Estimated trade losses for 2001 are placed at \$11.3 million (without including the entertainment software or book publishing industry numbers which are unavailable).

Estonia made significant progress in reforming its legal regime in recent years, including within the last year. However, several critical problems in the law remain. For example, there is no civil *ex parte* search remedy available for copyright owners; this tool is one of Estonia's WTO TRIPS obligations. In addition, foreign sound recording producers continue to suffer discriminatory treatment in Estonia, and to cure this, Estonia should swiftly withdraw its reservation to the Rome Convention. For these reasons, Estonia should be placed on the Watch List this year.

ESTONIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	1.5	40%	2.0	60%	NA	60%	NA	60%	NA	99%	NA	100%
Sound Recordings / Musical Compositions	9.0	60%	9.0	60%	9.0	70%	8.0	85%	4.0	80%	NA	NA
Business Software Applications ¹	0.8	69%	NA	69%	NA	72%	NA	NA	NA	97%	NA	NA
Entertainment Software	NA	90%	3.7	98%	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	11.3+		14.7+	14.7+	9.0+		6.0+		4.0+		NA	

COPYRIGHT PIRACY IN ESTONIA

When Estonia acceded to the WTO in 1999, it was obligated to meet not only the substantive copyright provisions of the TRIPS Agreement, but also the enforcement obligations. In addition to its multilateral obligation, Estonia is also under a series of bilateral obligations. First, Estonia currently participates in the U.S. Generalized System of Preferences (GSP) program, which includes certain discretionary criteria related to Estonia's providing "adequate and effective protection of intellectual property rights."² Second, 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. Unfortunately, this bilateral agreement did not enter into effect.

Even though the Estonian market is relatively small, it is dominated by piracy in almost every copyright sector. 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. Many anti-piracy training programs have been conducted in cooperation with the copyright industries, including the IIPA and its members, the Finnish Copyright authorities, EU PHARE and the United Nations UN/ECE IPR program for Eastern Europe. These programs included training for customs officials, police, prosecutors, judges and government officials from certain ministries. The Motion Picture Association, (MPA), the International Federation of the Phonographic Industry (IFPI), the Business Software Alliance (BSA), 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,

¹ BSA loss numbers for 2001 are preliminary.

² In 2000, \$11.1 million of Estonian imports to the United States benefited from the GSP program, accounting for 2% of its total imports to the U.S. For the first 11 months of 2001, \$13 million of Estonian goods (or 5.8% of Estonia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 24.9% increase over the same time period last year.

the EOCP has worked hard to raise anti-piracy issues within the government of Estonia at the highest levels.

The Growth of Internet Piracy and Optical Media Piracy in Estonia

CD-R and Internet piracy is growing rapidly, especially because Estonia has a very high computer literacy rate. The videogame, film and recording industries all report that the CD-R and Internet piracy phenomena are growing in Estonia. In fact, for the recording industry, the rapid growth of CD-R piracy of music has overshadowed the existing import problem of pirated sound recordings. Internet piracy in Estonia and the suitcase problem continue to challenge this industry. In April 2001, the private sector (including the EOCP) concluded a Memorandum of Understanding with Estonian Internet Service Providers (ISPs) that enables the effective survey (notice) and removal (takedown) of infringing materials from the Internet.

According to the most recent information, there are still no known CD plants operating within Estonia. Nevertheless, the Estonian market remains flooded with illegal material manufactured product in other countries, notably Russia and Ukraine. As the result of the lack of *ex officio* authority by the police and only sporadic actions by customs officials (especially in some border regions), pirate material has flowed unimpeded into and out of Estonia from neighboring countries. The industries had hoped that the October 2000 promise by customs officials to heighten border measures, especially against "suitcase" piracy, would provide effective. Customs and EOCP's joint raids in Tallinn's harbor on Finnish tourists showed some positive results. In addition, Estonian and Finnish anti-piracy organizations organized "warning banners" for the harbor; this had a big impact and was widely discussed in the Finnish and Estonian media. According to BSA, Estonian customs was successful, especially at the border with Latvia, the Tallinn sea and airports, and the portion of the Russian border adjacent to St. Petersburg.

There does not yet appear to be widespread, systematic transshipment of pirated goods through Estonia, as there is in Lithuania, for example. Industry reports indicate that there have been a few transit cases in which Russian music repertoire was intercepted in Estonia. The copyright industries remain concerned that this could become a significant problem and urge ongoing vigilance by customs. Industry investigations into the sources of possible transshipment sources continue.

Piracy Levels Are High Across All Copyright Sectors

Piracy of sound recordings and music remains widespread in Estonia. The estimated level of audio piracy remained constant, at 60% for 2001. Only in November 1999 did Estonia finally correct the major obstacle to enforcement of sound recordings when it adhered to the WTO TRIPS Agreement and thus, for the first time, establish a point of attachment for foreign sound recordings. Estimated trade losses due to the piracy of sound recordings and musical compositions in Estonia in 2001 were \$9 million. Recorded musical works are being widely distributed on the Internet and copied hand-to-hand (cassettes and CD-R), and are still (albeit to a lesser degree) 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 copyright organizations (EFU) and 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.

The Interactive Digital Software Association (IDSA) estimated levels of entertainment software piracy in Estonia is at 90%. 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. There is very little retail piracy anymore, as most piracy is operated out of private homes. As a result, the offering of illegal material over the Internet, which is then distributed by mail, has grown rapidly. The EOCP has contributed to better enforcement, as well as several training programs on the problems of the entertainment software industry. Estimated 2001 trade losses due to videogame piracy are not available.

The Motion Picture Association (MPA) reports that the domestic production of high quality, prerelease Finnish-language pirate videos and their sale to Finnish tourists remains a grave concern because of Estonia’s geographical proximity to Finland. In fact, the Finnish Anti-Piracy Center now estimates that 6% of the Finnish video market is comprised of pirate copies brought from Estonia. 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. These prerelease titles are sourced from camcorder recordings in U.S. cinemas, usually made a few days after U.S. release. False contracts, especially Russian “sub-license agreements,” are used to lend a semblance of legitimacy to the trade, confusing enforcement authorities. 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 estimated video piracy level is 40% in Estonia, with pirate videos available in retail outlets and occasionally in open-air markets. For the motion picture industry, the Kadaka Market in central Tallinn has been more or less brought under control after a series of raids and media campaigns in 2001. Kadaka’s displaced suppliers, however, have migrated to mail order and Web-based marketing, and are pressuring smaller shops in town to stock their product. MPA confirms that Internet piracy, in the form of both Web-based marketing and downloadables, is becoming a serious concern. It is also being used for the sale of pirate smart cards. Through cooperation with the police, several infringing sites have been closed down. Estimated trade losses due to audiovisual piracy in Estonia amount to \$2.0 million in 2001.

The business software industry estimated that 69% of business software in use in Estonia was unauthorized in 2001. The Business Software Alliance (BSA) estimates that the U.S. trade losses due to software piracy in Estonia were \$800,000 last year.³

³ According to a mid-2001 report issued by Datamonitor, it reported that the Estonian government lost about 330 million kroons (about US\$18.1 million) in unreceived tax revenues due to software piracy in Estonia in 2000. It also attributed to software piracy a loss of over 1.1 billion Estonian kroons (about US\$56 million) in retail software sales in 2000.

COPYRIGHT ENFORCEMENT IN ESTONIA

Estonia Fails to Meet Its TRIPS Obligations to Provide Expeditious and Deterrent Criminal, Civil, Administrative and Border Enforcement

Estonia's laudable legal reforms alone have not been enough to deter piracy in that country. Estonia must adopt practices that result in effective criminal, civil, administrative and especially border enforcement, in order to comply with the TRIPS Agreement. Raising the anti-piracy problem to the interministerial level of the Cabinet in 2000 was helpful in calling the government's attention to the problem.⁴

Simply stated, Estonian officials, working with industry, must act to stop the Internet, hand-to-hand piracy, large-scale operations in the markets and the collectively large-scale losses at the border. Customs officials were willing to initiate anti-piracy enforcement activities last year. However, the police reversed their willingness in year's past to take action. In fact, BSA reports that with respect to software piracy matters, the police now treat these cases as a low priority matter. This change in attitude may be the result of an upper level police directive re-ordering priorities in the force. In contrast, most of the copyright industries reported good cooperation by the police in 2001 in running some street market raids, but judicial enforcement was almost nonexistent.

Ineffective Border Enforcement

A top priority for the Estonian Government must be to clamp down on the massive number of illegal imports of musical recordings and business and entertainment software. In addition, the government should take actions to reduce the rapid growth of Internet piracy and hand-to-hand piracy.

Estonia continues to act 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. It appears that Lithuania remains a transshipment country for illegal product that reaches Estonia, the product itself mainly being made in Russia, Belarus and Ukraine. The lack of effective enforcement in Estonia is significantly harming legitimate markets for copyrighted products, such as sound recordings, audiovisual and entertainment software, in Finland, Sweden and other countries in the region.

⁴ 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. For example, video distributors today use and finance their own private stickering system that is administered by EOCP.

The anti-piracy organization (EOCP) reported 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. For example, BSA reports that in 2001, customs seized 318 CD-ROMs, 158 of which were identified as being illegal.

The “Suitcase” Problem: Since part of the piracy problem in Estonia is still due to the 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 will improve this situation.

Most encouraging was the announcement last year by the Estonian customs authorities that they would seize the suitcase material and thus address this major border enforcement problem. This is crucial because both the new Estonian customs law and the Finnish copyright law have a personal use importation exception (which has the effect of allowing small amounts of pirated materials in personal luggage into Finland).⁵ 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. For example, in June 2001, Estonian customs raided Finnish tourists leaving Estonia and confiscated a large number of pirate music CDs and videos. The tourists were fined.

Invalid Licenses 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 license 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 these 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.

Punishment for Store Owners Enforcement against storeowners is hampered because the appropriate officials do not know the proper procedures to take in these piracy cases. In addition to the procedural problem of the verification of documents, there is the problem of identifying legal versus illegal copies. Neither significant criminal nor administrative remedies have 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 interministerial officials responsible for IPR enforcement. The industries expect that the new 2000 licensing law will accomplish the revocation of such business licenses. The EOCP has seen several examples of the Licensing Law being used to revoke the business license of stores that have been caught selling pirated material.

⁵ Estonian law does not allow customs to make checks on passengers’ personal luggage without reasonable cause. Despite this, Estonian customs has developed a practice of conducting random spot checks on the personal luggage of tourists, identifying several instances where tourists have been caught attempting to ship pirated products back to Finland. As yet, no challenge has been made to the seizures, but clearly the potential exists for the challenge to be made.

Police Raids and Coordination Efforts Should Be Improved

The Open Market Problem Has Almost Disappeared

The illegal open markets appeared over four years ago. In October 2000, the government of Estonia pledged to deal with the dual problems of the open illegal markets and lax border enforcement. For example, 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 had 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. Also as a result of this survey, the Cabinet took action to support passage of various legal reforms, including the Copyright Act, Commercial Lease Act, and Consumer Protection Act.

As a result of police and private industry action, the number of stalls selling illegal material in the Kadaka Market was dramatically reduced, from an estimated 160 stalls to 6 to 8 stalls. To date, there is no available information whether the 2001 amendments to the Consumer Protection Act are working to close those few remaining stalls at Kadaka. The good news is that the Kadaka Market will be restructured in October 2002. It will have one supermarket chain and the stalls and kiosks will be shut down. The Kadaka Market falls under the jurisdiction of one of Tallinn’s police districts.

Now the success in shutting down the Kadaka Market problems must be repeated in other markets and other cities. These markets not only hurt the local copyright market, but also, cater to tourists, thus contributing to the “suitcase” problem.

Police Cooperation with Industry Faltered in 2001

The Recording Industry Association of America (RIAA) reports that the police have made some raids and seizures, mostly at outdoor markets. A local group of industry organizations (EFU and EOCP) continue to assist the police in developing production identification systems and preparing legal actions and evidentiary material. For example, in February 2001, the Economic Police raided a warehouse in Tallinn and seized some 20,000 music CDs. In a subsequent operation, the Tallinn police raided a duplicating factory in a private home outside the city, and seized approximately 30,000 pirate units on different media. It appeared that this well stocked house was a likely supplier to the Kadaka and Merekeskus markets. However, the police generally exhibit less interest, especially at the leadership levels, to develop and take anti-piracy actions in a concerted manner.

BSA reports a disappointing and dramatic slowdown in police activity in relation to both resellers and end users in 2001. In 2001, 15 raids took place, seven against resellers, eight against end users. Of the reseller raids, approximately 700 CDs were seized, and in the end-user raids, 427 software programs were examined, 200 of which being identified as unlicensed. Although 87 PCs were examined during the course of raids, none were confiscated (a reversal of previous practice). BSA reported that 2001 was an extremely poor year in terms of the amount of raids undertaken by the Estonian police against illegal resellers. BSA agrees that a general upgrading of

the Kadaka market area will marginalize the presence of illegal resellers of pirated software, although it is likely to relocate, as opposed to eradicate, the problem. Although prosecutors and judges remain committed to effective IPR enforcement, the BSA is disadvantaged by the fact that the police forces now regard software piracy enforcement as a low priority matter. In 2001, a mere 20,000 kroons (USD\$1,100) was levied in fines relating to software piracy cases.

The software industry reports that end-user piracy has received scant attention from the special IPR enforcement unit, although the software industry has had good cooperation with the IPR unit on certain enforcement actions and high-ranking officers in the unit. The Central Criminal Police consider end-user piracy to be a serious problem, but not one that they are tasked with dealing with. They are of the view that it is for individual police departments to address. Those departments lack both the motivation and authority to take on such actions.

MPA reports that a major raid occurred in February of 2001, where the Economic Crime division of the Tallinn police raided a residential apartment containing stacks of cardboard boxes filled with over 2,000 pirate optical discs. Apart from the discs seized, the raid is significant in that a computer was also found holding valuable marketing data regarding pirate sales at the Kadaka shopping mall. Two persons were taken into custody pending further investigation. Using information obtained from the raid, the police discovered a large duplication lab in a private house where further evidence of direct links to Kadaka and Merekeskus shopping malls and six people were arrested. In total, over 5,000 pirate videocassettes were seized in 2001.

Prosecutorial Delays and Evidentiary Burdens

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. BSA reports that it is encountering more "false invoicing" problems in its cases. Following BSA end user actions, targets frequently produce fraudulently obtained or falsified invoices which purport to show that software programs were acquired prior to enforcement action taking place. The police find this a difficult issue to deal with effectively.

No Civil *Ex Parte* Search Authority and No Statutory Damages

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. TRIPS requires that this civil *ex parte* search authority be provided and applied.

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.

Administrative Proceedings Are Rather Successful

Administrative proceedings are widely used by the copyright industries. In fact, these procedures are perceived as a rather effective tool in Estonia, given the difficulties with the criminal and civil enforcement regimes. Administrative penalties are significant, providing for a maximum of two years imprisonment and over 500,000 kroons (US\$27,500) in fines. In October 2000, amendments were adopted to extend the deadline for providing documentary evidence against a suspect in order to initiate a case to a more realistic two-year timetable.

Enforcement efforts for the business software industry 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. Legal entities can only be charged under the Estonian administrative code; only natural persons can be charged under the criminal code. Penalties under the administrative code are mostly limited to fines (and, in certain instances, partial or total business closure), and the rate of 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 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.

Few Judicial Sentences Are Issued, None of Them at Deterrent Levels

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 agreed to seize the so-called "suitcase" materials as well. There were a number of police seizures of CD material (usually in the 3,000 to 5,000 range) in 2001 as in years past.

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 at issue. In practice, the fines are now imposed on a per copy basis, of 7,500 to 100,000 kroons (US\$433 - \$5,775) per copy, with a total not to exceed 500,000 kroons (US\$27,500).

The Estonian courts have heard a few audiovisual piracy cases in which they have applied fines of between 10,000 and 15,000 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. MPA has also experienced problems finding out the disposition of its cases because of communications problems with the police.

LEGAL REFORM IN ESTONIA

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 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. The Estonian government believes that this bilateral is null and void because its parliament never ratified this agreement.

In the late 1990s, Estonia undertook a series of legal reforms to join the international trade and copyright community. 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. (Later in 2001, additional amendments to the copyright law and related laws were made in an effort to improve anti-piracy efforts). Estonia adhered to the World Trade Organization (WTO) on November 13, 1999. In 2000, Estonia acceded to the Geneva Phonograms Convention (effective May 28, 2000) and the Rome Convention (effective April 28, 2000).

Copyright Law Amendments of 1999

In 1999, the first of two expected packages of legal reforms to improve the legal and enforcement regime was adopted in Estonia. The first set (January 1999) comprised 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. IIPA supported the substantial and significant improvements that Estonia has undertaken since its independence, and especially the 1999 amendments directed at IPR enforcement.

The second set of amendments was originally scheduled for consideration in 2000, but this was postponed. These amendments when adopted would fulfill 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). The latter set of amendments for digital treaty ratification and implementation was delayed awaiting the final

completion and implementation by the members of the European Union of the Copyright Directive. As a result, it appears that the earliest Estonia will consider legislative efforts will be 2003.

Estonia should be encouraged to further amend its copyright 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) expressly afford civil *ex parte* search authority; (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 rights (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 (6) delete Article 62(2), the author’s rights “safeguard clause” which is unnecessary and inconsistent with the Rome Convention (Article 1). In addition, the Estonian government should completely implement the October 2000 decision by customs officials to seize parallel import material with effective border enforcement.

Finally, the important issue of retroactivity should be clarified. 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 within 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 text) from June 9, 1927. Estonian copyright officials claim that for “works,” there is clear 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. Estonian officials should publicly and clearly state how these TRIPS obligations are being satisfied for both works and sound recordings.

2001 Amendments to the Copyright Act

The Estonian parliament adopted amendments to the copyright law that prohibit trade in specific goods if the legal person holding a license trades in pirated products.⁶ Additional amendments were made to the Commerce Lease Act and the Consumer Protection Act that reportedly outline the rights and obligations of parties to the lease and permit them to implement certain measures to protect their rights. These amendments entered into force on June 11, 2001. Unfortunately, these amendments did not address the outstanding substantive, legal deficiencies outlined above.

⁶ “Estonia: New Laws Enacted to Control Importation of Counterfeit Goods,” World Intellectual Property Report, Sept. 2001 at p. 7.

The Rome Convention Reservation Must Be Withdrawn

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. This is unfair to foreign phonogram producers, especially because Estonian material is provided full national treatment for all rights under U.S. law including digital public performance rights for its producers. When it ratified the Rome Convention (1961), Estonia made a reservation under Article 16(1)(a)(i) concerning Article 12. 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 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.

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. 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.

Amendments Affecting Criminal, Civil and Administrative Remedies For Copyright Infringement

1999 Amendments: On January 21, 1999, a variety of amendments to the Estonian criminal code were adopted, as were 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 (Criminal Code Articles 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" (Criminal Code Article 281).

The Copyright Act amendments [Articles 83(5) and 6] provided end-user software piracy fines that can be levied against legal entities of between 150,000 to 250,000 kroons (US\$8,480 to \$14,130) for the "use," including installation, of computer programs. These administrative remedies also include fines between 20,000 and 50,000 kroons (US\$1,130 to \$2,826) for copyright infringements of any work or sound recording by legal entities. The fines increase to 250,000 to 500,000 kroons (US\$14,130 to \$28,260) 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. The maximum statutory fines in the Copyright Act for software piracy were raised from 250,000 up to 500,000 kroons (US\$14,130 to \$28,260). 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\$423 to \$5,650), in addition to the permissible confiscation of the computer hardware.

New 2002 Penal Code: A new penal code is due to come into force in Estonia in Spring 2002 (reportedly the actual date of implementation will be sometime between April and July 2002). The copyright industries report that the Penal Code is likely to create a distinction between categories of offenses along a “crime/misdemeanor” model. Industry reports indicate that, under Article 14 of the penal code, non-natural legal entities (such as companies) will face criminal liability for, among other things, piracy offenses, which will attract fines in the range of 50,000 to 25 million kroons (US\$2,800 to \$1.4 million), with the additional potential penalty of the liquidation of the company concerned. Some industry groups are consulting with the Ministry of Culture over gaps with respect to the penalties applied to software piracy cases. Misdemeanors are likely to attract penalties of 200 to 18,000 kroons (US\$11 to \$1,000) for living, natural persons, 50,000 to 500,000 kroons (US\$2,800 to \$28,000) for legal entities.

The Prevention of Import and Export of Goods Infringing Intellectual Property Rights Act of 2001

In June 2001, the Parliament adopted legislation that improves border measures regarding pirated and counterfeit goods. According to press reports, this new legislation entered into force on September 1, 2001.⁷

WIPO Treaties

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 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. In addition, right holders need to be able to protect so-called “copyright management information” that is attached to or accompanies a work or

⁷ *Id.* IIPA does not have the text of this legislation on importation measures and therefore cannot provide more detailed comments at this time.

sound recording, including protection against the alteration, removal or falsification of this information.

Government Software Management

BSA reports that the Ministry of Justice has implemented guidelines and rules on acquiring legal software.

ENFORCEMENT CHARTS FOR ACTIONS IN ESTONIA (2000 and 2001)

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000		
ACTIONS	EOCP ¹	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	107	14
By Police	N/A	14
By Customs	N/A	0
Number of cases commenced (Incl. Internet cases)	176	14
Number of defendants convicted (including guilty pleas)	N/A	3
Acquittals and Dismissals	N/A	0
Number of Cases Pending	21	11
Total number of cases resulting in jail time	0	0
Suspended Prison Terms	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total Suspended Prison Terms	0	0
Prison Terms Served (not suspended)	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total Prison Terms Served (not suspended)	0	0
Number of cases resulting in criminal fines	N/A	3
Up to \$1,000	N/A	3
\$1,000 to \$5,000	N/A	0
Over \$5,000	N/A	0
Total amount of fines levied	N/A	USD1,100

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	EOCP	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted ³	47	6
By Police	30	6
By Customs	17	0
Number of cases commenced (incl. Internet cases)	535	6
Number of defendants convicted (including guilty pleas)	N/A	0
Acquittals and Dismissals	N/A	0
Number of Cases Pending	20	6
Total number of cases resulting in jail time	0	0
Suspended Prison Terms	1	0
Maximum 6 months		0
Over 6 months	1	0
Over 1 year	0	0
Total Suspended Prison Terms	1	0
Prison Terms Served (not suspended)	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total Prison Terms Served (not suspended)	0	0
Number of cases resulting in criminal fines	N/A	0
Up to \$1,000	N/A	0
\$1,000 to \$5,000	N/A	0
Over \$5,000	N/A	0
Total amount of fines levied	N/A	0

CIVIL COPYRIGHT ENFORCEMENT STATISTICS³ 2000		
ACTIONS	EOCP	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	0	
Post Search Action	0	
Cases Pending	0	
Cases Dropped	0	
Cases Settled or Adjudicated	0	
Value of loss as determined by Rightholder (\$USD)	0	
Settlement/Judgment Amount (\$USD)	0	USD 161,000

CIVIL COPYRIGHT ENFORCEMENT STATISTICS³		
2001		
ACTIONS	EOCP	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	5	
Post Search Action	N/A	
Cases Pending	3	
Cases Dropped	0	
Cases Settled or Adjudicated	N/A	
Value of loss as determined by Rightholder (\$USD)	1400	
Settlement/Judgment Amount (\$USD)	N/A	USD 167,000

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2000	BUSINESS APPLICATIONS SOFTWARE 2001
Number of raids/searches conducted	36	19
Number of administrative cases brought by agency	20	7
Number of defendants found liable (including admissions/pleas of guilt)	14	9
Ratio of convictions to the number of raids conducted	0.39	0.47
Ratio of convictions to the number of cases brought	0.19	0
Number of cases resulting in administrative fines	7	0
Total amount of fines levied	USD 42,000	0
US\$0-\$1,000	0	0
\$1,001-\$5,000	1	0
\$5,001-\$10,000	5	0
\$10,000 and above	1	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	0	0

Notes –

¹ EOCP is a joint organization that represents the music, film, and interactive games industry. They note the difficulty in many instances of separating music, film and game piracy cases, especially because the pirates sell all products.

²EOCP does not have separate statistics for criminal and administrative cases.

³ Damage claims were submitted in criminal proceedings.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

GUATEMALA

EXECUTIVE SUMMARY

Although the copyright industries continue to confront high piracy levels in Guatemala, IPR enforcement has improved considerably since the creation of the Special Prosecutor's Office for intellectual property crimes. Unfortunately, legislative reform recently passed with substantially decreased criminal penalties and removed a statutory damages provision for civil copyright infringement in its entirety. Software piracy at the government level still remains a serious problem in Guatemala. In September 2000, amendments to the Guatemala copyright law were adopted in *Decreto 56-2000*, and entered into effect on November 1, 2000. This law reinstated the "public" prosecution of copyright crimes, an issue that had been at the top of the copyright industries' agenda for years. The *Decreto* also implemented certain requirements of the WIPO treaties. Guatemala is close to completing its domestic process to ratify both WIPO treaties, and we recommend that this and the deposit of its instruments with WIPO be accomplished promptly.

The Special Prosecutor's Office for intellectual property crimes recently created by the copyright law amendments has helped to improve copyright enforcement in practice in Guatemala. This Special Prosecutor's Office, however, is overburdened and understaffed; it currently takes at least three to four weeks to obtain a search and seizure order to raid a suspected copyright infringer. Copyright piracy levels remain high. For example, the level of business software piracy in Guatemala is 75%, one of the highest in Latin America. Although Guatemala is moving in the right direction, there is still much work to do to meet its multilateral and bilateral intellectual property rights obligations. IIPA recommends that USTR keep Guatemala on the Special 301 Watch List.

GUATEMALA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ¹	13.4	75%	12.3	77%	12.7	80%	8.0	82%	6.3	86%	7.5	90%
Motion Pictures	2.0	60%	2.0	60%	2.0	70%	3.0	70%	3.0	86%	NA	100%
Sound Recordings / Musical Compositions	NA	NA	4.0	60%	4.0	60%	4.0	60%	4.0	60%	3.0	50%
Entertainment Software	NA	NA	0.1	60%	NA	NA	4.0	85%	4.2	87%	4.0	79%
Books	2.5	NA	2.3	NA	2.5	NA	2.5	NA	2.0	NA	2.0	NA
TOTALS	17.9		20.9		21.2		21.5		19.5		16.5	

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."²

Some of these problems, like piracy at government level, have not been resolved yet. There have been some attempts to engage the government in a legalization process, to no avail.

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 2001 was 84%, 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 \$15.1 million in 2001. BSA believes that these losses are largely due to the fact that Guatemalan law (as discussed below) fails to establish

¹ BSA estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$12.6 million at 79% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and the revised estimates are reflected above

² 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 that year. Guatemala is also a beneficiary country of three U.S. trade programs. In 2000, \$30.5 million of Guatemalan goods entered the U.S. under the duty-free GSP code, accounting for 1.2% of its total imports to the U.S. For the first 11 months of 2001, \$30.5 million of Guatemalan goods (or 1.3% of Guatemala's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 6.1% increase over the same time period last year. In 2000, \$250 million of Guatemalan goods entered the U.S. under the CBI, accounting for 12.2% of its total imports to the U.S. For the first 11 months of 2001, \$217 million of Guatemalan entered under the CBI, representing a 3.4% decrease (or 9% of Guatemala's total imports to the U.S. from January to November). In 2000, \$14.7 million entered under the CBTPA, accounting for .6% of its total imports to the U.S. For the first 11 months of 2001, \$458 million entered under the CBTPA, representing 19% of Guatemala's total imports to the U.S. for the same period.

effective deterrents for infringing acts. During 2000, BSA conducted seven raids against end users and one raid against a reseller. All of these cases were settled out of court. In 2001, BSA conducted 10 criminal raids against end users and 3 criminal raids against resellers of illegal software. These cases were also settled out of court.

Book publishers report that unauthorized copying of college books has increased. Cheaper books through the old RTAC program are no longer available. VAT on book sales increases the original prices by up to 90% over the list prices in the Mexican subsidiaries of U.S. publishers. There is little respect for intellectual property, and no enforcement of existing laws. Estimated losses due to book piracy rose slightly in 2001, to \$2.5 million.

Based on prior reports, sound recording and music piracy in Guatemala dominates the local market. Estimated losses and piracy levels are not available for 2001.

The Interactive Digital Software Association (IDSA) reports that to piracy of entertainment software (including videogame CDs and cartridges, personal computer CD-ROMs, and multimedia entertainment products) is found in Guatemala. Estimated 2001 videogame piracy levels and losses are not available.

COPYRIGHT ENFORCEMENT IN GUATEMALA

BSA is encouraged that copyright enforcement has improved significantly since the creation of the Special Prosecutor's Office for IP crimes. However, BSA still faces some significant delays in the issuance of *ex parte* searches.

Delays in Criminal Enforcement

There have been reports of delays in obtaining *ex parte* search orders. Currently it takes at least three weeks to obtain a search order from the moment a criminal complaint is filed.

There have also been some reports of further delays, in some cases because of the lack of coordination between the Special Prosecutor's Office and the police. In Guatemala, the Special Prosecutor's Office has to request from the Police a preliminary investigation of the case before requesting the Court to issue an *ex parte* search order. Because the police in Guatemala are not properly trained to conduct these types of investigations, it is not uncommon that the prosecutor has to ask the police to resolve some mistakes committed during the investigation.

In November 2001, BSA filed a criminal complaint against a reseller of illegal software. The prosecutor requested the police to conduct an investigation and corroborate the defendant's correct place of business. It is common practice in Guatemala for the police to provide the Prosecutor's Office with both an oral and written report of the investigation. The oral report is transcribed and later submitted to the Court along with the rest of the warrant search request documents. In this case, the address submitted in the police written report and the address submitted in the transcripts of the police oral report did not match. For this reason, the Court denied the prosecutor's request to issue a search warrant. The mistake was eventually fixed and the raid successfully conducted. However, it took almost two months to obtain the search warrant,

ample time for the evidence to be destroyed or simply disappear from the reseller's place of business.

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 which 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).

For these reasons, during 2000 and 2001, BSA did not file any civil actions for copyright infringement.

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 right holder 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 are 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). We understand the WCT is in its last stage of ratification before deposit with WIPO, with the paperwork currently within the Ministry of Foreign Affairs. The WPPT appears to have taken a wayward turn in the legislative process in late 2001, and now is waiting for its third reading. IIPA and its members recommend that Guatemala move forward to complete its ratification process promptly and deposit its instruments for both treaties with WIPO.

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.

Government Software Management

During the last two years, there have been several attempts to engage the government of Guatemala in legalizing its installed software base. In June 2001, one of BSA member companies

finalized a legalization agreement with a government agency, but when the documents were sent to the Ministry of Public Finance for final approval, the process was stalled. Few agencies have legalized the software they use. Most of the public administration still uses unlicensed software.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

HUNGARY

EXECUTIVE SUMMARY

Hungary has made great strides in modernizing its copyright legal regime over the past several years, including extensive revisions to the Copyright Act in 1999, passage in 2001 of a new Act on Electronic Commerce and Information Society Services, and amendments to its Criminal Code. However, the copyright industries report mixed results at best with on-the-ground enforcement operations in a market that could otherwise sustain good growth. This is 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; more enforcement efforts are also needed against this form of piracy, although passage of the new e-commerce legislation, which implements a notice and takedown system, could provide much-needed relief.

In 2001, 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. Hungary should be placed on the Watch List this year.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	18.0	40%	18.0	40%	22.0	40%	19.0	40%	18.0	40%	26.0	60%
Sound Recordings/ Musical Compositions	4.5	30%	3.0	20%	4.0	20%	7.0	20%	7.0	20%	7.0	23%
Business Software Applications ¹	NA	NA	21.0	50%	30.1	52%	30.8	57%	19.6	58%	32.9	71%
Entertainment Software	43.3	90%	9.6	86%	NA	NA	13.2	75%	NA	NA	NA	NA
Books	4.0	NA	4.0	NA	4.0	NA	4	NA	4.5	NA	4.5	NA
TOTALS	69.8		55.6		60.1		74.0		49.1		70.4	

¹ BSA loss numbers for 2001 are preliminary.

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 has lessened; these are being replaced by CD-R pirate materials due to the relatively low prices of CD burners and blank CDs. Pirate VCDs (imported by the local Chinese community mainly from Malaysia and Thailand) and locally burned CD-Rs containing audiovisual contents are beginning to appear in the market.

In years past, there was evidence that the production of pirate materials by CD plants in Hungary is being exported to other Central and Eastern European countries as a result of poor optical media production control systems and lax border enforcement. 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. Hungary's two known replication facilities appear to use source identifying, or SID, codes on their manufactured CDs. So this problem, at least for now, has abated, even though optical media regulations were never adopted. At present, the copying or "burning" of CDs by private users is responsible for the majority of illegal CD production.

The Motion Picture Association (MPA) reports that the leading audiovisual piracy problem in Hungary is the high level of back-to-back copying of videos in small, locally owned rental/retail shops. Shop owners purchase a single cassette and make copies in their homes. It is estimated that up to 40% of rental shops carry pirate product. The product is packaged with high quality counterfeit labels created from modern color copiers that make detection very difficult. In addition, the quality of the copies themselves has become so advanced that they are virtually indistinguishable from the original. There is also a strong presence in the flea markets of pirated videos that are created upon request. The fact that these copies are made to order makes them difficult to detect, and the amount of product confiscated does not reflect the true amount of the vendor's business. Local television and cable companies regularly transmit titles for which they do not have broadcast or retransmission rights. Pirate videocassettes are also broadcast, especially by small cable providers in tiny villages. There has been progress in this area over the past year, with the piracy levels dropping from 60% to approximately 30%. There is still a high level of pay-TV signal theft through the use of pirate smart cards and cable/satellite decoders.

Pirates are also beginning to use the Internet to market their wares. Pirate VCDs and CD burners are starting to appear in Hungary in greater quantities. The local anti-piracy organization for filmed entertainment, ASVA, is increasingly seizing CD-Rs containing audiovisual content, possibly downloaded from the Internet. The Internet is also being used to market technical equipment for inactivating copyright protection. This is despite 1999 Copyright Act amendments that contained important anti-circumvention 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 \$18 million.

For the recording industry, as noted, Ukraine became the main source of pirated musical CDs entering Hungary, once the flow from Bulgaria subsided 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-Rs). Estimated trade losses due to recording piracy in Hungary are \$4.5 million in 2001, with a 30% piracy level.

Internet piracy and MP3 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 in Hungary and recent e-commerce legislation should improve the situation. It is too early to tell if the new legislation will be effectively enforced, and so far no criminal cases have been brought. In March and June 2000, the police in Paks raided an operation in which a small group of counterfeiters was advertising illegal copies of software online, but was distributing copies offline. According to preliminary results of the investigation, more than 8,000 end-users had purchased illegal software through the counterfeiters. Over 400 suspects continued to be investigated in connection with the operation throughout 2001.

In the 1999 Copyright Act 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 the streets and out of kiosks, flea markets, and retail stores so that it does not interfere with the market for legitimate product. The recording industry reports that small quantities have been seized at second-hand CD outlets, and another, more prominent local dealer has been sued by the industry.

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 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. The police conducted seven criminal raids on end users during 2001. Additionally, the Prime Minister's office and the Ministry of Finance each issued software asset management orders requiring the use of licensed software in government offices. The predominant concerns for the software industry are threefold: (1) no effective *ex parte* search authority for right holders; (2) generally slow criminal and civil proceedings; and (3) inadequate sanctions imposed in many cases. According to the BSA, the average duration of court proceedings is approximately 2 - 4 years for civil or criminal claims; further, fact-finding examinations by experts that take six months to a year to conduct are routinely required by the courts, even when not strictly necessary. Amendments to the criminal code, which now sanctions copyright infringements performed either for the purpose of gaining profit or causing financial injury to the right holder, were a welcome development, as was the extension of

protection to computer databases. Estimated 2001 piracy levels and losses for business software piracy are not available.

The interactive entertainment industry still experiences high levels of piracy. The progress made in controlling large-scale commercial optical disc production in the last year have not greatly changed the piracy situation in Hungary. Production of gold (recordable) disks by individuals or at small shops still continues. The advertising and sale of pirate products via the Internet and through the mail is likewise still prevalent. Console material continues to be imported from other countries in the region. All of these activities make it extremely difficult for entertainment software publishers to sell legitimate product in Hungary. Estimated trade losses and videogame piracy levels for 2001 are not available.

The book publishing industry reports no improvements in the Hungarian book marketplace in 2001. Piracy of educational texts, in particular the unauthorized photocopying, continues to be a problem. Estimated trade losses due to book piracy remained constant from the previous year, \$4.0 million in 2001.

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.

Hungarian prosecutors and judges remain generally reluctant to treat copyright infringements as serious crimes. Prosecutorial delays and the failure to impose deterrent penalties for those few criminal cases that do reach the judgment stage are serious problems. The court system is overloaded with a large number of cases, which contributes to delays in resolving pending copyright cases. The Hungarian Criminal Code is good, but needs improvement. In May 1993, the criminal code was amended to provide higher penalties for copyright infringement, including fines of up to 10.8 million Forints (US\$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 offenses related to intellectual property rights ("IPR"), such as piracy, with additional increases for other activities (e.g., an additional two years for signal theft). Additionally, in December 2001, the criminal code was amended to ensure that proprietary databases are protected through the criminal law and that infringements causing financial harm to the right holder (but not necessarily profit for the infringer) are prohibited. Accordingly, the criminal provision regarding the crime of infringement of copyright and neighboring rights now also covers infringement of databases.

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 in 1999 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 anti-piracy efforts in Hungary have been conducted by the police throughout the country in cooperation with ASVA, the local anti-piracy organization. ASVA continues to report excellent cooperation with the police.

Enforcement against duplication facilities in private homes has also improved. Despite the fact that searches of homes are based on “probable cause” and 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, police searches at private residences have now become more systematic. When decided by the prosecutor, Tax Administration also gets involved in the investigation process. Hungarian police have been active in a number of raids and seizures, but there are reports of “tip-offs” in one district within Budapest.

MPA reports that prosecutorial indifference remains a major impediment to combating piracy. In 206 raids conducted in 2001, ASVA reported the seizure of 6,379 pirate videocassettes, steady with 2000. ASVA initiated 245 new criminal actions in 2001.

Enforcement against recording and music piracy, including production, importation and distribution of unauthorized back-catalog recordings, remained a significant problem for 2001. 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 Hungarian police have worked 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 in connection with crimes involving software infringement was good in 2001. The police conducted seven end-user raids, but no reseller raids. Although other countries in the region performed more raids in 2001, the Hungarian end-user raids were typically larger scale raids, and resulted in greater judgments and settlements per raid performed than those in neighboring countries.

In February 2001, the police – acting on a lead provided by BSA – raided an end user in the transport industry. Police discovered 36 PCs, 21 of which were loaded with illegal software. This was a notable success, as the police had initially been reluctant to act on the lead, which was anonymous.

The software industry reports that prosecutions, even of cases reaching final judgment, generally secured sentences involving probation and small fines. The average sentence was between two and 12 months suspended. The software industry reported no fine above US\$1,000; in fact, criminal fines that are ordered by courts are usually below US\$200 in cases involving software piracy. Obviously, these penalties are not deterrent to commercial piracy.

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.

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 difficulty 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, 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 violations. 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 at least 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. A criminal raid was subsequently undertaken.

The BSA managed to achieve some positive civil litigation results in 2001, similar to the situation in the last two years. The BSA initiated five civil lawsuits against end users during 2001; additionally, BSA obtained 11 judgments against and reached three settlements with end users during 2001. 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, with an additional delay of about a year for cases that are appealed.

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. In 2001, Hungary passed its Act on Electronic Commerce and Information Society Services, to address the problem of online infringement. These developments are all very laudable, undertaken by the Hungarian government to lay the legal framework to combat digital piracy.

In sum, these legislative developments 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 (20 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 other than sound recordings 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 right holders 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 signals was adopted, prohibiting the unauthorized retransmission of signals, and prohibiting the manufacture, distribution, possession, sale, rental and use of unauthorized descrambling devices.
- A notice and takedown regime for infringing online content was created, whereby ISPs must remove infringing content that they host within 12 hours of being made aware by the copyright owner.

However, certain other issues remain unaddressed, as 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 them to be, and further amendments 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.
- 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.

Criminal Code

In January 2000, Hungary amended its criminal code, increasing the maximum jail sentence to eight years for general copyright infringement and making signal theft a criminal offense that carries a maximum sentence of two years. The criminal code provisions should improve enforcement if they are utilized. Also added into the code were provisions to improve the evidentiary presumptions of copyright ownership. Additionally, in December 2001, the criminal code was amended to ensure that proprietary databases are protected through the criminal law. Improvements for border enforcement are still needed.

Government Software Management

The software industry was very pleased when sections of the Hungarian government voluntarily engaged in a software management program to ensure that only licensed software was in used in their offices. In 2000, the Ministry of Finance issued a software asset management decree (following an earlier one in Prime Minister's Office in 1999), which applied both within the ministry and to all of its subsidiary offices. Similarly, during 2001, the Prime Minister's Office and the Ministry of Finance issued orders requiring the use of licensed software in government offices. By these actions, the Hungarian government has exhibited its desire to cooperate with the software industry in avoiding piracy within its offices.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

ITALY

EXECUTIVE SUMMARY

Incorporating real deterrence into the Italian legal system has been, and still remains, the key enforcement issue. With the Anti-Piracy Law entering into effect in September 2000, Italy must now implement it. Initial indications are that the law is being enforced in a more aggressive manner. It remains imperative that the new higher level of fines and jail terms be imposed in practice, with the goal of deterring piracy. Piracy rates in Italy exceed 20% and higher across the board – still among the highest rates in Western Europe. Organized crime elements are involved in commercial piracy, and Internet piracy in its many formulations is beginning to threaten the development of new and existing markets.

Enforcement in Italy should proceed in a TRIPS-compatible manner with deterrent penalties. Such deterrence includes exempting high technology products (particularly software) from a burdensome and TRIPS-inconsistent “stickering” provision of the Anti-Piracy Law and ensuring that such products still receive criminal protection. Enforcement should be targeted also at 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 remove 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. For these reasons, IIPA recommends that Italy remain on the Watch List for 2001.¹

ITALY: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	140.0	20%	140.0	20%	160.0	25%	200.0	30%	220.0	30%	278.0	35%
Sound Recordings / Musical Compositions	40.0	23%	50.0	25%	60.0	25%	60.0	20%	60.0	20%	51.0	22%
Business Software Applications ²	285.0	46%	327.0	46%	338.4	44%	276.5	45%	216.4	43%	291.9	58%
Entertainment Software	NA	74%	NA	65%	60.9	52%	58.2	50%	61.8	53%	65.0	55%
Books	23.5	NA	23.5	NA	23.0	NA	21.0	NA	20.0	NA	20.0	NA
TOTALS	488.5		540.5		642.3		615.7		578.2		705.9	

¹ For more details on Italy’s Special 301 history, see IIPA’s “Special 301 History” summary (appendices D and E of this filing).

² BSA loss numbers for 2001 are preliminary.

COPYRIGHT PIRACY IN ITALY

Piracy Levels Remain High Across All Industry Sectors

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 generally does not deserve high fines and jail terms. This attitude extends to where intellectual property offenses are concerned. The 2000 Anti-Piracy (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 that seriously impact the business software industry. On the positive side, enforcement actions by the authorities in 2001 have increased following passage of the AP Law (see enforcement section, below).

Video piracy of motion pictures before and during their Italian theatrical release remains a serious piracy problem in 2001 and continues to cause the film industry's highest losses in Western Europe. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Italy are estimated to be \$140 million in 2001. The video piracy rate is around 20%, of which only a small portion is due to optical disc piracy. The piracy rate remains in the 30%-40% range in southern Italy. 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.

VCDs and DVDs are slowly supplanting traditional piracy of videocassettes. While there is no concrete evidence of counterfeit DVDs flooding the market, DVDs are being used to create masters for illegal video copies. VCDs and CD-ROMs containing film recordings are being sold in flea markets located mostly in the South of Italy. DVDs and VCDs can be found at large laboratories and duplication centers which are producing not only VHS copies, but also mass quantities of other pirated goods ranging from audio-visual and musical products, to software and video games. The impact of optical disc piracy is expected to continue to grow over the next couple of years, unless improved enforcement and the application of deterrent penalties occurs.

Other problems facing the motion picture industry include unauthorized public performances in social centers and broadcast TV piracy. Unauthorized public performances in social centers and private clubs remain a problem. Such clubs exhibit first release theatrical films to their "members" during, or even in advance of, legitimate theatrical release. They also exhibit videos rented from nearby shops, and in some cases, purchase sell-through videos, which they then rent to their clients. This type of piracy is also practiced by hotels, cruise ships, and ferries. Obviously, such violations increase during the summer months and the tourist season.

Broadcast television piracy, among the almost 700 local private television stations, is a continuing concern, particularly in southern Italy and Sicily. These companies engage in the practice of transmitting motion pictures without having previously acquired the rights and sometimes even airing illegally copied VHS tapes of first-run films. It appears that the TV stations are being duped by phony licensing agreements and "ghost" companies. FAPAV, the local anti-piracy organization, works with the Authority for Communications Security and files criminal complaints against broadcasters engaged in piracy.

With the introduction of commercial pay television in Italy, satellite signal theft piracy is growing at a strong rate. 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. Italian satellite television magazines and some newspapers market these illegal materials with numerous pages of advertising. The trade in illicit smart cards has increased significantly over recent years, and more pressure from pirates on the legitimate industry is expected. MPA reports that pirates are increasingly using the Internet as a resource to sell counterfeit copies and equipment modified for illegal use.

The sale and use of pirate smart cards is a major problem, the piracy rate being in excess of 50%. The problem has been severely aggravated by the effect of Legislative Decree 373/00, which has been held by the Court of Cassation to have nullified the corresponding criminal provision of the Anti-Piracy Law. A bill has been presented in the Senate to reinstate the former criminal provision, which needs to be passed into law as a matter of the greatest urgency.

CD-R burning has remains the most common type of music piracy in Italy and is the recording industry's largest problem. Large illegal CD-R burning centers are active all over Italy (especially in the south), and consolidated street vendors networks take care of distribution of these illegal products. The estimated piracy rate declined slightly to 23% in 2001. In March 2001, the recording industry believes that a world record was set with the largest seizure ever of the new, and dangerous, phenomenon – the CD-R "factory." In this raid, 189 linked CD-R burners were seized. Organized crime is often behind this CD-R production. Especially in the south, some of the most infamous criminal networks manage the CD-R production and distribution and invest the huge profits in both illegal practices like smuggling, drug dealing, weapons trading and other illegal activities. CD burners are usually hosted in private apartments (students and/or unemployed people are provided with a monthly fee in order to host and to run the machinery 24 hours a day) as are printing machines for labels and cover art. Burned CD-Rs and printed inlays are then delivered to clandestine warehouses where the material is assembled and distributed to street vendors.

There are also intricate distribution networks 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. CD-R piracy and distribution of recorded music has become a serious problem in Italy. While counterfeit product also was a problem in past years, in 2001 little evidence of counterfeit goods came to the police force's attention. However, there was one major raid carried out in December 2001, with more than 30,000 counterfeit CDs imported from Eastern Europe seized by the *Guardia di Finanza*.

Piracy of entertainment software has continued at high levels, both in sales of hard copies of PC and console games, and through persistent hacking and Internet piracy. This piracy is also

under the tight control of the Mafia, not just in the south (like Naples) but throughout Italy. Illegal immigrants are often used to distribute these pirated products. The entertainment software industry also experiences high levels of imported pirated product 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. Estimated trade losses due to videogame piracy are not available.

Piracy of business applications software by corporate end users (end user piracy) – the major focus of 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 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. Estimated 2001 trade losses due to software piracy in Italy amounted to \$285 million, with a 43% piracy level.

Wide-scale photocopying piracy has been a consistent problem in Italy, due primarily 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 (\$0.029) per page after January 1, 2001. This increased to 85 lire (\$0.038) per page from September 1, 2000 and increase every year until 2005, when it will be 135 lire (\$0.061) per page. However, no similar agreement has yet been reached with librarians, so copying in universities continues. The Italian reproductive rights organization (RRO) has been negotiation with the Association of University Librarians, but a final arrangement has not yet been reached. In 2001 the amount of unauthorized copying made by students in universities has declined somewhat as the universities have had to make payments. Estimated losses due to book piracy in Italy last year were \$23.5 million.

The Growing Threat: Internet Piracy

The Internet is a fast-growing market in Italy, with pirates using its resources to sell counterfeit copies and equipment modified for illegal use. MPA reports that there are also sites that contain information about instructions for smart card production or updates of the latest protection codes. In fact, one major case involving university students who downloaded large numbers of films is currently within the Italian court system. The Postal and Telecommunications Police have begun to expand their activities to include this kind of piracy. IDSA also reports widespread use of Internet piracy involving distribution of videogames.

COPYRIGHT ENFORCEMENT IN ITALY

In addition to high piracy levels in Italy, the copyright-based industries also are 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.

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. First, these new penalties must be applied in practice. Many Italian magistrates are reluctant to impose deterrent penalties on pirates, especially where, as is often the case, the defendant is not a native Italian. This is particularly regrettable as such persons are in fact the preferred channel used by organized crime for the distribution of illegal product. The government must set a clear policy of deterrent action against all pirates, whatever their origins.

Second, judicial reform and public education must be taken seriously. As IIPA has recommended for the last two years in our Special 301 submission, Italy should pursue and maintain a national, well coordinated anti-piracy campaign. Last year SIAE made a small start in this direction by broadcasting a number of television spots on video and music piracy. More work needs to be done. Such campaigns can help in establishing a proper atmosphere, as would the establishment of regional coordination groups in each prefecture with the participation of special IPR-trained prosecutors. Italy should conduct 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.

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.

A particular problem is the use of the *Giudizio Direttissimo* (Immediate Judgment) to reduce the backlog of criminal cases. Pirates are routinely brought straight before a judge under this procedure to receive a low suspended sentence of imprisonment. The pirate is then released to resume his offending. Using false names, a pirate may go through this process a number of times without any serious interruption to his piracy.

All industries use the criminal system; the civil system is even slower and less efficient.

The 2000 Anti-Piracy Law On the Books

The new AP Law raised maximum fines from 3 million lire (\$1,348) to 30 million lire (\$13,480). 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 (\$135).

Despite the salutary changes accomplished by the 2000 Anti-Piracy Law, 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 were 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. And the software industry reports that, to the best of their knowledge, although the law extending copyright protection to software was adopted in 1992, Italian courts have to date never imposed a prison sentence on an end-user pirate. In order for Italy to meet its TRIPS obligations, the prosecutors and judges must ensure that the new penalty structure is *actually* implemented.
- **Absence of expeditious criminal remedies and avoiding unwarranted delays:** Under the old law and continuing in 2001, it takes many months following a raid before charges are filed commencing a criminal case in court. Indeed, in some software industry cases, criminal proceedings were not begun until *four years* after the raids against the defendants. It is often difficult or impossible for right holders to obtain any information about the progress of cases and learn of plea bargains months or years after the fact, with few opportunities 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 barred or 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. However, the picture is not wholly negative. In Decision 6899/01 of December 14, 2001, the Court of Naples imposed immediate sentences of imprisonment on a number of the defendants in a case of organized commercial piracy. This contrasts, however, with the indulgence with which immigrant vendors of pirate material are treated. As mentioned above, this leniency plays into the hands of organized crime.
- **Conditioning criminal remedies for software infringement on using an SIAE sticker:** Troublingly, Article 171*bis* of the AP Law may be misinterpreted to legalize all pirate software that merely bears an 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. 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 (see further discussion below).

The 2000 Anti-Piracy Law Applied In-Practice During 2001

The recording industry reports that the implementation in 2001 of the AP Law has resulted in improvements with law enforcement cooperation as well as an increased number of operations and arrests. FPM, the Federation Against Music Piracy, was involved with 355 operations last year. Its anti-piracy efforts in 2001 resulted in a 55% increase in seizures of illegal music CD-Rs from the prior year – 1.23 million in 2001, up from almost 800,000 in 2000. 726 CD-R burners were seized. The number of pirate audiocassettes seized in 2001 was only 62,863 units, a 45% drop from the prior year. FPM reported 510 arrests – an astounding 431% increase over the prior year, and formal criminal complaints to the judicial authority were filed against 546 people.

Most of these actions were taken by using the administrative provisions of the AP Law. These actions have had a noticeable, positive impact on resellers, businesses and Websites. The impact on reducing the extent of street vendor sales has not been as visible; however, the new AP Law has been used to produce arrests. The police can arrest infringers where more than 50 infringing copies are found. The recording industry reports that there were many more arrests followed by immediate administrative fines during 2001, 85% of which involved street vendors. In cases of recidivists, jail terms of 1 year have also been imposed. The fast track procedures have meant the immediate convictions of the defendants with sentences imposed of more than five months in jail. However, all first convictions will be, and have been, suspended. Most of the defendants dealt with in this way have been immigrant street vendors.

MPA reports that since the AP Law was passed, the amount of raids by the police on video stores, laboratories, and street vendors has risen dramatically. In addition, the statistics show that judges are assessing higher fines and even issuing imprisonment in 30% of the cases involving FAPAV (the local anti-piracy organization). The media coverage and greater awareness by the public has been an unexpected bonus. There is no news yet of the sentences being imposed under the new law, but recent trends and the raising of penalties should provide satisfactory results.

The motion picture industry reports that in the 17 criminal cases in which FAPAV assisted the prosecutor and that ended in 2001, 88% resulted in a prison term (26 defendants received an average of 14 months imprisonment). Fines were imposed in 14 of the 15 cases in which a jail term was imposed, with the following levels: 13 cases ended with a fine up to \$1,000 (92.85%), one with a fine ranging between \$1,000-5,000 (7.15%). There were two acquittals (11.75%).

The business software industry continues to report positive developments on the criminal enforcement front following adoption of the Anti-Piracy Law. In 2001, the *Guardia di Finanza*, the national fiscal police, continued its strong support for the business software industry, conducting 233 criminal raids nationwide (mostly on a regionalized basis), and seizing over 550,000 illegal products (a 200% increase over 2000). Local police also engaged in substantial criminal enforcement activities. In Savona, the magistrate and local police raided the city's *entire* population of suspected end-user pirates. In Veneto, police raided 59 companies in six months, 75% of which had infringing products (police found nearly 2000 unlicensed programs worth over one million dollars). In all, approximately 100 individuals were charged with criminal piracy and counterfeiting of business software in Italy in 2001. And overall, several industry members did notice appreciable gains as the year wound to a close. Much of this new activity is due to the new

law. 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.

In 2001, business software piracy rates remain too high and the industry suffered some setbacks in criminal enforcement. For example: Following raids by the GdF in Parma, magistrates refused to allow three of the cases to proceed. The cases are especially disturbing, as they all arise under the AP law. One magistrate ruled that architects could not be pursued for criminal end-user piracy under the law because architects are not organized as corporate commercial entities under Italian law. A second magistrate ruled that the law's criminal end-user provisions do not apply to ordinary business, but rather only to organized crime. There is no support in the law for either of these conclusions. A third magistrate ruled that the GdF lacks competence to pursue criminal end-user piracy under the new law, as that power is granted to SIAE, the royalty collections agency. The software industry also has continued to have difficulty in using public media to communicate its anti-piracy message. The Italian Advertising Standards Authority has adopted a pattern of challenging industry-sponsored campaigns, demanding that industry amend a 2000 television campaign and a 2001 raid spot.

The deficiencies in the Italian criminal enforcement system, especially at the level of judicial resolution of criminal cases, are perhaps best illustrated by the following partial enforcement statistics:

COPYRIGHT ENFORCEMENT STATISTICS IN ITALY: CRIMINAL CASES

ACTIONS	MPA		IFPI		BSA	
	2000	2001	2000	2001	2000	2001
Number of Raids conducted				355	257	233
Number of indictments filed			309		130	105
Number of defendants convicted (including guilty pleas)	19	26		670	NA	6
Ratio of convictions to the number of raids conducted					NA	NA
Ratio of convictions to the number of indictments				85%	NA	NA
Total number of cases resulting in jail time		26		620	NA	NA
1 to 12 months	12	13				
13 to 24 months	5	13		1		
25 to 36 months				3		
37 to 60 months						
Over 61 months						
Number of cases resulting in criminal fines	2	14		4		
Total amount of fines levied						
US\$0-\$1,000		13				
\$1,001-\$5,000		1				9
\$5,001-\$10,000						3
\$10,000 and above				5		2
Total amount of restitution ordered) in how many cases (e.g. \$XXX in Y cases)						

Civil Enforcement Is Slow and Ineffective In Italy

Civil enforcement continues to be slow also, cumbersome and difficult. The law does provide for effective search and seizure orders, which are usually granted one to two weeks after the petition has been filed. The software industry has, however, experienced some difficulty in getting search orders granted. In one case, for example, the High Court in Voghera refused, on privacy grounds, to grant a petition for a search order. The Court reasoned that the plaintiffs, while conducting the search, could examine the target's data and thus violate its privacy. In reaching this conclusion, the Court ignored the numerous safeguards used during the execution of a search order to ensure that only evidence relevant to the infringement is examined. In another case, the High Court of Rome rejected a software industry application for a search warrant on the grounds that the "tip" came from an anonymous source. Reasoning that the search would thus be exploratory, the Court denied it. The Court's reasoning reflects a misunderstanding of the relevant precedents, under which search orders are typically granted when the plaintiff lacks evidence adequate to support proceedings on the merits. Further complicating proceedings against infringers to obtain definitive injunctive relief and/or compensation for damages, plaintiffs are obliged to commence full-fledged proceedings on the merits, which has often been paralytically slow and difficult, despite the recent modification of the civil procedural code. (The software industry received a judgment in 2001 in a case that dated back to 1992.) Furthermore, many 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. Progress does seem to be occurring in this area, however, and in two software piracy cases (one in Milan in 2000 and one in Caserta in 2001), courts awarded civil damages at full retail price and an additional amount for compensation of moral damages.

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 eight 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, which establishes rules for the calculation of civil damages, may be read to restrict damages to 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.

COPYRIGHT ENFORCEMENT STATISTICS IN ITALY: CIVIL CASES

ACTIONS	2000 BSA	2001 BSA
Number of civil raids/searches conducted	7	8
Post-Search Action		
Cases Dropped	2	2
Cases Settled	8	3
Cases Adjudicated	4	4
Value of loss as determined by Court (\$USD)	\$20,900 ³	\$106,851
Judgment Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)	\$20,900; 4	\$106,851 in 3 cases
US\$0-\$1,000		
\$1,001-\$5,000		
\$5,001-\$10,000		1
\$10,001-\$20,000		
\$20,001-\$50,000		
\$50,001-\$100,000		1
\$100,000 and above		
Settlement Amount (\$USD) in how many cases	\$105,000	\$96,000

COPYRIGHT LAW DEVELOPMENTS

Need to Fully Implement the Anti-Piracy Law and Eliminate the SIAE Sticker Requirements for Software

Positive Reforms with the AP Law

Passage of the 2000 Anti-Piracy Law resulted in 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 (\$135), confiscation of any infringing materials, and the

³ Inclusive of cost awards; also note that one of four judgments reported provided for no damages, as discussed in the accompanying text.

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 (\$900), 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 (\$2,690) fine to four years and a fine of 30,000,000 lire (\$3,445).
- 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 (\$2,240 to \$22,414). 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 (\$13,445) 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 between 200,000 and 2,000,000 lire (\$90 and \$900) may be imposed.

As noted earlier, book piracy is now subject to the criminal provision and photocopying in commercial copyshops as well as within educational institutions, and is now subject to remuneration to the copyright owners.

TRIPS, the SIAE Sticker and the Software Industry

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 181*bis* of the law contains an extremely burdensome requirement that could require software producers either to physically place a sticker on each work sold in Italy or to file complex "product identification declarations" – 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 Article 171*bis* of the law.

The September 2001 regulation implementing the stickering scheme does not resolve these problems. Under the law, computer and multimedia programs containing less than 50% of a music, film or audiovisual work, as well as computer and multimedia programs exclusively containing music, film or audiovisual works expressly realized to be inserted into such programs are to be excused from the stickering requirement. The Italian government had assured industry that when this provision of the law was implemented in the regulation, it would exempt business software across the board. The exemption as set out in the regulation is not unconditional, however. Instead, the regulation provides that works meeting the “50% test” can be exempted *only* with SIAE’s consent. The regulation does not define the circumstances under which SIAE may grant or withhold its consent, the timelines under which SIAE must act, or how often such consent must be obtained. Nor is receiving consent adequate to trigger the exemption or ensure criminal protection of unstickered programs. A party that has obtained SIAE’s consent must file with SIAE a “product identification declaration” and a sample of the products that it intends to distribute at least 10 days prior to the date upon which the products enter the market. The declaration must also include detailed information regarding the products, as well as a listing of all works of art that the products contain and information regarding the company’s distribution channels. Absent such declaration, the products do not receive criminal protection under the law; indeed, distribution of such products is arguably illegal and subject to seizure by Italian authorities (indeed, Italian authorities seized unstickered computer programs in August 2001).

The stickering regime established in the law and its implementing regulation may 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 and declaration requirement, 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.

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.

A broad coalition of high-technology industries in Italy has held extensive discussions with representatives of the Italian government and with SIAE officials over the past 18 months to develop a consensus that would implement the exemption contemplated in the AP Law. Industry has also sought the support of the office of the USTR, the U.S. Embassy, and representatives of the European Union. As of the date of this submission, negotiations with the government are ongoing, and industry remains hopeful that a solution can be reached.

Stickering Costs Concerns

The Italian government continues to move forward on the issue of mandatory SIAE stickering. In addition to questions surrounding the exemption for computer software, there

continue to be critical issues concerning the costs for such stickers. SIAE wants a unified fee of 60 lire per sticker, which could produce annual revenue of some US\$9 million. SIAE defends the amount by arguing that it has to cover not just the administration of the sticker, but also the cost of its planned anti-piracy activities. SIAE is planning a US\$3 million anti-piracy program, but all local attempts to date to secure details of what it plans to do with such a budget have been unsuccessful. It is feared that SIAE may interpret its anti-piracy function under Law 248/00 as limited to the inspection of stickers. The funds set aside for anti-piracy work should be applied in the reduction of piracy, and not be limited to merely checking stickers.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

LITHUANIA

EXECUTIVE SUMMARY

The most persistent problem confronting the copyright industries in Lithuania continues to be the lack of any effective, on-the-ground enforcement, resulting in devastatingly high piracy levels. Failures by the police, prosecutors, and especially by customs officials, to engage in effective domestic criminal enforcement are destroying the possibility of establishing legitimate markets for copyrighted materials in Lithuania. Plus, Lithuania is a major transshipment point for pirated materials. Lithuania must address these enforcement deficiencies by implementing better customs procedures and by using the new criminal law to punish illegal operations, including those run by organized crime elements. The police must commence raids and seizures as well as implement administrative actions (such as taking licenses away from infringing kiosks), and prosecutions must commence. Customs officers must strengthen their activities at the borders to intercept pirate product. Courts must also properly grant *ex parte* search orders against end-user pirates.

On the legislative front, there remains an urgent need to guard against legislative backsliding aimed at decriminalizing certain IPR infringements. Furthermore, clarifications and amendments must be made to ensure protection for foreign pre-existing works and sound recordings, among other issues. Stronger criminal sanctions against organized crime are necessary, including the commencement of criminal searches and raids. Several serious evidentiary hurdles that impede effective enforcement must be lifted.

IIPA acknowledges the legal reform progress made in 2001: Lithuania acceded to the World Trade Organization (WTO) and also deposited instruments of accession to the two WIPO "Internet" Treaties. Now, Lithuania's many news laws must be implemented and enforced in order to deter piracy in that country and to halt the transshipment of pirate materials through its porous borders. IIPA recommends that Lithuania remain on the Special 301 Watch List for 2002.

LITHUANIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2001

INDUSTRY	2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	1.5	90%	1.5	80%	NA	100%
Sound Recordings / Musical Compositions	7.0	85%	7.0	85%	5.0	85%
Business Software Applications ¹	2.5	76%	NA	76%	NA	80%
Entertainment Software	NA	NA	3.5	98%	NA	NA
Books	NA	NA	NA	NA	NA	NA
TOTALS	11.0		12.0		5.0	

In October 2001, USTR kept Lithuania on the Special 301 Watch List after its out-of-cycle review,² stating: "The U.S. Government is encouraged by the steps Lithuania has taken over the past year to strengthen its intellectual property legislation, including granting judiciary and customs officials *ex parte* search and seizure authority. In addition, resources for IP enforcement have been increased, most notably in the Customs Department. Moreover, USTR understands that Lithuanian courts have recently achieved convictions in software piracy cases and that the sentences in these cases included jail time, damage awards, and the confiscation of business assets. Despite those positive steps, however, Lithuania remains a market and transshipment point for pirated software, videos, and music...."³ Lithuania also participates in the U.S. Generalized System of Preferences (GSP) program, which offers preferential trade benefits to eligible beneficiary countries and includes a discretionary criteria that the country must provide "adequate and effective" intellectual property rights protection.³

COPYRIGHT PIRACY IN LITHUANIA

Lithuania Continues to be a Transshipment Point for Pirated Traditional and Optical Media Products

Given its geographical location between East and West Europe, and its totally ineffective border enforcement, Lithuania remains a major regional exporter of pirated material – music CDs

¹ BSA loss numbers for 2001 are preliminary.

² Office of the U.S. Trade Representative, "USTR Announces Results of October 2001 "Special 301 Out-of-Cycle" Reviews on Intellectual Property Protection, Release 01-91, October 31, 2001.

³ In 2000, \$3.2 million of Lithuania's imports to the United States benefited from the GSP program, accounting for 2.5% of its total imports to the U.S. For the first 11 months of 2001, \$11.3 million of Lithuanian goods (or 7.2% of Lithuania's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 342.2% increase over the same period last year. For more details on Lithuania's Special 301 history, see Appendices D and E of this 2002 Special 301 submission.

and audiocassettes, CD-ROMs containing entertainment and business software, videos, and videogame cartridges. Most of the material is produced in other countries, especially Russia, Ukraine, and more recently, Belarus. It is then shipped through Lithuania to other countries in Eastern, Central, and Western Europe, specifically Poland, the other Baltic States, Germany and Scandinavia.

Up until January 2001, Lithuanian customs officials did not have the proper (*ex officio*) authority to do their jobs. Also, customs officials 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. There were reports of some improvements in the resources available to customs officials in 2001; but, it is clear that much more needs to be done to improve the situation at the border.

Indeed, customs officials continue to report that there are many shipments of Russian materials that are entering Lithuania, with the Russian distributor claiming (invalid) licenses to distribute there (i.e., "within the territory of the USSR"). Lithuanian officials have complained to IIPA that they have no means of verification, and no ability to stop this material. These officials need to be better trained, to have proper resources, and have use their authority to commence criminal investigations and seizures when they detect illegal activity.

Optical Media

There is at least one known CD manufacturing plant in Lithuania, but there may be as many as three such plants. It is unknown, both by the industry and Lithuanian law enforcement, how much, if any, of the production is at a legitimate level versus being illegal overproduction. The one known plant, which competes with other plants in the region (largely Polish and Russian plants) in meeting largely domestic and Baltic orders, is expected to expand, increasing its production capacity within the Baltic region. Industry reports suggest that this plant is planning to launch another two new lines (one of them DVD and VCD) in May 2002, and the old line is going to be moved to Estonia.

In order to avoid an expansive growth of illegal CD production within Lithuania, steps must be taken quickly to regulate optical disc plants. Lithuania should work with the copyright industries to adopt proper tools to regulate the production, distribution and export of optical media. Such regulations should 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, CD-ROMs, and other optical disc media. Also, all of the plants must be required to adopt SID codes, so that the source of illegally produced CDs can be traced and any necessary actions taken against infringing manufacturers.

Internet Piracy

Internet piracy is beginning to take hold in Lithuania; most of this is in the form of web advertising of illegal hard-copy material. MPA reports that there are many amateur Websites marketing pirate videocassettes, VCDs and parallel imported DVDs. Cooperation with the ISPs (Internet service providers) reportedly has been positive to takedown these Websites. BSA reports encouraging progress with the police taken against Internet-based pirates. After a BSA investigation in the U.K., U.S., Germany and Australia, evidence supplied to the Lithuanian Tax Police enabled a criminal case to be filed against an illegal manufacturer and distributor of business software based

in Lithuania. In October 2001, the target's premises were raided, and several PCs and several thousand CDs were seized. Arrests followed the raid and a prosecution is planned for 2002.

The most popular form of piracy on the Internet in Lithuania is selling recorded CD-Rs (mostly from MP3s) by announcing lists available in Web pages or in special announcements sections and then delivering these CD-Rs by mail (or some other way) directly to the customer.

Piracy Remains High Across All Industries

The recording industry reports that, in 2001, the music piracy situation in Lithuania was worse than at any time. It appears that several organized crime groups are now involved in heavy pirate CD traffic, with little or no enforcement activity by the authorities. The streets of the main cities are still full of kiosks selling pirate CDs and video cassettes. 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 were \$7 million in 2001. Cassettes and CDs are pirated in almost equal amounts. 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, Lithuania became a haven for sound recording piracy during the 1990s and this remains a lingering problem.

Apart from the very high levels of domestic music piracy, one of the main problems for the recording industry is that Lithuania is the main transit country for pirate CDs from Russia, Ukraine and Belarus, which are then further shipped to Estonia and Latvia as well as to Poland and other neighboring countries. Before Russia and Ukraine took over as the region's largest pirate CD producers, Bulgarian pirate CDs were being shipped through Lithuania. However, investigating the transshipment of CDs though Lithuania has proven very difficult – shipments in transit cannot be seized by Lithuanian customs. According to recording industry sources, there were only four actions taken by the customs (with the assistance of the copyright industries participation through the producer's organization, FGPA). In total, 9,305 CDs and 14,574 audiocassettes were seized at customs. In one instance, a shipment from Russia (mostly Russian repertoire) to Germany contained illegal products (about one quarter of the total) mixed in with legal product; in another shipment from Belarus to Lithuania, 4,210 pirate audiocassettes were seized. Both these cases were taken over by Tax Police. In another case, 4,686 illegal CDs were seized, and a criminal case was initiated by customs; this seizure led to the further disclosure of an illegal production warehouse in Vilnius in which 205,566 pirate CDs were later seized. In the only officially recorded case of contraband during 2001, a shipment of illegal CDs (1,100 of them) was discovered on a train.

For the motion picture industry, the distribution of pre-theatrical release titles on videocassette is the primary piracy problem in Lithuania. Organized crime now dominates 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, and subsequently shipped to Poland, Germany or other Baltic states – particularly through Lithuania's porous border with Belarus. Many amateur Websites 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. Still, 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 have conducted extensive media campaigns, highlighting every enforcement action and every legislative initiative undertaken by the authorities.

Television piracy is also on the rise, 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 that appear to be largely unregulated. 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, but finding it very difficult to get established in the commercial marketplace. The MPA estimates its losses in Lithuania were \$1.5 million in 2001, with the video piracy rate estimated to be 90%.

The BSA reports that in Lithuania, the piracy rate remained constant over the past two years, at 76% in 2001. One of the most popular flea markets in Lithuania is Gariunai in Vilnius, a popular location where pirate software can be easily obtained.⁴ Estimated U.S. trade losses due to business software piracy in Lithuania is \$2.5 million in 2001.

The entertainment software industry reports that most of the illegal material (especially prerecorded silver discs) comes mostly from Russia. These pirated materials are then stored in Lithuania for distribution throughout Eastern and Central Europe, as well as for distribution in Lithuania itself, according to the Interactive Digital Software Association (IDSA). There is a small but growing local market involved with burning videogames on gold discs. In addition, Internet piracy is rapidly rising. As recently as 2000, estimated videogame piracy levels were over 90% of the market. This industry also reports problems with ineffective enforcement by Lithuanian customs officers. Estimated 2001 trade losses due to videogame piracy are not available.

COPYRIGHT ENFORCEMENT IN LITHUANIA

Lithuania needs to implement – in practice – its criminal, civil, administrative, and border provisions. To summarize, Lithuania took a major step forward to improve its legal regime with the adoption of its comprehensive Copyright Act in 1998, which replaced 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. Third, in May 2000, Lithuania adopted improvements to its criminal code and in January 2001, the customs code was revised to include the all-important *ex officio* authority to allow customs authorities to properly seize suspect material at the border. All these provisions must now be put to use by judges, customs officials, police and prosecutors to stop the organized criminal piracy activities within Lithuania.

Over the 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,

⁴ Matthew Peckham, "Soft Copy: Pirating around the world for fun and profit," CGOnline.com, Jan. 2, 2002.

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. 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. The Copyright Board has been working on a draft proposal to amend the Lithuanian copyright law in order to harmonize it with the most recently adopted EU Directives.

Enforcement Actions Taken by the Police, Prosecutors And Judges Must Improve in Order to Effectively Enforce the Laws

The recording industry reports that raids have occurred, but there is no deterrent effect to this activity. In 2001, there was one major seizure by the organized crime police in December 2001 in Vilnius which resulted in the seizure of approximately 200,000 pirate CDs coming from Belarus. Detailed statistics on all the 2001 actions are not presently available. The recording industry reports that prosecutorial enforcement remains almost nonexistent; there has been some, but not enough, cooperation from the enforcement authorities. For example, once the Economic Police conduct raids, interest is lost, and the cases close. In contrast, the Tax Police are making more concerted efforts to win cases, and as a result, encouraging precedents are beginning to be built. Successful enforcement actions by the relevant authorities, including the Economic and Tax Police, take place, but not as often as is needed.

BSA reports that in 2001, there were 60 raids and seizures directed at flea markets, resellers and end users. Forty-three tax police raids took place against illegal end users of business software. In 2001, there were 42 administrative judgments at lower court level: Significantly, lower courts have also begun to award civil damages in respect of copyright infringement to right holders as part of the administrative judgment process. As at early 2002, several further administrative cases are pending. In 2001, tax police also initiated eight criminal actions against resellers and end users. BSA has obtained its first criminal judgments against both end users and resellers in 2001: In September 2001, a District Court entered a criminal judgment against an illegal end user, imposing a fine of 25,000 Litass (US\$6,250), and ordering the company to pay 300% compensation in the sum of USD 28,476 (in civil damages). Also that month, a criminal judgment against an illegal reseller was made by a district court, with the defendant being given a three-month prison sentence, and being ordered to pay the sum of US\$15,700 as damages to the right holder. In November 2001, the Lithuanian Court of Appeal upheld that judgment. In December 2001, a separate District Court entered a further judgment against another Defendant in respect of end-user piracy, imposing a fine of 12,500 Litass (US\$3,000), with the civil compensation aspect to be decided.

Ongoing Evidentiary Hurdles to Investigations and Prosecutions

The Lithuanian police and prosecutors have been hampered by legal deficiencies and evidentiary problems, some of which have been resolved on the books but they need to be implemented in practice.

The major the legal deficiency up 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, but these sanctions were absent from Lithuanian law. This problem was addressed when the new criminal code was adopted, providing penalties, including fines and up to two years' imprisonment. These

penalties must now 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). The key is that this authority must now be utilized by the prosecutors to engage in effective enforcement action against IPR crimes. There remains a looming possibility, pushed by local associations of small Lithuanian businesses, of a repeal of criminal sanctions for pirate activity after only one year of reform and only a single case. Repeal of these laws would place Lithuania in even further violation of TRIPS obligations, and should be vigorously opposed.

To date, there have been several successfully prosecuted criminal cases. Some involve resellers of pirated business software. The recording industry reports that in early February 2002, they won their first criminal copyright case for copyright infringement of music in Lithuania. The penalty imposed was one year probation and confiscation of the seized materials. The case was initiated by the Tax Police in spring 2000. During 2001, the recording industry reports 15 criminal cases (one of them audio and video material, three of them audio material and computer software, and the rest only audio material). All 15 were started by the Tax Police.

Second, there is a burdensome evidentiary problem related to proof of authorship or ownership affecting several copyright industries.⁵ 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. Therefore in order to prove that a suspect product is in fact pirate, a “specialist” must reach a conclusion, which is then presented as evidence. The police reported numerous instances to IIPA officials wherein even after 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 cases to proceed. 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 recording industry reports that its right holders also still have to go through extremely cumbersome expert reports to pursue administrative actions against piracy. For example, every single song on every single CD has to be listened to, accounted for, inventoried and such. The problem, especially for the recording industry, is that the seizures are mostly done only as the last part of illegal distribution chain, where there are respectively small amounts, but a very large variety of titles, which makes it difficult to account for all of them. And, as the regulations require, the recording industry has to account for every seized unit, in order to be sure that the case is concluded successfully. According to the regulations, the plaintiff has six months to prepare an expert report; the recording industry is doing its best to prepare these cases within a three-month time span. MPA notes that expert reports have to be filed for every videocassette seized. Still, local video distributors have cases and they have been processed relatively quickly (six months), but cases have been postponed because of technicalities found in the papers submitted.

⁵ The BSA indicates that this issue is no longer a problem for the business software industry in Lithuania. That is because a presumption of ownership is now applied by the courts for business software works. The difficulty remains for individually created copyrighted works, and in the production of evidence pertaining to the retail value of those works. This is because certain acts only “qualify” as offenses when the retail value of the work exceeds a certain amount (100 times the minimum wage). In those cases “expert” evidence is required to confirm ownership in the work as well as the retail value.

Third, 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, with judges have reported to the IIPA that there were some difficulties allowing legal entities to commence copyright suits; however, some industries (software) report that this has not been a problem for them.

Fourth, the recording industry reports that unclear rules about court fees are generating problems. Courts have been inconsistent in their application of court costs, apparently confusing the general provisions (which involve 5% of the claim) and the civil code rules on intellectual property rights (100 litas). The application of this rule has to be clarified because the application of the 5% civil claim rule imposes an excessive financial burden on the rights holder and may impinge on their ability to bring a case in the first instance.⁶

Civil Actions

In 2001, BSA entered into approximately 20 civil settlements with illegal end-users and resellers, involving damages agreed at the statutory level. In addition, BSA has benefited from five civil judgments being awarded in its members' favor against end-users, all involving compensation awards at the top end of the maximum permitted statutory levels. The level of damages present in the Lithuanian law has attracted some adverse press, and led to "populist" efforts in the Lithuanian Parliament (SEIMAS) to have the levels relaxed or reduced. These have fortunately been rejected by the Parliament.

The business software industry did not try to commence any civil *ex parte* searches in 2001. That is because the courts require a significant "deposit" to be made to secure an order. In addition, the software industry believes the law is flawed because it can permit prior notice to be provided to the intended defendant, thus completely eviscerating the effectiveness of the remedy.

LEGAL REFORM: THE COPYRIGHT LAW, CRIMINAL CODE, CUSTOMS CODE, AND RELATED ISSUES

In order to comply with the WTO TRIPS obligations, Lithuania must put all of its enforcement tools into working order. The Criminal Code, the Customs Code, the Civil Procedure Code, and appropriate administrative sanctions all form the enforcement arsenal necessary to fight commercial piracy in Lithuania. The problem is they are not effectively used in practice.

Lithuania has experienced a significant amount of legal reform over the past 10 years, at both the bilateral and multilateral level. 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. In May 2001, Lithuania acceded to the World Trade Organization.

⁶ A draft new code on civil procedure is due to be published in February 2002, to set a 3% fee. Note that this fee issue is not confined to Lithuania. Similar onerous fees are imposed in certain other Western European jurisdictions.

Criminal Code Revisions (2000)

Before May 2000, the only criminal provision for IPR crimes was Article 142 from the Soviet Civil Code. A new criminal code was adopted in May 2000. Reportedly,⁷ the new provisions include fines and a two-year term of imprisonment. Also, the revisions include penalties for infringements of digital rights, that is, rights management and technological protection measures, punishable by one and two year imprisonment terms, as well as fines. These new fines and terms of imprisonment must be enforced to stop the spread of digital piracy.

A very serious problem appeared in 2001. In the spring of 2001, an effort by some Lithuanian small business groups (such as retail shop owners, but more troubling, by some organized crime groups) began public lobbying efforts to remove some of the criminal sanctions for IPR violations and reduce the levels of compensation that can be awarded to right holders under the copyright law. Legislative efforts last year did not go far, and there have fortunately, to date, been no changes. However, reports suggest that this legislative effort has resumed and will continue in 2002. Since the criminal code has only been in place for a short time, and only sparingly used, any effort to repeal the criminal sanctions must be defeated to avoid Lithuania stepping further back from its obligations under international treaties and trade agreements.

IIPA members continue to urge the imposition of criminal penalties as is required to comply with the provisions in the WTO TRIPS Agreement (Article 61). Criminal penalties should be imposed in such a way 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) retransmitting protected programs without authorization.

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 civil cases to permit 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, but there are questions about its efficacy.

Customs Issues

In January 2001, the Lithuanian Parliament adopted new provisions in the customs code granting the authority to customs officials to make *ex officio* seizures. Customs officials now have the authority 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, is vital to prevent

⁷ IIPA has not been able to obtain or review a copy of the new criminal code and is unaware of the scope of amendments to the criminal procedure code.

piracy transmissions at the border. But in past meetings with IIPA and its members, customs officials have complained that they lack the proper training and resources to effectively conduct proper border enforcement action. Customs officers also point out that the Lithuanian Border Police should improve efforts to halt contraband (including pirate goods) at the border.

Copyright Law (1999)

Lithuania has taken several actions with respect to adhering to international copyright conventions. It joined 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. In particular, 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 its obligations under 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.

To review, 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. 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. IIPA's comments expressed concerns that the draft copyright bill, although a major improvement over the existing Copyright Law of 1994 (civil code), if adopted, would still contain serious deficiencies that needed to be addressed if Lithuania were to adopt a modern copyright law and an effective enforcement regime.

The Lithuanian Copyright Law (Act No. VIII-1185) was finally enacted on May 18, 1999; the date of entry into force was June 9, 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, and this board includes representatives of the copyright industries to consider enforcement activities. The copyright law was a major step forward for the legal regime in Lithuania. Unfortunately, the law still contains significant deficiencies. The IIPA's comments ⁸ of these deficiencies are summarized below:

- The transitional provisions of the copyright law should explicitly provide for protection for preexisting works and sound recordings in Article 72 (i.e., full retroactivity consistent with Article 18 of Berne and Article 14.6 of TRIPS). Of note, this article also fails to comply with the term of Lithuania's accession agreement with the EU, and the EU's Term of Protection Directive.

⁸ Many of these comments were also included in IIPA's October 1998 comments to the Lithuanian Parliament.

- 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 an exclusive right. In fact, broadcast royalty payment obligations owed to U.S. phonogram producers and performers must be paid.
- 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 law’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 tripartite 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. We also argued that 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.

WIPO Treaties

One positive legal reform note in 2001 was Lithuania’s accession to the two 1996 WIPO digital treaties – the WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT). On January 26, 2001, Lithuania deposited its instrument acceding to the WPPT and on May 25, 2001 to the WCT.

In fact, in the 1999 copyright law 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 (Article 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, and 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.

Government Software Legalization

In May 2001, the Lithuanian Ministry of the Interior signed an order entitled "A Recommendation on the Use of Software in State Institutions and Bodies." The recommendation is, according to the software industry (BSA), the first comprehensive central government software management decree in Eastern Europe. Among other things, the recommendation mandates (1) the appointment of a Chief Information Officer, (2) the completion of an initial software inventory (follow-up audits are to be conducted at the discretion of each agency), and (3) the centralized acquisition of software. In addition to binding central government departments, the recommendation also applies to third parties that have received government funding. The adoption of the recommendation follows over two years of intensive lobbying by the software industry which is now working to ensure its proper implementation.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

MALAYSIA

EXECUTIVE SUMMARY¹

IIPA recommends that Malaysia be maintained on the Special 301 Watch List. However, in order to sustain the progress that Malaysia has made in several important areas of the fight against piracy, and to bring its performance to an acceptable level in the other key areas in which progress is thus far lacking, IIPA urges Malaysian authorities to commit to the following actions:

- Enforcement
 - Create a permanent copyright enforcement unit within the Ministry of Domestic Trade and Consumer Affairs, dedicated solely to this task. The unit must be given sufficient manpower and resources to do this job, and its officers must be properly trained to conduct raids, carry out investigations, and prepare fully documented files for use in prosecutions.
- Optical Disc Act
 - Strictly enforce the Optical Disc Act (ODA), particularly with regard to the mandatory use of SID codes. The licenses of optical disc plants which fail to do so or which commit other significant violations of the ODA must have their licenses revoked, regardless of whether the plant has received other operating licenses from other government agencies.
 - In collaboration with industry, implement a comprehensive program of collection and analysis of exemplars from all licensed optical media production facilities, including making any changes to license terms, implementing regulations, or (if necessary) the ODA itself, that are needed to authorize such a program.
- Prosecutions
 - Create a unit of legally qualified and adequately trained prosecutors within the Attorney-General's Chambers to prosecute all high profile copyright cases involving the production, distribution and export of copyrighted materials, particularly optical media products, or involving corporate end user piracy of business software.
 - Institute charges of copyright violations within 30 days after full documentation is received from copyright owners.

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

- Appeals

- Promptly review any copyright case which results in acquittal in the lower court, and institute an appeal in any case in which the court has required live testimony or permitted cross-examination of deponents as to the subsistence or ownership of copyright when those matters are not genuinely at issue. For any acquittal where the decision is made not to appeal, advise the right holders of the decision and the reasons for it within seven days after the acquittal.
- To promote deterrent sentencing, including full accountability of business and institutional managers and corporate directors for piracy taking place within their organizations, prosecutors should appeal sentences in all cases of pirate production, distribution, or export, or corporate end-user piracy of business software, in which a sentence of imprisonment is not imposed.

IIPA urges USTR to schedule an out-of-cycle review for Malaysia, during which its Special 301 status would be re-examined based on the degree of its fulfillment of these benchmarks.

MALAYSIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2001

INDUSTRY	2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	80%	41.0	80%	42.0	85%	40.0	80%
Sound Recordings/ Musical Compositions ²	148.9	70%	15.6	65%	5.0	40%	13.0	70%
Business Software Applications ³	63.0	62%	75.4	66%	67.8	71%	63.8	73%
Entertainment Software	56.4	93%	NA	98%	164.0	99%	135.2	99%
Books	8.2	NA	8.0	NA	8.0	NA	8.0	NA
TOTALS	316.5		140.0		286.8		260.0	

OPTICAL MEDIA PIRACY

Beginning in the late 1990s, 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

² The estimated piracy level for sound recordings for 2000 represents an adjustment of the 60% figure reported in IIPA's 2001 Special 301 filing. The loss figure for 2001 is an estimate of legitimate sales displaced by piracy. Previous years' loss figures were estimated sales revenue in the pirate market. With the sharp drop in prices for pirate product, this estimation method no longer reflects the losses inflicted by piracy. The piracy loss figure for 2000 has also be adjusted but without changing the estimation method.

³ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$96.0 million at 66% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

organized criminal enterprises that are suspected to be running optical media factories and distributing their output worldwide.

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. Since 2000, Malaysia has actively raided pirate optical media production facilities, and is bringing into force a new Optical Disc Act that could provide a vital legal weapon against the pirate syndicates that operate them. 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 Remains Unacceptable

The Malaysian market for copyrighted materials of all kinds remains dominated by piracy. The problem is particularly acute for optical media products, including music and video CDs, DVDs, and CD-ROMs containing entertainment, educational and business software and literary material.

Optical media piracy continues to wreak havoc upon all sectors of the domestic market. Not only is it impossible for legitimate producers to compete against pirates based on price, but pirates also evade censorship laws and offer consumers unexpurgated music and audiovisual products that law-abiding producers are unable to match.

The Malaysian recording industry, for example, reportedly is on the verge of collapse, following a 75 percent drop in revenue in 2000, attributable mostly to piracy.⁴ Pirate CDs are widely available throughout the country for about RM5 (US\$1.30), one-third of last year's pirate price. The Recording Industry Association of America (RIAA) estimates that piracy levels for recorded music increased to 70% in 2001, with losses to U.S. industry estimated at US\$148.9 million.⁵

Similar problems afflict the audiovisual sector. Within days after new films are first released for theatrical exhibition in the U.S., and sometimes even before their release, pirate VCD and DVD versions are readily available on the streets of Kuala Lumpur at prices as low as RM5 (US\$1.30) and RM12 (US\$3.20), respectively. 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 on the market. The Motion Picture Association of America (MPAA) estimates that eight of every ten copies of audiovisual product in the market are pirate, with losses estimated at US\$40 million.

Entertainment software companies report a deterioration of the local market, even given the sky-high piracy levels reported in previous years. Pirates seem to be dumping product – both PC games and those for play on consoles – on the local market at prices as much as 95% below legitimate retail. Virtually no legitimate sales can take place in such an environment. According

⁴ "Malaysia's Music Industry at Risk of Collapse from Piracy," Channel News Asia, Sept. 10, 2001.

⁵ See footnote 2 supra.

to the Interactive Digital Software Association (IDSA), the piracy rate for entertainment software in Malaysia is 93%, causing estimated losses of US\$56.4 million to U.S. industry.

Although business software companies are also adversely affected by the prevalence of pirate optical media products in the Malaysian retail market, the more damaging piracy problem for this sector in Malaysia is the illegal use of software by end users, such as when a business or other institution that may legitimately acquire one copy of a computer program then makes unauthorized copies of it available for use by its employees throughout the premises or over a network. This is a problem to which the Malaysian authorities have been able to respond more effectively, as discussed below. Nevertheless, the level of business software piracy in Malaysia – estimated by the Business Software Alliance (BSA) at 62% – and the losses inflicted on U.S. companies by piracy – an estimated US\$63 million in 2001 – remain much too high.⁶

At the root of all this market damage is the enormous excess capacity for the production of optical media formats. Much of this excess capacity is devoted to pirate production, largely for export. Officially there are 43 optical disc plants in the country, constituting 109 production lines; but unlicensed underground facilities are also believed to be continuing in operation, and unlicensed plants of substantial size were raided as recently as July 2001. As Malaysian authorities readily acknowledge, 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. In fact, the unauthorized output of Malaysian optical media plants has been identified in markets on every inhabited continent. Pirate music CDs from Malaysia have been seized throughout Asia, Latin America, Australia, Europe, and now Africa: Many of the infringing music discs currently flooding the Kenyan market appear to have originated in Malaysia, as have pirate discs seized in Mauritius and Ghana. Malaysia is a major supplier of pirate video CDs and DVDs to Asian destinations via Singapore, and these products have also turned up from South Africa to the U.K. and from New Zealand to the U.S. 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 the world's single leading source of pirate product.

Pirate optical media exports from Malaysia move fast and far. The hit movie "Planet of the Apes" had its theatrical world premiere in Hong Kong on July 26, 2001. That same day, it appeared on the streets in Malaysia in a pirate VCD version. Within days this pirate VCD was available in Beijing (July 30), Shanghai (July 31), and Manila (August 1). By the next week, the pirate VCD could be found in Taiwan (August 3), Indonesia (August 7), and India (August 9). Meanwhile, the pirate DVD version of "Planet of the Apes" made its debut in Malaysia on July 30, four days after theatrical release. Within two days, on August 1, it was available in Shanghai, and in the Thai and Australian markets. The next day (August 2) the pirate DVD was spotted in Beijing. Meanwhile, the film did not have its theatrical debut in Malaysia until August 9. By that time, pirate versions had been on the street for over two weeks and had reached at least nine countries.

⁶ Piracy of books and other published materials in formats other than optical media is discussed below.

In sum, the landscape of piracy in Malaysia has not changed significantly from that described in past years. There were a few variations in 2001, some positive and some negative. On the plus side, intensive and concentrated enforcement efforts led by the Ministry of Domestic Trade and Consumer Affairs (MDTCA) have proven once again to offer some short-term relief at the retail level. Enforcement campaigns against hot-spots of retail piracy such as Petaling Street in Kuala Lumpur and Holiday Plaza in Johore Baru, just an hour's drive from Singapore, reduced the number of stalls and retail outlets selling pirate VCDs and DVDs. However, these advances proved short-lived, especially in the capital, and other shopping complexes continued a brisk trade in pirate products. In an even more ambitious enforcement initiative last year, a Malaysian Cabinet Order banned all sales of optical media products from open stalls. As this ban rolled out nationwide in September and October some local government authorities became actively involved in enforcement, and availability of pirate product dwindled substantially as numerous open-air markets were cleaned up. Here too, however, the relief proved to be temporary; many pirate stalls are now back in operation and pirate optical media product still remains readily available nationwide.

More disturbingly, Malaysian pirates are beginning to adapt to government enforcement efforts and are employing different distribution channels to avoid detection. As enforcement pressure focuses on stalls and retail outlets, pirates hawk their wares door to door in residential and office buildings. They have also increased use of the Internet as a marketing medium, delivering pirate product to customers via mail or courier service.⁷ Pirate syndicates are also beginning to shift production from conventional optical media pressing facilities to more dispersed CD-Recordable operations, including "burn-to-order" facilities. A significant percentage of pirate entertainment software in PC formats is produced in such operations rather than in larger factories. Pirate CD-R discs of music recordings are turning up more frequently in Malaysian night markets. A raid in March 2001 outside Kuala Lumpur disclosed pirate facilities with 75 CD-R burner towers containing 440 individual writers, as well as 15,000 "burned" CD-Rs containing international and local music repertoire. The estimated monthly production capacity of the raided facilities was 1.2 million CD-R discs.

Finally, Malaysia-based pirates seem to be turning not only more nimble, but also more threatening. A number of senior officials, including the MDTCA minister, provincial and municipal government leaders, state legislators, and enforcement officials, have received death threats in the mail, some wrapped around daggers.⁸ Paradoxically, this disturbing behavior may be evidence that Malaysia's enforcement efforts are getting closer to bearing fruit. The declining prices for some pirate product could also indicate a market dump by the syndicates as they prepare to leave Malaysia for environments they perceive to be more secure from law enforcement pressure.

Optical Disc Act's Potential Is Yet Unrealized

The year 2001 was a critical period for implementation of Malaysia's Optical Disc Act (ODA), enacted in 2000. The ODA's comprehensive framework for the regulation of optical media production facilities in Malaysia includes a licensing regime, under which these facilities 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

⁷ See, e.g., Ng, "Net-based illegal VCD ring busted," *The Star*, Aug. 26, 2001.

⁸ Cheesman, "Video Pirates Make Death Threats," *Australian Financial Review*, July 31, 2001, at 10.

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 for 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 ODA 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. In short, this law has the potential to provide a cornerstone for a successful enforcement effort against pirate production of optical disc products in, and their export from, Malaysia.

Unfortunately, these benefits are only beginning to be realized, because of the slow implementation schedule contained in Section 57 of the act. The first year of implementation has been hampered by a lack of transparency, mixed signals about compliance deadlines, and some problems with initial inspections under the act. Although the ODA came into force on September 15, 2000, the deadline for applying for a license to operate a production facility was March 15, 2001. Section 57 then provided a further six-month grace period before full compliance with all license conditions could be demanded. In practice, the time taken by Malaysian authorities to act on license applications further relaxed the true deadline. At least three of the 43 facilities ultimately granted licenses did not receive approval until July or August of 2001, five to eight months after their applications were received. These plants were not required to be in compliance until January or February of 2002. At the same time, a deadline of December 15, 2001 for all licensed plants to employ SID codes was announced by MDTCA and widely publicized, although its legal basis is uncertain.⁹ The application process lacked transparency. It is unclear how rigorously applications were scrutinized; IIPA is unaware of any applicants being turned down, while it is clear that at least two plants that had been raided and found to be producing pirate product in the recent past were granted licenses anyway, despite pending piracy cases against them. One of these plants (Hong Kong CD Industries) has also retained its license despite the January 2002 confiscation of a vehicle on the factory's premises that contained 25,000 CDs lacking SID codes.

Despite the extended deadlines for compliance, MDTCA officials began inspections of licensed plants in September 2001, and reportedly some 30 inspections have been carried out. While these inspections turned up some instances of noncompliance which the plants were given two weeks to rectify, MDTCA inspectors lack the technical expertise to conduct a full investigation. For instance, inspectors were asked to obtain sample discs from each plant inspected, so that they could be tested in industry forensic labs to see if they could be correlated with pirate product seized overseas. However, MDTCA issued no protocol for the collection of these samples, so the inspectors collected damaged discs in some cases that were not suitable for forensic analysis. Additionally, the inspectors refused to turn over most of the sample discs to industry for analysis, and MDTCA itself lacks the laboratory facilities for conducting the analysis. While Malaysian authorities should be encouraged to step up their program of surprise inspections of all plants licensed under ODA, they must also exercise the authority ODA provides to require (as a condition of licensure) that plants provide sample discs at regular intervals, and to share these discs (and those collected during inspections) with industry investigators for forensic analysis. Indeed, including industry experts on the inspection teams would greatly facilitate the sample collection process. If

⁹ Suffian, "Dec. 15 Deadline for Zip [sic] Codes on Discs," *New Straits Times*, Sept. 6, 2001, at 6.

such inclusion is not already authorized by the ODA or its implementing regulations, then appropriate regulatory changes should be made as soon as possible.

Recently, MDTCA announced that it would station enforcement officers within the plants themselves for an indefinite period.¹⁰ While this move could help to reduce noncompliance with license obligations, it is no substitute for devoting a sufficient number of well-trained inspectors to ODA enforcement and directing them to cooperate closely with industry enforcement experts in conducting inspections and analyzing the results.

The optical media production plants currently licensed include some 109 production lines. This is far more than can possibly be devoted to the legitimate production of optical media products for the domestic market or for licensed export. Not only does this counsel vigilance to prevent the licensed production capacity from being diverted to piratical purposes, it also dictates that no further licenses should be issued. Malaysian authorities have candidly acknowledged this well documented problem of overcapacity, and have apparently issued no further licenses since last summer. This policy should be formalized, and any pending license applications should be denied. The concern is particularly acute with respect to DVD production capacity. Despite an almost total lack of legitimate production orders for this format in Malaysia, five DVD production lines have reportedly been licensed, and applications are reportedly pending for an additional 10 or so production lines. These applications should be rejected forthwith.

It is still far too early to determine whether the Optical Disc Act will realize its potential in the fight against optical media piracy in Malaysia. As described below, Malaysian authorities have moved swiftly against unlicensed plants in the first few months after the application deadline passed; such enforcement efforts must be sustained. With regard to licensed plants, the enforcement record so far is less encouraging, as described below, but enforcement under the ODA itself has not yet begun. 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

Even before the Optical Disc Act takes full effect, Malaysian authorities continue to use other laws to conduct raids against pirate optical media plants. The level of raiding activity in 2001 did not equal the track record of 2000, but did include at least five significant operations. In most of the 2001 raids, MDTCA and/or police officials not only confiscated pirate product, but seized and removed equipment and replication lines. This newly adopted enforcement tactic deserves particular commendation, since depriving pirate syndicates of the use of their production equipment is a powerful tool in discouraging them from further operations in Malaysia. In this regard, the July 5, 2001 raid conducted by censorship authorities against a facility in Batu Caves, Selangor, stands out as a disturbing exception. Although some 4,000 pirate VCDs were confiscated (including 450 copies of the current hit, "Pearl Harbor"), no arrests were made, no equipment was seized, and the plant is reported to be in full operation again. Furthermore, although the raided plant reportedly had been issued a license under the ODA, authorities have never responded to industry calls for the license to be revoked or suspended. This case demonstrates ongoing problems of lack of coordination among enforcement agencies in Malaysia.

¹⁰ "Enforcement officers at CD factories to wipe out piracy," The Star Online, January 28, 2002.

The fruits of these raids underscore the scope of the optical media piracy problem. In most of these factory raids, authorities seized not only pirate product, but also “stampers,” the masters from which tens of thousands of further unauthorized copies can be produced, either at the same plant or at another facility overseas. A plant raided in Serendah on March 28, 2001 turned out to be a new facility that had been in operation only three months, and whose capacity was in the process of being expanded. This evidence contradicts the reports that pirate syndicates are beginning to abandon Malaysia in favor of other, more compliant territories.

MDTCA should be commended for carrying out these factory raids and making these seizures, and such enforcement efforts should be continued and stepped up. But the ultimate effectiveness of these efforts remains to be seen; surely they have not yet put much of a dent in the prevalence of pirate product in the Malaysian market or in the thriving pirate export trade. MDTCA seems to regard a raid as the culmination of an investigation, and rarely follows up on any investigative leads identified during raids. This reluctance virtually guarantees that if anyone is held responsible for the operations of pirate optical media 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.

Enforcement Resources Must Be Augmented

The preceding narrative re-emphasizes that Malaysian enforcement authorities, particularly within the MDTCA, are ready, willing, and able participants in the fight against optical media piracy. In 2001, as in 2000, MDTCA officials at all levels remained actively engaged in anti-piracy activities, and generally responsive to the concerns of industry regarding strategy and tactics in this effort. However, it has become increasingly clear that MDTCA, as presently organized, lacks the resources and manpower to carry out the kind of sustained and intensive anti-piracy operations that are needed to bring fundamental change to the piracy picture in Malaysia. This shortfall is becoming increasingly acute as MDTCA takes on critical new licensing and inspection responsibilities under the ODA, while continuing to shoulder the bulk of enforcement responsibilities. If Malaysia is to succeed in turning the corner in the fight against optical media piracy, MDTCA needs more help than it is now getting.

There are 720 MDTCA enforcement officers nationwide. Anti-piracy enforcement is only one of their many responsibilities, which include the enforcement of a number of labeling, weights and measures, and other consumer protection statutes. Thus, at holiday seasons when there is a particularly rich environment of retail piracy targets, MDTCA agents are often engaged in other duties. Consequently, copyright enforcement tends to be sporadic rather than sustained. The decision to station MDTCA officers at each licensed optical media production facility is a further stress on the enforcement agency's resources. There is evidence that the manpower devoted to anti-piracy activities, at least on the retail level, is declining. For instance, in the past, two MDTCA officers were permanently assigned to respond to requests for anti-piracy raids from the recording industry. Now these two officers are available only twice a week. The ability to move promptly against pirates is compromised accordingly. Some other copyright industry sectors have even less access to MDTCA enforcement resources. Unfortunately, other enforcement agencies such as the police, censorship authorities and local governments also appear to be reducing their manpower commitments to anti-piracy enforcement.

A number of solutions to this enforcement shortfall deserve serious consideration. First, MDTCA should establish an enforcement team of officers dedicated exclusively to copyright piracy and ODA matters, as it has long done for other statutes under its enforcement jurisdiction. Second, as the demands on MDTCA under the ODA increase, other agencies must shoulder more of the anti-piracy load. Besides national enforcement agencies, reliable and experienced local authorities should be given joint responsibility and tasked to handle more of the retail level enforcement operations. National enforcement agencies should be encouraged to carry out operations on a cross-border basis to minimize the risk of corruption and local favoritism. Third, as discussed below, MDTCA should be relieved of some of the burden of prosecuting piracy cases, in favor of better qualified prosecutors from the Attorney General's Chambers. Finally, it seems obvious that MDTCA simply needs more and better trained manpower in order for it to achieve more significant results in the fight against copyright piracy.

One initiative which MDTCA has supported over the years is the campaign against end user piracy of business software applications. BSA works closely with the MDTCA enforcement division, and jointly carried out five successful raids against corporate end-user pirates in Kuala Lumpur, Penang and Kuching in 2001. The MDTCA has cooperated closely with industry, maintains good lines of communication with the private sector, and has consistently demonstrated a willingness to seek the industry's views. In 2001, building on the successful Crackdown 2000 campaign, this cooperation resulted in a successful anti-piracy awareness and software legalization campaign in Penang, which included the sending of about 30,000 general warning letters from the MDTCA Enforcement Division and the delivery of 130 specific warning notices to companies, in addition to MDTCA newspaper advertisements, and random checks of offices nationwide. Nevertheless, MDTCA assistance simply scratches the surface of the widespread problem of end-user business software piracy. The Malaysian government needs to recognize its responsibility to allocate sufficient resources to MDTCA for this critical enforcement task. MDTCA must also be more proactive in undertaking enforcement against high profile company directors for end-user piracy within their organizations. There also needs to be an increased focus on end-user software piracy through awareness campaigns to supplement enforcement activities.

Despite these shortcomings, in tackling the problem of end-user business software piracy, the Malaysian government has shown over the years that it is willing to devote resources to joint industry-government programs, and has achieved some positive results. By contrast, in the campaign against the production, distribution and export of pirate optical media products, there is a growing mismatch between the responsibilities allocated to MDTCA and the resources and manpower available to it to fulfill these responsibilities. This mismatch must be corrected as soon as possible.

Bottlenecks in the Criminal Justice System Must Be Addressed Now

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 of an impact on Malaysia's pervasive optical media piracy problem. The main reason for this failure is that raiding has almost never been followed up by active prosecutions, much less with the imposition of deterrent penalties on violators. This is the fundamental flaw in Malaysia's anti-piracy effort, compromising all its progress on other fronts, and Malaysian authorities have barely begun to address it.

The disheartening statistics mirror those reported in prior years. In some respects they are worsening. In 2000, MDTCA asked the recording industry to submit documentation in 67% of the cases arising from raids, indicating that criminal charges were under consideration in those 94 cases. In the first nine months of 2001, documentation was requested in 177 cases, but this represented only 62% of the 284 raids carried out. More disturbingly, prosecutions were actually initiated in only four of these 284 MDTCA cases. In the 31 raids carried out by the police, not a single criminal prosecution had been initiated as of September 20, 2001. While these statistics may not account for all cases – some could have been disposed of with nominal fines under labeling laws before industry documentation was even requested – they are fully consistent with the longer term trends. Indeed, of 400 music piracy cases under consideration for prosecution since 1997, only 20 resulted in charges and only four of these have been concluded. The number of piracy convictions over the past decade can be counted on the fingers of one hand. Again, there may have been guilty pleas and nominal fines in some additional cases, but enforcement officials do not keep right holders apprised of case progress and the status of many prosecutions is simply unknown. MPAA's report is similar, if slightly more encouraging; only four of the 28 raids it initiated in 2001 have been brought to court.

Retail pirates have come to rely on the endemic delays in the Malaysian courts. In the overwhelming majority of cases, vendors remain free to ply their trade for many months before being called to court. Any contested case routinely takes at least three years to come to trial. 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.

Unfortunately, even in more consequential cases, 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. The verdict rendered in June 2001 in a case arising from one of the early raids on a pirate optical media plant – in December 1997 – exemplifies the problem. In this high profile case, 2,500 pirate CDs and VCDs were seized on the premises of Hong Kong CD Industries in Selangor. Three and one-half years later, the defendant's sentence was based on 300 pirate music CDs and 700 illegal VCDs. For these 1000 illegal copies, the fine imposed was only RM 100,000 (US\$26,300). Additionally, all seized machinery was returned to the defendant so that the pirate plant could resume operation. No one was sent to jail. While the government did appeal for a tougher sentence (that appeal is still pending), the outcome in the trial court falls far short of deterrence.¹¹

At least the Hong Kong CD case ultimately was concluded. That cannot be said about the vast majority of the most serious cases, those arising from raids against illegal CD plants. None of the raids that have occurred since March 2001 has yet resulted in the filing of any charges.¹²

¹¹ As noted above, Hong Kong CD was also issued a production license under the ODA despite the pendency of this prosecution.

¹² Nor has any prosecution resulted from the March 2001 raid, described above, on the massive CD-R production facilities outside the capital.

Indeed, cases arising from factory raids that took place in 1998 have not yet come to trial. In many of these cases, production equipment seized at the time of the raid has been returned, and, as noted above, at least two of these defendants were issued licenses under the ODA to produce optical media products, even though the piracy cases against them remain pending.

Bottlenecks plague the entire criminal justice process in Malaysia. After a raid is carried out, MDTCA investigators or police 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.

The processing path for piracy cases in Malaysia is bifurcated, depending upon whether the police or MDTCA conducted the raid giving rise to the charges. The MDTCA pathway is hopelessly backlogged. An internal directive gives state offices of the MDTCA 21 days to present the case to the Attorney General's Chambers for consent to proceed with a prosecution. This deadline is almost never met. Even in cases in which this consent is obtained, the case is then turned over to a MDTCA prosecuting officer. These officials are not legally trained; in some cases they are simply investigating officers or office administrators who have been assigned to this duty. MDTCA prosecuting officers generally lack the skills to handle complex legal questions, a fact that is well known to defendants and their counsel. Accordingly, MDTCA officers are under considerable pressure to resolve piracy cases under price control or labeling statutes, which avoids complex legal issues but which results in purely nominal penalties. Cases originated by the police may fare better because they are handled by prosecutors in the Attorney-General's Chambers who have law degrees. Even here, long delays are the norm, and only a tiny minority of cases (3 out of 64, by the recording industry's reckoning, between January 2000 and September 2001) result in formal charges.

Any case that survives this gauntlet, and which can weather a succession of additional delays in the judicial process, is ultimately brought before a court which is almost always unfamiliar with the copyright law. Here the MDTCA-prosecuted cases are once again disadvantaged. For example, under a recent amendment to Section 42 of the Copyright Act, prosecutors may employ an affidavit procedure to prove the subsistence and ownership of copyright in a piracy case, thus dispensing with the need for live testimony and cross-examination on this generally indisputable issue. However, many judges ignore the statute and allow defendants to insist on live testimony and cross-examination of the party submitting the affidavit, thus defeating the purpose of the amendment. Untrained MDTCA prosecutors are in no position to stop this manhandling of the copyright law. Nor are they effective in persuading judges of the need to impose deterrent sentences, even in the handful of cases which actually proceed to that stage. Finally, cases prosecuted by MDTCA are almost never appealed because the prosecuting officers lack the expertise to do so.

None of these problems is at all new, but the Malaysian government's failure to address them can no longer be tolerated when it puts at risk the future of the entire campaign against optical media piracy. Nor is it impossible for the Malaysian court system to surmount them; indeed, there are some isolated examples to the contrary. For instance, in the only prosecution to date arising from a factory raid carried out during 2001, the charges involving the Pyramic Point plant in Penang were filed on March 23, one day after completed documentation was received from the Motion Picture Association, and less than two months after the raid occurred. The case was then processed efficiently at the trial level and an appeal was promptly docketed and is

scheduled to be heard in February 2002. Malaysian authorities should strive to make such prompt processing the norm and not the (rare) exception.

Bottlenecks in BSA cases are also a problem. No end-user business software piracy case arising in the past five years has been successfully resolved in the Malaysian courts other than by a plea of guilty. The lack of competent and well trained prosecutors exposes these cases to delays. Nevertheless, there have also been some bright spots. Well trained prosecutors are being assigned to more end-user software piracy cases. In one particular end user case dating back to a raid in 1997, the MDTCA has actively pursued the prosecution with prosecutors trained by BSA. The case, which began in 2001, is still in the courts though a result is anticipated by this summer. In addition, in May 2001 a Malaysian court handed down the toughest sentence yet in an end-user software piracy case, including a fine amounting to RM5000 (US\$1300) per infringing copy. Still, BSA cases are far from immune to the delays and other problems plaguing other piracy cases. Prosecutions remain pending in 8 of 10 corporate end user piracy cases brought in 2000–2001. One of the cases disposed of this year was initiated in 1995, and resulted in a fine of only RM500 (US\$130) per infringing copy. Another pending case from 1997 is still unresolved, and in cases arising from raids as long ago as 1998, formal charges have not yet been filed. The pending criminal case against a company director for end-user business software infringements occurring in the company has not yet been resolved.

Clearly the systemic problems plaguing the Malaysian prosecutorial and court systems call for a systemic solution. IIPA calls for immediate adoption of at least the following reforms:

- A specialized unit of qualified and trained Public Prosecutors within the Attorney General's Chambers should handle all copyright piracy cases, or at least all those involving production, wholesaling, warehousing, or high-volume retailing of pirate optical media product, or corporate end-user piracy of business software. This unit should be assigned all such cases, whether arising from MDTCA or police raids.
- Both MDTCA and the Attorney General should issue directives to their respective prosecution teams requiring all copyright piracy cases to be filed in court within four weeks of the receipt of complete documentation from rights owners. Prosecution teams should be held accountable for failure to meet this deadline.
- A directive should be issued to the specialized copyright prosecuting unit, requiring them to bring section 42 procedures to the attention of all courts, and to appeal all cases in which courts require live testimony or permit cross-examination of deponents where the subsistence or ownership of copyright is not genuinely in issue.
- Prosecutors should be further instructed to appeal any case in which insufficient penalties have been imposed. The instruction should contain a numerical guideline for different types of piracy cases, which at a minimum should be set at RM 5000 per infringing copy in cases involving unlawful production of optical media products, as well as a jail term of less than six months in such cases.
- Company directors should be charged as a matter of course for end-user business software piracy within their organizations. Prosecutors should be instructed to seek sentences of imprisonment in such cases and to appeal them when such sentences are not imposed.
- Immediate consideration should be given to establishing a specialized intellectual property court, or otherwise ensuring that significant piracy cases are assigned only

to judges who are properly trained and experienced in handling such cases. Malaysia's ASEAN neighbor Thailand has had considerable success in using a specialized court to resolve seemingly intractable problems similar to those Malaysia has long experienced, including huge case backlogs. This model, among others, should be studied to see how it could most expeditiously be adapted for the Malaysian legal environment.

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 and 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. Corporate end-user software piracy must be prosecuted and punished with similar efficiency and deterrent effect in order to make significant progress against this problem as well. The quantity and quality of prosecutions of optical media pirates and corporate end-use pirates of business software, measured by these criteria, should be the predominant factor in Malaysia's ultimate placement in the Special 301 hierarchy.¹³ The concrete steps outlined above must be put in place promptly as a token of Malaysia's commitment to solve this problem.

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 and the arrest of leading pirate exporters 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. 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.

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

¹³ The problems of judicial bottlenecks and the absence of deterrent sentencing have also undermined enforcement against book pirates, as discussed below, and similar solutions are required in order to make progress in this sector.

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.

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. No new book piracy convictions were reported in 2001, and the results obtained in the previous year (in cases arising from raids in 1996) fell far short of the level of penalties needed to deter a pirate commercial photocopying operation. 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. In those cases that do result in prosecutions, courts should permit the introduction of a photo-ready copy of a pirated book, rather than the original book itself, as evidence in infringement cases, and should avoid unnecessary demands for testimony to prove copyright ownership and subsistence when those questions are not genuinely put in issue.

Unfortunately, Malaysian enforcement authorities have not been as responsive to enforcement requests from publishers as they have been in the optical media environment. In the only raid carried out in 2001 against illegal copy shops, MDTCA officers raided only six of the 12 targets identified by industry investigators. However, they did confiscate photocopying equipment used for piratical purposes.

AAP estimates that book piracy in Malaysia accounted for \$8.2 million of losses to U.S. publishers in 2001.

COPYRIGHT LAW REFORM

Spurred by a desire to enhance the attractiveness of its Multimedia Supercorridor to high-tech investments, Malaysia took a number of steps in the late 1990s toward updating its copyright laws to meet the challenges of the Internet era; but since then, its modernization efforts seem to have stalled. 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 treaty 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 play a leadership role in the global electronic marketplace, 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. These goals are especially urgent now that the WCT and WPPT are coming into force and thus are assuming the status of international minimum standards for the e-commerce environment.

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. To solve this problem, Malaysia should consider amending the law to provide minimum sentencing levels. Any alternative means of achieving this objective, such as through the issuance of enforceable sentencing guidelines, should also be explored.

Legislation enacted in 2000 removed one legal roadblock in the path of effective prosecutions against copyright piracy. As noted above, 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; however, in those rare instances in which it has been tested in an actual prosecution, some judges have ignored it. A case in which Section 42 was properly applied by the trial court to ease the documentary and testimonial burden of proving an infringement case involving an Indian film is now before the High Court on appeal. The outcome of that appeal, expected this year, could determine whether it is necessary to enact a further amendment to achieve the purpose of the 2000 legislation.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

PERU

EXECUTIVE SUMMARY

Effective enforcement – on both the administrative and the criminal levels – remains the copyright industries' primary concern in Peru. Positive progress continues with Peru's administrative agency, INDECOPI, for those few copyright industries which use this agency as an enforcement mechanism. However, Peru must improve its efforts and results in criminal enforcement. More police actions are needed, prosecutors must actively pursue piracy cases, and judges must impose deterrent sentences in order for Peru to meet its bilateral and multilateral copyright obligations. Some copyright pirates have received sentences with a jail term of two years, but all have been suspended (which happens with prison sentences of less than four years). Peru also needs to improve its border controls.

Peru has deposited its instrument of accession to the WIPO Copyright Treaty, but ratification of the WIPO Performances and Phonograms Treaty has not yet been achieved. The WPPT is a key element in establishing an adequate legal framework for the protection of sound recordings in a digital environment, and Peru should immediately ratify the WPPT. For the recording industry, the proportion of the Peru's market for pirated audio products – 95% – rivals countries like China and Paraguay. Estimated trade losses due to piracy of U.S. copyrighted materials in Peru was \$84 million in 2001. IIPA recommends that Peru stay on the Special 301 Watch List in 2002 and requests continued, aggressive bilateral engagement on copyright issues.

PERU: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	4.0	50%	4.0	75%	4.0	65%	4.0	50%	5.0	60%	4.0	60%
Sound Recordings / Musical Compositions	57.8	97%	55.0	96%	50.0	85%	50.0	85%	40.0	80%	NA	NA
Business Software Applications ¹	13.5	59%	12.6	61%	22.2	63%	30.5	64%	25.0	66%	29.4	79%
Entertainment Software	NA	NA	3.8	70%	NA	NA	NA	NA	5.2	NA	NA	NA
Books	9.0	NA	9.5	NA	10.0	NA	10.0	NA	10.0	NA	10.0	NA
TOTALS	84.3		84.9		86.2		94.5		85.2		43.4	

¹ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$21.5 million at 61% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

BILATERAL COPYRIGHT ISSUES WITH 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, and particularly difficulties related to obtaining effective criminal, administrative and border enforcement in that country.² In early 2000, Peru developed a plan of action for IPR issues which led IIPA to withdraw its GSP/ATPA petition on February 7, 2000. In our Special 301 filing last year, IIPA identified several actions to enforce copyright and promote economic development which the Peruvian government could take to implement its general commitment to the U.S. government, including:

- making the anti-piracy problem an issue of national priority;
- dedicating additional resources 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; this will require effective police action, effective prosecutions and the timely issuance of judicial judgments with deterrent sentences;
- having INDECOPI impose deterrent-level penalties in all cases. And in those cases involving the calculation of *derechos devengados* (the rightholder's share of damages), the penalties issued must exceed the value of legitimate copyrighted products infringed;
- improving border enforcement. Customs' efforts at seizing suspicious copyrighted products as well as raw materials used in making those products should be considered a government priority; and
- ensuring that the Peruvian government not infringe the rights of copyright holders in its use of copyrighted products, particularly business software, in its ministries and agencies. The Executive should issue a decree to ensure legal use of business software.

During 2001, willingness by Peruvian officials, particularly at the executive and administrative levels, to address copyright issues continued. However, much more improvement on specific results in enforcement needs to be made. Many of the elements in the five-point plan above have not yet been satisfied. IIPA requests that continued high-level bilateral contacts on these issues continue in 2002, as well as on the critical issue of ensuring that Peru ratifies the WPPT, the companion treaty to the WCT which Peru has already ratified.

COPYRIGHT PIRACY IN PERU

² In 2000, \$45.1 million in Peru's imports to the United States benefited from the GSP program, accounting for nearly 2.3% of its total imports to the U.S. An additional \$846 million of Peruvian products benefited from the Andean Trade Preferences Act (ATPA) in 2000, accounting for 42.6% of total imports to the United States. For the first 11 months of 2001, \$61.7 million of Peruvian goods (or 3.7% of Peru's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 52.2% over the same period last year. In the first 11 months of 2001, an additional \$677.6 million of Peruvian goods entered the U.S. under ATPA, representing a 12.7% decrease 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 2002 Special 301 report.

The recording industry reports that Peru continues to have one of the highest levels of audio piracy in the world – approximately 97%. Pirate audio product in Peru appears in all formats – cassettes, CDs and now mostly CD-Rs (recordable CDs). The legitimate market for sound recordings has virtually disappeared in a sea of piracy. During 2001, the legitimate industry sold only 884,000 units, compared to the 5.6 million units sold in 1987. In 2001, the market decreased by 44 percent from 1.6 millions units sold in 2000. Customs figures indicate that there were more than 10 blank CD-Rs legally imported into the country for every CD sold in the country. In addition, industry investigations show that every week thousands of blank tapes and CD-Rs are smuggled into the country through Tacna in Chile (Iquique-Arica) and then are distributed for illegal duplication around the country. Replication of the music is accomplished locally.

Estimated trade losses due to record piracy in Peru were \$57 million in 2001, reflecting a slight increase over the prior year. Over recent years, many recording companies (at least 10) closed because they could not compete with the overwhelming levels of piracy. In addition, over 350 businesses that 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. APDIF PERU worked with local authorities to perform some raids during 2001, but they proved to be insufficient to deter the increase in music piracy.

Video piracy is the most significant piracy problem in Peru, and is rampant both in video clubs and with street vendors. The Motion Picture Association (MPA) estimates the 2001 video piracy level in Peru at 50%, an improvement over the prior year. Nevertheless, the piracy situation in street markets remain pervasive that thousands of pirate videos are sold in the street market one block away from police headquarters. In addition to street sales, 80% of all video stores, estimated at 800, rent pirate videos. Well organized pirate duplication laboratories and pirate distribution systems supply both video stores and street markets. Cable television piracy by signal theft has become a large problem in Peru, mainly due to the lack of government control over local cable systems. The problem is increasing, since successful pirate cable operators expand their systems into many cities of the province. In Lima and in the rural areas, cable operations use satellite DTH decoders to broadcast premium movie channels without any royalty payment. Estimated trade losses due to motion picture piracy in Peru remain at \$4 million in 2001.

The Business Software Alliance (BSA) reports that illegal duplication of business software within larger Peruvian private sector companies has declined significantly over the past five years, but remains a serious problem inside small and medium-sized organizations. 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, in Lima. Recent investigations have demonstrated that pirates frequently move their production facilities around Galerías Garcilazo and Wilson, so they can evade police raids. The level of illegal use of business software in Peru was 59% in 2001, with estimated losses due to the piracy of U.S. business software placed at \$13.5 million. These stable levels 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.

Book publishers report little change in the piracy problem over the last year. 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. The economic crisis in Peru adversely affected sales of legitimate books over the past two years. Estimated trade losses due to book piracy in Peru dropped slightly to \$9.0 million in 2001.

The Interactive Digital Software Association (IDSA) reports that piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) is widespread in Peru, with estimated piracy levels for entertainment software in the range of 70% (2000). Estimated 2001 trade levels and losses due to videogame piracy are not available.

COPYRIGHT ENFORCEMENT IN PERU

Peru's 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 recording and motion picture industries, prefer to use criminal procedures through the Public Ministry.

In April 2000, many copyright industry associations in Peru joined with several Peruvian governmental entities in establishing a special commission called the Comisión contra la Adulteración, Falsificación y Piratería (CONTRACOPÍA). 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 current 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 property rights initiatives. The commission has introduced 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 the copyright law. Colleagues inform IIPA that they cannot estimate this bill's likelihood of success. CONTRACOPÍA also helped expedite the nomination of the Special Prosecutor. Other than that, it did not take much action in 2001.

INDECOPI restructured its intellectual property division in February 2001; a new leader should be permanently assigned in the coming few months. The business software industry continues to work with INDECOPI effectively on many of its end-user actions. Despite being an effective entity, INDECOPI charges a discriminatory case fee to initiate all software piracy cases, alleging that it needs to finance the fees of the experts that accompany such case. The case fee is twice as high as the one imposed on other copyright industries. Recently, the film industry has begun to work with INDECOPI to conduct raids against operators of illegal cable television systems. However, INDECOPI has proven generally ineffective in enforcement against video piracy as well as other cases involving the production, distribution and sale of pirate materials. The recording industry does not bring administrative enforcement cases in Peru.

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.

More police actions are needed

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.

The piracy problem for the recording industry is severe. For example, 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. 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 was able to conduct 251 raids in 2001, confiscating 2.7 million pirate units. It is important to note that Dr. Maria Jessica Leon Yarango, a prosecutor with the Public Ministry, has been a key player in investigations of all these cases which the recording industry has filed recently, and the record industry wishes to publicly acknowledge her for her efforts in these impossible circumstances. In June 2001, the Peruvian national police, working on information provided by APDIF, raided the El Hueco market and seized more than 1 million CD-Rs, almost 100,000 cassettes, 76,000 jewel boxes, 2 million inlay cards, and over 24,000 pirated music videos. No one was arrested. The case is with the intellectual property special prosecutor unit pending further process. These raids are conducted between 3:00 and 5:00 a.m. to prevent confrontation with market vendors, which limits the potential for arrests of suspects.

In 2001, the BSA commenced eight criminal actions through the Public Prosecutor (Fiscal de Prevención del Delito) against resellers suspected of software piracy. In addition, the police self-initiated 30 raids to reduce piracy in pirate bazaars such as Galerías Garcilazo and Wilson, Lima. Regarding the 2000 and 1999 pending criminal cases, the court issued five decisions, which are currently under appeal. In all five cases, the court sentenced the pirates to two years in prison. However, the prison term was suspended because, under Peruvian law, only prison terms of four years or more are actually imposed.

Prosecutors have been unable to move copyright cases along and judges have issued only few, nondeterrent sentences

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. She seems willing to pursue copyright infringement cases, but is overwhelmed with a large caseload.

On November 28, 2001, the Public Ministry and INDECOPI created a Special IP Prosecutor's Office, and appointed two special prosecutors. It is still early to assess whether these new positions will improve criminal enforcement.

Few criminal cases reach the Peruvian judiciary. Of those that do, judges do not impose deterrent sentences. Most cases result in suspended sentences. No copyright pirate has received deterrent sentences for criminal copyright infringements in Peru, despite the fact that the law contains high levels of penalties.³ Under Article 57 of the Peruvian Criminal Procedures Code, sentences of four years or less are

³ 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

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).

During 2001, the recording industry reports that few arrests were made and the defendants were always released immediately. APDIF Peru opened 251 cases and obtained 4 sentences, all of which were suspended.

The Administrative Enforcement System in Peru Is Starting to Provide Effective, But Limited, Copyright Protection and Enforcement for Certain Kinds of Infringing Activities

The INDECOPI Copyright Office has been relatively effective in investigating business software cases and starting cable television piracy cases in 2001

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.⁴ Requests for administrative inspections have generally been approved 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 2001, BSA commenced 35 end-user administrative actions through INDECOPI and was able to settle most of the cases. Presently, INDECOPI has 18 cases pending decision.

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. To date, there has been no progress made on this case. Copyright holders have experienced some frustration with Peru's customs procedures. Generally, when containers suspected of carrying counterfeit products enter the country, the rightholder can immobilize the shipment. However, before the contents can be verified, the Customs bureau requires the importer to realize a payment for customs clearance. In many cases, the importer will not claim the container or pay for its clearance. Thus, the containers are held at the customs warehouse for weeks (even months) without the rightholder being able to formally verify the legitimacy of the goods, and seize them should they turn out to be pirate products. In addition, 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.

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.

⁴ This also reflects the fact that the defendants in the business software cases are generally otherwise legitimate businesses or establishments that are using unauthorized software, and such cases are substantially distinct from the problems encountered by the audio and audio visual industries—i.e., the commercial manufacture, distribution and sale of piratical materials.

The recording industry does not bring administrative enforcement cases in Peru.

The INDECOPI Tribunal is re-evaluating 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 the past two years, 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 issued 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, the Tribunal’s president has stated that INDECOPI will issue 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 clarifying 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*. 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.

Peruvian Border Measures Must be Improved to Halt Suspect Shipments and to Track Shipments of Copyrighted Products and Materials with Underdeclared Values

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. Authorities must take action on the ground to stop and hold suspect merchandise. First, 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. Second, 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 under declared values.

COPYRIGHT LAW AND RELATED ISSUES

WIPO Treaties

On July 31, 2001, Peru deposited its instrument of accession to the WIPO Copyright Treaty (WCT) with WIPO in Geneva. Unfortunately, the legislation to ratify the WIPO Performances and Phonograms Treaty (WPPT) still has not received legislative approval. Peru's failure to ratify this companion treaty is cause for concern, and Peru should move as quickly as possible during 2002 to cure this anomaly by ratifying the WPPT. IIPA understands that the Executive Branch and the Copyright Office have been supportive of WPPT ratification. Both WIPO treaties provide the basic framework for the transmission of content in e-commerce. Their effective implementation will promote efforts to raise minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials.

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.

Government Software Management

During 2000 and 2001, the BSA and INDECOPI participated in a jointly branded software legalization campaign in Peru, including joint publicity bearing the INDECOPI and BSA logos. After the campaigns ended in July, BSA and INDECOPI continued carrying out joint activities, such as joint educational programs and enforcement actions through the end of the year.

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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

IIPA recommends that Poland remain on the Watch List and that an out-of-cycle review be conducted this year. The lack of effective criminal and civil copyright enforcement in Poland continues to be a major problem for all industries. Cooperation between customs, police and the industries in anti-piracy raids and seizures of infringing goods continued to be positive in 2001 with respect to actions taken in many cities. In this regard, raiding results were encouraging despite the high levels of piracy and the infiltration of organized crime elements. However, few criminal cases reached the sentencing stage and most cases have languished at the investigative or prosecutorial stage. The judiciary also needs to improve its performance, and issue deterrent sentences in an expeditious fashion. All these elements are part of Poland's current TRIPS obligations and its bilateral obligations to the U.S. under the Generalized System of Preferences (GSP) program.

Most disturbingly, there has been no significant progress in the past year on deterring piracy at the Dziesięciolecie Stadium, known as the "Warsaw Stadium." Numerous open stalls sell pirated copyright materials, especially recordings and videogames. While customs officials, along with the police, conduct almost daily raids in the Stadium, business in piracy remains as brisk as ever. The Polish customs officers have documented that Stadium operators announce enforcement raids over the loudspeaker system as the raids occur. Both Polish federal and municipal officials are unwilling to take specific steps to close this Stadium. IIPA and local copyright owners have long advocated that this Stadium should be closed. Pirate optical media continue to enter Poland from Ukraine, Lithuania and more recently Belarus. Poland should regulate the production, distribution and export of optical media. The overall trade losses due to piracy in Poland are estimated at \$236 million in 2001.

On the legislative front, some copyright-related legislation remains unresolved. On a positive note, Poland accomplished a long-sought goal of the copyright industries: adopting amendments in June 2000 to make the Polish copyright law comply with the WTO TRIPS Agreement. However, this 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 second copyright bill containing numerous controversial provisions is legislatively dead, but could be taken up in the near future. Additionally, further clarifications to the law governing *ex parte* civil searches need to be made for this measure to be effective in the fight against piracy. Although at least one application for an *ex parte* civil search was granted in 2001, the procedural delays that are a part of the current implementation of the underlying law entirely detract from the effectiveness of the measure. Ratification of the two WIPO treaties, with passage of copyright law amendments and implementing regulations, are important to the copyright industries.

Given all these concerns with Polish enforcement and legislative issues, IIPA recommends that Poland remain on the Watch List and that an out-of-cycle review be conducted no later than September 2002. In particular, this out-of-cycle review should focus on several elements:

Enforcement

- Immediate closure of the Warsaw Stadium. If the activities in the Stadium should happen to move to other location(s) in Poland, that situation must also be addressed by Polish authorities and falls within the scope of this out-of-cycle review.
- Intensified raids, both in and through the Warsaw Stadium, to halt activities related to the sale and distribution of pirated copyright materials. This goes beyond the quick-hit raids to include measures to crack the organized crime rings controlling the Stadium and its finances and the remove businesses in the Stadium which are not able to provide immediate, tangible authorization from right holders to sell copyrighted products.
- Consistent, every-day actions conducted by the basic units of the police, customs, border guard at street markets and bazaars throughout Poland. These efforts should be directed at eliminating the coordination centers for pirate production and distribution (including smuggling). This effort will require improved cooperation with the relevant authorities of the Ukraine, Belarus, Lithuania, Czech Republic, Germany and Russia.

Legislative-Related

- The special government IPR Task Group (led by the Ministry of Culture) should release its report on IPR protection in Poland as soon as possible. This report (which will include only general recommendations) then needs the approval of the government. The next step should be to develop, swiftly, a detailed plan to outline strategies for the permanent and consistent improvement of IPR rights, including law enforcement, legislation, and training. This plan should contain both short-term actions (e.g., closing down street markets selling pirated products, constant police raiding and seizures) and longer term objectives (judicial reform to speed up the slow court processes in IPR cases).
- Prompt ratification of WIPO treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty).
- Draft legislation to amend the Law on Copyright and Neighboring Rights to implement the obligations of the WIPO treaties and the EU Directives should be released for industry review and comment before legislative introduction.

IIPA suggests that this review be conducted not later than early September 2002. The closure of the Warsaw Stadium should occur on an expedited basis, without delay.

POLAND: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	27%	25.0	25%	25.0	25%	25.0	25%	25.0	25%	30.0	20%
Sound Recordings / Musical Compositions ¹	37.0	30%	31.0	30%	22.0	40%	16.0	40%	9.0	35%	9.0	15%
Business Software Applications ²	55.8	49%	82.7	54%	130.0	60%	113.3	61%	86.1	61%	152.7	73%
Entertainment Software	115.8	90%	103.1	85%	70.9	60%	72.1	62%	68.2	59%	76.4	65%
Books	6.5	NA	7.0	NA	7.5	NA	7.0	NA	13.0	NA	13.0	NA
TOTALS	240.1		238.8		255.4		233.4		201.3		281.1	

COPYRIGHT PIRACY IN POLAND

This section provides an overview of the general market situation with respect to piracy for the copyright industries in Poland, including optical media piracy, internet piracy and the more traditional forms of piracy. The next section addresses the distinct piracy and enforcement problems which afflict the Warsaw Stadium.

Overview of Law Reform and Piracy: The market for legitimate products in Poland, which only a few years ago seemed promising, has been seriously damaged, especially for the music and entertainment (videogame) software industries. In the mid-1990s, some of the obstacles to effective enforcement were found in legal deficiencies in the 1994 Polish copyright law. The June 2000 copyright law amendment 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 also added key enforcement tools. IIPA and its members hoped that the effective implementation of the new copyright law would deter piracy in Poland; so far, that result has not occurred, with the levels of piracy remaining relatively constant for most (not all) industries in 2001.

Training Efforts: The private sector has worked hard to train Polish officials on copyright law and enforcement. 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 organization associated with the MPA); and the Business Software Alliance's (BSA) representative in Poland. This effort was supported by the EU PHARE program. Many successful raids and seizures have been undertaken by cooperation of these organizations and the police. Industry organizations have also undertaken numerous efforts to train Polish enforcement authorities, including police, customs, prosecutors and judges. The motion picture industry, through its local anti-piracy organization FOTA, conducted 15 seminars for police departments as well as judges and prosecutors. The music industry, IFPI Warsaw and ZPAV, held

¹ RIAA's 2000 loss estimate of \$21.0 million reported in IIPA's 2001 Special 301 submission has been revised to \$31.0 million.

² BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$92.6 million at 55% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

18 training seminars for customs officers, customs inspectorates, and border guard units. A December 2001 judicial IPR training program was sponsored by the Ministries of Culture and Justice and co-organized by ZPAV.

There is a need for constant training sessions for policemen, customs and border guard officers, prosecutors, judges in the field of IPR protection and methods of fighting piracy. This activity is very important, especially since there are frequent staff changes in these agencies, and so the training sessions should really be repeated every year. The Polish government should take steps to ensure regular training. In addition, the government should consider developing an educational program of schools (what is copyright, how and why should it be protected, emphasizing that immaterial and material goods should be equally protected, etc). Such knowledge is currently not being provided (and the age group of 13-25 is the largest target group for the sales of music, films, software, computer games, etc.).

IPR Task Force of Government and Industry: There are at least two Polish government groups studying the Stadium. First, a task force established by the November 2000 decree issued by the Prime Minister is led by the Ministry of Culture (in 2000, by the then Minister of Culture and National Heritage in charge). In October 2001, the Ministry returned to its former name of the Ministry of Culture (leaving out the term “of national heritage”). The task force consists of four groups (responsible for analyses, education, legislation and the Stadium). In the fall of 2001, different rights holders organizations (such as ZPAV, FOTA, BSA and ZAiKS) presented the task force with comprehensive reports on the current IPR protection situation in Poland. The “Analyses Group” has been preparing an official government report, and this draft is close to being released. The report apparently only contains general recommendations, not specific, detailed plans which would outline a permanent strategy to improve the problems the report will identify. Second, a regular working group (not a task force *per se*) is coordinating with the Governor of the Mazovian District. Both groups are studying the Stadium issue, and presumably will be able to make a recommendation whether or not to close the Stadium.

Traditional Forms of Piracy Remains Embedded in the Polish Markets

The level of recording and music piracy in Poland in 2001 was 30%, with estimated trade losses amounting to \$37 million. Approximately 90% of all pirate CDs available on the market have been smuggled to Poland through the eastern border; they came from the Ukraine, often via different transit routes (Lithuania, Belarus). Therefore, cooperation with customs is the recording industry’s highest priority. In 2001, 1,001,180 pirate units (carrying musical recordings) were seized by Polish enforcement authorities (police, customs, border guard).

The year 2000 was announced by the President of Customs as the Year of Intellectual Property. ZPAV did not expect overnight changes, but has been encouraged by positive attitudinal changes compounded with concrete anti-piracy activities. The newly appointed President of the Central Board of Customs has officially confirmed that the Polish customs administration will continue to take particular interest in the issues of intellectual property protection. In the last quarter of 2001, assisted by ZPAV and FOTA, the customs office in Warsaw undertook efficient and perfectly organized activities against pirate distribution at the Warsaw Stadium. As a result, in October and November 2001, over 100,000 pirate CDs were seized. The Polish customs regularly organizes local and central seminars for the newly appointed customs officers, focusing on the protection of intellectual property. ZPAV representatives, participate in such seminars, they share their knowledge and present new solutions which, having been discussed with customs and prosecutors’ office representatives might facilitate procedures of IPR protection.

The recording industry continues to report that the Warsaw Stadium remains the biggest point of pirate music CD distribution (wholesale and retail). Other main centers of pirate distribution include: open markets along the Poland-Germany border; electronic markets in Kraków and Wrocław; large used car markets (e.g., in Lublin); open markets in other Polish cities: Poznań, Łódź, Katowice, Szczecin. CD-R piracy and MP3 (recordings in MP3 format fixed on carriers) are still an insignificant phenomenon. Eleven (11) CD plants are operational in Poland (34 lines); eight of them have introduced the SID code, and six have an agreement of cooperation signed with IFPI Warsaw and ZPAV.

The new copyright law (discussed below) provided 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 forwarded to the Polish recording industry group some information on the register and they have been verifying this information and corresponding with companies who have registered their stock. The recording industry has not yet received any information on the results of the program, despite the fact that ZPAV assisted the former Ministry of Culture in the preparation of a database which would allow for an assessment of the actual situation in this field. The good news is that not many pre-1974 recordings are being sold at the retail level.

The entertainment software industry reports that their major problems in Poland are related to the high volume of sales of pirated and counterfeit videogame products at the Warsaw Stadium. The entire "crown" of the Stadium has been taken over by vendors selling pirate videogames and music. The same organized crime syndicate controls the sales of both pirated videogame and music recordings. 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 90% in 2001. This increase is reflected in the significant increase in the estimated trade losses due to this form of piracy, which amounted to \$115.8 million in 2001. IDSA member companies report that the pirated CD-ROMs (silver discs) are coming primarily from Russia and Belarus, with some from Ukraine. For example, pirated copies of videogame software for the PlayStation platform are selling for less than US\$1.00; over 80% of this market is lost to the pirates. Already 20% of the PlayStation2® market is lost to piracy in Poland.

The business software industry reports that piracy levels in Poland remain high for such a developed market, even despite sustained police cooperation in recent years. The good news is that 2001 represented some progress in addressing this situation, as estimated 2001 trade losses due to business software piracy in Poland declined significantly in 2001 to \$55.8 million, with a 49% piracy level. Internet piracy, which has become one of the most significant forms of piracy, was also targeted by prosecutors in 2001. For example, in October 2001, the police raided a reseller that had been distributing illegal software via the Internet through its own Web page. The police seized more than 3500 CD-Rs during this raid and detained four suspects. Moreover, the police obtained a list of 700 customers of the reseller that they have indicated they will use for further investigation of unauthorized users. BSA reports continuing and good co-operation with the Polish police in combating piracy. The police carried out a number of high profile raids on large companies in 2001. For example, in January 2001 the police in co-operation with the BSA conducted a raid on the Proznan branch of a multinational company. The police seized 120 computers and unlicensed software belonging to a number of software manufacturers. The BSA,

also reported increasing and positive activity by Polish prosecutors during 2001. For example, prosecutors began forwarding customer lists found in raids of pirate resellers to the police for investigation. In one city, the prosecutor ordered an investigation of 500 customers of a pirate reseller.

The Motion Picture Association (MPA) has noticed that the number of illegal optical discs has been rising at a dramatic rate, while videocassette piracy remains stable. The economic situation in Poland is such that the majority of the public is not able to afford DVD or personal computers. As such, the market for pirate videocassettes is expected to remain bouyant for several more years. However, the Internet has created a new market for those interested in optical discs and downloads. Furthermore, the crime of signal theft has been increasing as people become aware of the opportunities available through smart card piracy. In response to these technologies, FOTA (the local anti-piracy group) organized 15 seminars in 2001. Most of them were for police departments and law enforcement, but there was also a highly successful presentation to judges and prosecutors dealing with the issues of copyright protection, including EU accession requirements and the Internet.

The motion picture industry reports that video piracy continues to be the most significant form of piracy in Poland, even though it decreased in 2001. Such piracy, primarily involving pre-theatrical 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. These shops also engage in the purchase of newly pirated videos in order to rent them to the public and trade with other video stores. The overall video piracy rate has stabilized at 20-25%. Cross-border video 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 along the Polish-German border. Cable television piracy is estimated to be about 15%. The biggest issues are the illegal retransmission of coded programs and the use of pirated smart cards. MPA reports that the optical disc market for filmed entertainment has been growing in Poland, and there is an optical disc piracy rate of 50%, which as a result, brings the overall video piracy rate up to 27% for 2001. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Poland were estimated to be \$25 million in 2001.

AAP reports that there is photocopying, mostly of journals in universities. There is no detectable full book commercial piracy. As reported in prior years, local publishers and licensees of trade books do enforce their licenses. Estimated trade losses due to book piracy in Poland are placed at \$6.5 million.

Optical Media Piracy in Poland Is Growing

Imports of piratical optical media: Back in 1999, the most pirate CD imports into Poland came from Ukraine, Lithuania and the Czech Republic. These pirated optical media products (CDs, DVDs, and CD-ROMs) include illegal audio, audiovisual, and software (of business applications and entertainment) material. The recording industry reports that huge amounts of music CD imports (amounting to about 85% of the pirated music) still enter Poland mainly from Ukraine, Lithuania and Russia. 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 Polish police and customs regularly seize pirate CD shipments from Ukraine on trains, buses and private cars (suitcase smuggling), which strongly indicates that thousands of pirated optical discs are finding their way onto the Polish markets daily.

More recently, the entertainment software industry reports that almost all PC product was imported from Russia, with smaller amounts from Belarus. 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 two Polish replicators believed to have exported disks into western Europe for distribution in Denmark and Holland. In that case, Polish police, acting upon the request of the BSA and IFPI, raided the replicator near Katowice and Łódź 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. Currently, Polish prosecutors are waiting for a reply to their request for legal assistance issued to the prosecutor's offices in Denmark, the Netherlands and the Czech Republic.

The Motion Picture Association (MPA) reports that many of the optical discs seized have been imported from other countries. However, the introduction of CD burning technology has created a domestic problem, with individuals producing their own discs and distributing them over the Internet. As was the case with counterfeit videocassettes, the production in Poland is diffuse and small scale, and therefore hard to stop. Nevertheless, in 2001, 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.

MPA reports that the optical disc market for filmed entertainment has been growing in Poland. In the last month of 2001, a few illegal DVDs appeared, but the public is primarily interested in VCDs and CD-ROMs containing films. Since only one legal distributor is offering the VCD format, the remaining VCDs found are illegal copies. CD-recordable pirate product is usually copied at home and then sold at bazaars and on the Internet. Their quality differs according to the original source material, but at times can be comparable to VHS quality. MPA's estimate of the optical disc piracy rate in Poland for its products is 50%.

Domestic CD Production in Poland: There are 11 CD plants that are operational in Poland, with 34 operational lines. Eight of these plants have introduced the SID code; six 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. However, in 2001 criminal proceedings were instituted and pending against another two CD plants: Silesia and Pomerania. The Pomerania case was commenced upon the complaint of ZPAV and IFPI for infringing copyright and neighboring rights. Investigations indicate that pirate production in Pomerania took place with the assistance of DOC Data, a German CD plant.

In order to avoid a possible growth of illegal CD production within Poland, steps must be taken to regulate optical disc 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 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.

Internet Piracy in Poland is a New Reality

Piracy over the Internet is beginning to appear in Poland. MPA reports Websites advertising the sale of pirate videocassettes and VCDs; the police and FOTA both find it difficult to identify the owners of such sites because of national data protection legislation. BSA reported that in October 2001, the police raided a reseller that had been distributing illegal software via the Internet through its own Web page. The recording industry (ZPAV) reports that although the number of Websites offering unauthorized MP3 files for download is not very high, a peer-to-peer exchange of music using Kazaa or Grokster software is quite popular in Poland. In 2001, ZPAV undertook the initiative to notify local internet service providers about the infringing material located on their servers. As a result, 31 Websites were taken down and hundreds of files removed upon ZPAV's notice. In general, the ISPs' response is uplifting - in most cases their reaction is prompt and effective. ZPAV closely cooperates with IFPI's Internet Anti-Piracy Unit in the fight against Internet piracy. Furthermore, ZPAV informs the police about any noticed Websites containing lists of tracks in MP3 format offered for further CDR recording of various compilations. The police, an institution authorized to institute proceedings in such cases, focuses on identifying offenders and securing relevant evidence.

THE WARSAW STADIUM – STATE-SANCTIONED PIRACY

In his April 30, 2001 Special 301 announcement, U.S. Trade Representative Robert Zoellick noted, "We look to Poland to improve its enforcement efforts, especially at the Warsaw Stadium..." IIPA and its industry representatives in Poland have long urged the Polish government to address the problems with the Stadium. Incredibly, the Stadium remains in operation, its lease having been renewed by a Polish government entity for the year 2002. The scope of piracy in this Stadium, and the lack of effective deterrence, is a blatant violation of Poland's current TRIPS obligations as well as its bilateral IPR obligations.³

Reports continue to circulate that Poland's problem of optical media and separately, the Warsaw Stadium, are tainted with organized crime involvement. Industry reports do note,

³ Poland participates in the U.S. Generalized System of Preferences (GSP) trade program, which includes a discretionary criterion requiring "adequate and effective protection" for U.S. rights holders. In 2000, \$316.6 million of Poland's imports to the United States benefited from the GSP program, accounting for nearly 30.4% of its total imports. For the first 11 months of 2001, \$264.7 million of Polish goods (or 31% of Poland's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 8.6% from the same period last year.

however, that up until now, there has not been any criminal case conducted that would confirm direct connection between organized crime and controlled distribution at the Stadium. However, the scale of the phenomenon of the Stadium clearly points toward this likely possibility. Unofficial reports from industry sources and police sources confirm the organized crime connection.

Involvement of the Municipal and State Authorities with the Stadium

What makes the continued existence of the Stadium so objectionable is the direct involvement of government entities. Numerous sources (including industry representatives, U.S. officials and a Polish news magazine Wprost) confirm that the Polish State Treasury owns the land on which the Stadium is situated. Specifically, the Central Sports Center leases the land to a private company, DAMIS. Another involved local agency is the administration board of the Warszawa Praga Południe Communities, this group is part of the district which houses the Stadium and purportedly is also a party to the Stadium's lease. The Central Sports Center submitted DAMIS's application for the lease extension to the State Bureau of Sports which was in the Polish Ministry of Education before its reorganization after the November 2001 elections. The State Bureau of Sports is now being liquidated.

IIPA has been informed that the Stadium's lease to DAMIS has been renewed for one-year, through the end of 2002. While industry reports indicate that DAMIS itself will "do its best" to stop the trade of pirate products at the Stadium, DAMIS employees (which serve as security for the Stadium) regularly warn the sellers in the Stadium, by using the loudspeaker system, of actions taken by customs or the police. DAMIS clearly has a financial interest in keeping the Stadium open. In November 2001, ZPAV had submitted to the prosecutor's office 40 crime notifications against pirate CD traders at the Warsaw Stadium. Together with those documents ZPAV filed a motion to consider making the administrator of the Stadium DAMIS, the Central Sports Center and the Praga Południe Communities criminally liable for these crimes as aiders and abettors. All proceedings were discontinued due to the inability to determine the identity of the sellers (despite broad film documentation submitted together with the crime notifications). The issue of possible criminal liability of above mentioned institutions was not considered at all. ZPAV has appealed the decision to discontinue proceedings in all cases.

The Devastating Scope of Piracy in the Stadium

Widespread piracy at the Dziesięciolecie Stadium, located near the center of Warsaw, continues at completely unacceptable levels. The dire and dangerous situation at the Stadium has worsened. Organized crime elements are involved in the distribution of pirated materials, especially pirated optical media product, thus making it impossible for some of the copyright industries to independently take any anti-piracy action because the danger is too high. Some reports indicate that it is becoming so dangerous that individual consumers are afraid to venture into the Stadium to purchase any product.

Much of the distribution of pirated products is at a wholesale level. A Polish news magazine, Wprost, ran a cover story on the Stadium in its June 17, 2001 edition, describing the extent of lawlessness which involves levels of corruption beyond mere piracy and counterfeiting. It is clear that huge volumes of product are sold in the Stadium, generating large amounts of revenue for the local government. Wprost reported that one official from the Praga Poludnie district of Warsaw (where the Stadium is located) estimated that as much as 85% of an annual 11 million zlotys in marketplace fees (or about US\$2.58 million) comes from the Stadium alone.

Meanwhile, Polish police officials estimate that the value of illegal transactions at the stadium is more than 12 billion zlotys annually (about US\$2.8 billion). Also according to Wprost, 30,000 CDs are being sold daily at the Warsaw Stadium (with a total value of approximately US\$85,000), 15,000 discs with software (with a total value of approximately US\$73,000), along with many other pirated and counterfeit products.

The Stadium also serves as a centralized distribution point for pirated optical media material. Pirated optical media products (CDs and CD-ROMs) include illegal audio, software (of business applications and entertainment) and audiovisual material (in CD-R format). Some DVDs have been located at the Stadium recently, but currently they are too expensive for the average consumer.

Let us turn to industry specifics. Huge amounts of pirate music CD imports (amounting to about 85% of the pirated music) come into Poland mainly from Ukraine, Lithuania and Russia. ZPAV has recently obtained information from the Organized Crime Department of the Lithuanian police about the seizure in Vilnius of, among others, 110,000 pirate CDs with Polish repertoire. ZPAV has been representing the Polish recording companies in the current investigation. There has been no decrease in these amounts over the past year. The CDs 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. Because of the large volume of seized goods, the recording industry (ZPAV) pays for warehouse space in Warsaw where the pirated materials seized by the authorities are stored and secured. The industry also pays for the destruction of the pirated goods. Since it takes a long time for the court to issue final decisions, pirate materials have been stored in warehouses for years, even for cases initiated as long ago as 1993.

The recording industry reports that the police and customs regularly seize pirate CD shipments from Ukraine on trains, buses and private cars (suitcase smuggling), which strongly indicate that thousands of pirated optical discs are finding their way onto the Polish markets daily. For example, Polish customs has increased its efforts in late 2001, seizing over 114,000 pirate music CDs at the Stadium during the months of October and November 2001 alone. It is important to note that the recording industry reports that pirate audiocassettes are produced locally in Poland, but this is less than 1% of the product.

The entertainment software industry reports that almost all PC based product is now imported from Russia, with a small amount imported from Belarus. The Interactive Digital Software Association (IDSA) reports that the entire catalogues of some of its videogame publishers member companies can be purchased at the Stadium, and thus this is the most significant source of pirate entertainment software in Poland and surrounding countries. Prices for these CD-ROMs range from less than \$1 (for Playstation1 products) to \$5, and include materials not even released legitimately to the Polish market. The pirates are so sophisticated that pirate videogames have been localized for the Polish consumer by the pirates *before* the legitimate distributor can place legitimate, localized products in the market. Most of the pirate CD videogame product is sold in plastic sleeves, and no manuals are included. Interestingly, usually the local (legal) Polish distributor's names are stripped off the packaging, but the original publisher's name remains. There are also reports that pirate cartridge-based videogames manufactured in China and shipped through Hong Kong continue to be found in Poland. 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 manufacturing and distribution of entertainment software is being undertaken by organized criminal enterprises operating throughout the region.

The business software industry also reports that the Stadium harbors pirated and counterfeit business applications software. The Business Software Alliance (BSA) did not report any progress in 2001 with respect to the Stadium. BSA's criminal cases outside of the Stadium do not involve the gangs and organized crime elements involved in the illicit activities with the Stadium.

The motion picture industry reports that the Stadium only has a few stalls (5 to 10) selling pirated film products (compared to hundreds for the other industries). Part of the reason why the Stadium has less film piracy is that the DVD format has not yet widely penetrated the Polish market, thus the optical media distribution network for this product has not yet fully developed. Another reason is that, because of the language barrier, pirate video product in Poland is locally produced and most of the pirate products available at the Stadium are imported. The last few months of 2001 has shown an increase in the amount of optical discs being offered at the Stadium. The most popular format is CD-ROMs containing films compressed in the DivX format.

MPA received a late-breaking report that on February 13, 2002, a video pirate who had been operating out of the infamous Warsaw Stadium was sentenced to one year in prison. This sentence was not suspended, and it marks the first time that a video pirate has received jail time.

The Copyright Industries Outline Specific Actions Which Will Result in the Closure of the Warsaw Stadium

IIPA and the local copyright industries have advocated that the Polish government (which applied to the former government as well as the new government) take several specific actions to address the economic blight caused by the lawlessness of the Warsaw Stadium. Here is our three-point set of recommendations:

1. Closure: IIPA and local representatives have long advocated that the Stadium be closed. In 2000, the copyright industries hoped that the Stadium lease would not be renewed for the year 2001, but it was renewed. Again, IIPA and our colleagues requested that the Polish government, including its municipal authorities, refuse to renew the lease on the Stadium when it was to expire on December 31, 2001. The lease, however, was renewed. It is important to realize upfront that some Polish officials, along with the private company DAMIS, will not want to close the Stadium, given their financial interests. Local resistance (by both Polish officials as well as Polish community leaders) is a substantial obstacle to achieving this goal. To repeat, both the IPR Task Force (led by the Ministry of Culture) and the group working with the Governor of the Mazovian District are studying this issue of the possible closure of the Stadium issue.

2. Intensified Raids: Second, the Polish government should conduct series of enforcement actions, both in and through the Stadium. This effort would reflect a redoubling of efforts at the Stadium because hundreds of raids have already been run in 2001. It is important to report that Polish customs and police authorities have, in fact, conducted anti-piracy raids at the Stadium, but the scope of the problem is so large that no dent in the levels of piracy has been made. As described above, raids are conducted almost daily, resulting in the seizure of pirated materials. In late 2001, industry reports that Stadium actions are carried out primarily with the Border Guard, General Customs Inspectorate and the Warsaw Customs House, and less often with the Warsaw police. However, police from the Department of Combatting Economic Crime often act independently and undertake almost daily actions. They seize less product and focus more on detaining suspects.

For example, IFPI and its Polish affiliate ZPAV report that in 2001, over 200 criminal cases were instigated in the result of raids at the Stadium, in which 166,095 pirate units had been seized (in that 17,359 CDs with Polish repertoire and 143,280 with international repertoire), all at a value of over US\$1 million. In October and November 2001 alone, due to an increased activity of the Warsaw Customs Office, over 100,000 pirate CDs were seized there. During these raids, infringing merchandise is seized. The suspects involved are detained, most of these were foreigners, of which some 80% were Armenian. Many of these suspects were then deported. However, industry reports that the deported suspects often return to Poland with fake passports and resume their illicit activities.

To be clear, these "enforcement actions" within the Stadium should seek to go several steps *beyond* the quick-hitting raids that have proven ineffective in the past, and should include: (1) measures through organized crime law enforcement officials to crack the organized crime rings controlling the Stadium operations and its finances, and (2) the systematic removal of operations selling pirated products that are unable to provide immediate, tangible authorization from rightsholders to sell products (whether in the form of a license, proof of payment of taxes, etc.). It is important to increase enforcement actions in and through the Stadium *now* so as to catch those involved in the distribution chain immediately, before the Stadium is closed and its activities possibly (likely) relocated to another site in the Warsaw area.

3—Banning the Sale of All Copyrighted Products: Third, the Polish authorities should act immediately to halt the sale of "copyrighted products" in and through the Stadium. This would include the sale of all optical media product (e.g., music CDs, CD-ROMs of videogames and business software, and other CDs containing any copyrighted materials, such as books) as well as other pirated product such as videos and CD-Rs containing filmed entertainment. This also would include conducting inspections of trucks entering and exiting the Stadium, as well as warehouses located around Warsaw. This second element includes halting the sale of all optical media product within the Stadium, and follows naturally from the first element – increasing enforcement actions in the Stadium. The list of products to be included in such stoppage include: music CDs, CD-ROMs of videogames and business software, other CDs full of copyrighted materials (such as books and educational material), and filmed entertainment in both VHS videocassette and CD-R formats. In addition to immediately halting the sale of copyrighted products within the stadium, these efforts should also be expanded to reach commercial-scale illegal activity operating through the stadium (where products might not ultimately be intended for sale within it) by making use of inspections of the overnight flow of trucks into and out of the stadium.

The recording industry believes that the Polish enforcement agencies do not apply measures provided by the law to fight music-related organized crime. Although the actions aim at the seizure of illegal products, so far there is no specific case that would indicate the use of measures to prove activity in the organized criminal groups. This also constitutes one of the reasons of poor coordination of activities conducted by the enforcement. However, a large seizure of pirate CDs in Marki (outskirts of Warsaw) serve as a positive example. On November 9, 2001, Border Guard officers seized 21,600 pirate CDs in a private house. Eight persons (Armenian citizens) were detained. As a result of further proceedings, seven of them underwent deportation procedures. One Armenian was arrested in Poland for the purposes of investigation; recently an indictment has been submitted to court.

COPYRIGHT ENFORCEMENT IN POLAND

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 and lengthy delays in bringing and completing both criminal and civil infringement cases. Obviously the blatant problem of the Warsaw Stadium is a major gap in Poland's enforcement regime.

As discussed above, Polish customs officials and police have been active in 2001, but piracy is getting worse in copyright industries other than business software. 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 penalties in the amended copyright law are generally strong in relation to local market conditions, providing fines of up to US\$175,000 and jail sentences of up to five years. The key is whether they will be imposed in practice by the Polish judiciary. Regarding civil litigation, the BSA reports however, that because civil remedies for copyright infringement are favorable in Poland (at least as a matter of law), most defendants settle cases before they reach judgment in court. None of BSA's civil cases reached judgment in 2001. Please refer to the enforcement charts at the end of this country report for further information regarding enforcement actions in Poland taken in 2000 and 2001.

Polish Police Have Been Active in Raids But Cannot, Alone, Reduce Piracy

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 pirates of copyrighted matter. Moreover, although prosecutors are relatively quick to file cases, few cases progress quickly from the complaint stage to the hearing stage, because of procedural delays. Even when they do, the level of criminal penalties that are applied are 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.

In comparison to the lawlessness in the Stadium, generally positive copyright enforcement efforts outside the Stadium have taken place. The industries generally report that 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 elements in piracy. The Polish police and customs have been undertaking joint operations for some time. For example, ZPAV reports more enforcement success in anti-piracy actions in cities other than Warsaw, such as Wrocław, Kraków, Gorzów Wielkopolski, and key border towns: Biała Podlaska, Przemyśl. During 2001, 1,734 criminal cases were initiated against distributors of pirate sound recordings. A total of 1,028,915 pirate units were seized (e.g. 948,893 CDs, 43,831 audiocassettes, 22,805 MP3 files and 13,386 CD-Rs) with a total value of approximately US\$6.26 million.

The motion picture industry reports that police enforcement initiatives in 2001 continued to improve in the face of heavy piracy. FOTA has worked closely with both the national police in Warsaw and with regional and local police throughout the country. It also coordinates activities

with the national Chief of Police. Cooperation with FOTA's sister anti-piracy operation in Germany (the GVU) and the Polish customs authorities has also increased, especially in the wake of many training seminars FOTA has conducted over the last few years. Police activities against cable networks' operators and people distributing pirate smart cards have been very effective, resulting in 87 cases being filed in 2001. Given the high levels of intellectual property piracy in the country, the Polish government should ensure that adequate resources are committed to enforcing copyright legislation. MPA and FOTA report that 809 raids were conducted in 2001, with 802 criminal cases being filed. These raids resulted in the seizure of over 58,000 VCDs and 16,000 videocassettes. Unfortunately, only 70 cases were resolved by the judicial system during this same time period.

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. The law clearly states that a station can have their right to the retransmission of the broadcast revoked, but there still exists ambiguity over whether the NBC can revoke or reject their registration based upon copyright violations.

BSA reports that, as in years past, they received exceptional support from Polish police, particularly in end-user cases. Polish police raided, either upon BSA or BSA-member request, or *ex officio*, 153 end users. Although a number of the targets were individual end users, there were raids involving multinational companies, joint stock companies, high-tech companies, advertising agencies and private schools. Police also conducted 251 reseller raids. These figures, which are greater than the analogous figures for 2000, indicate greater activity by the police in 2001. Raids on flea markets in Warsaw, Wroclaw and Katowice, and a number of hard-disk loaders were among the raid targets of police during 2001. Overall, the BSA was pleased with the support it received from the police.

IDSA companies report that their local companies have to rely on police enforcement. Company representatives are fearful of direct involvement, citing that the situation there is extremely dangerous. Furthermore, such actions are viewed as quite useless given that the Stadium cannot or will not be shut down by the authorities. Daily raids will not affect the day-to-day business of large-scale pirate operations so long as the Stadium continues to be a viable place for them to operate. As already emphasized in this report, IDSA believes that the closure of the Stadium is vital to stemming rampant piracy in Poland.

Prosecutors and Courts Fail to Impose Deterrent Criminal Penalties

The motion picture industry reports that the sentencing of defendants has been somewhat of a disappointment. The average sum of the fine has not increased over time (usually about US\$50 to US\$150), although the courts have been raising the compensations for the wronged. Polish law allows for distributors to collect damages when a pirate is found guilty. Imprisonment has not generally been used as a deterrent measure, but a court for the first time has detained a person suspected of piracy in jail until the trial begins. Once a case is brought to court, the majority have concluded with guilty judgments. MPA and FOTA report that 809 raids were conducted in 2001, resulting in 802 indictments. Only 59 convictions were handed down, all resulting in suspended jail sentences. 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 . There were 11 cases which ended in acquittals or dismissal of the charges. 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. There are currently over 2,700 FOTA cases still pending in the court system.

MPA and FOTA report that on February 13, 2002, a video pirate who had been operating out of the infamous Warsaw Stadium was sentenced to one year in prison. The man was arrested on November 10, 2000 at the Stadium, where he was selling pirate videocassettes. After he was detained, Polish authorities searched his apartment where they found 23 VCRs and over 400 pirate cassettes. In addition to the one-year sentence (which was not suspended), he also received a fine of approximately \$1,600.

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. The recording industry (ZPAV) reports that about 1,532 cases have been initiated. According to available data, the infringing parties (distributors of pirate products) paid about US\$12,000 in penalties to ZPAV, the injured party.

In late 2001, the recording industry assisted in bringing two criminal prosecutions against two CD plants. The first case is against "Silesia," a company in Wroclaw, for infringement involving both local and international music repertoire, and the second is against "Pomerania" (formerly the "General Group") in Gdansk, on the same charges. It can be said that the head of a well known organized criminal group in Poland was a member of the Board of the General Group.

For business software cases, the BSA in 1999 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 in 2001, but concerns about weak judgments and delays in the legal process remain. From over 150 police raids in 2001, prosecutors have filed approximately 50-60 court indictments, and the BSA is aware of only 11 criminal convictions to date from those cases (less than a 10% ratio of convictions to the number of raids). A number of these 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 judgments, the BSA reports that they usually result in fines of between U.S. \$0 and \$1,000.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	719	106	1870
By Police			1668
By Customs		10	202
Number of cases commenced	704		1870
Number of defendants convicted (including guilty pleas)	44		
Acquittals and Dismissals	25 / 33	7	
Number of Cases Pending	2011	7	data not available
Total number of cases resulting in jail time	0	4	
Suspended Prison Terms	26	3	
Maximum 6 months			data not available
Over 6 months	26		data not available
Over 1 year			
Total Suspended Prison Terms			
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year		10	
Total Prison Terms Served (not suspended)		10	
Number of cases resulting in criminal fines	44		
Up to \$1,000	44		
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied	719		

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	809	153	1734
By Police		153	1509
By Customs		11	225
Number of cases commenced	802	16	1734
Number of defendants convicted (including guilty pleas)	59	126	
Acquittals and Dismissals	11 / 17		
Number of Cases Pending	2726	5	Data not available
Total number of cases resulting in jail time	0	2	
Suspended Prison Terms	40	3	
Maximum 6 months			Data not available
Over 6 months	37		Data not available
Over 1 year	3		
Total Suspended Prison Terms			
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total Prison Terms Served (not suspended)		6	
Number of cases resulting in criminal fines	59	6	
Up to \$1,000	59		
\$1,000 to \$5,000	809		
Over \$5,000			
Total amount of fines levied			

Additional Note on the above criminal chart: This chart does not yet reflect the February 13, 2002 one-year sentence issued in a video piracy case arising out of the Warsaw Stadium.

Additional data from the recording industry (ZPAV) on its cases:

ACTIONS	2000	2001
cases discontinued	222	110
cases with suspended discontinuance	76	37
cases closed with sentences	232	35

* This data applies to all cases pending in those years (regardless of the year they were instigated in).

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. At that time, Polish customs also had 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 of improving 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.

Currently the Central Board of Customs, together with the Department for Intellectual Property Protection, is under liquidation. The issues of IPR protection will be moved to the newly established customs houses, and central co-ordination of anti-piracy activities will be terminated. This solution is not a good one; it would be better to have the section that centrally co-ordinates IPR issues with regard to customs located at the level of the Ministry of Finance.

As mentioned above, customs officials have become more active recently in anti-piracy actions at the Warsaw Stadium, especially with respect to pirated music and entertainment software. In September 2001, the management of the Warsaw customs office has been changed. Since then, the activity of this office at the Warsaw Stadium has significantly improved, according to the recording industry. The problem is that their raids are not effective because the pirates seem to know that they are coming, and they conceal their product. There are reports of pirates leaving the stadium or covering up their illegal materials so that the police cannot search their stands.

In contrast, the BSA did not detect any improvement in stopping trans-border traffic of unlicensed works. Although customs had seemed willing to implement a software management policy within the Main Customs Office during 2000, the general elections that took place at the end of 2001 and their aftermath have halted further progress.

Currently Polish Customs is working to introducing a uniform customs database, a project conducted by the representatives of the British customs. ZPAV believes that one co-ordination center should be retained in order to direct antipiracy actions as well as conduct trainings for newly appointed customs officers.

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 be further clarified so that judges can begin to implement such procedures. The BSA reports that its application for an *ex parte* search was granted in March 2001. However, the procedural delays in obtaining this grant had been so great that the target had been able to legalize its software shortly before the raid. Such procedural delays vitiate the potential of *ex parte* civil searches.

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 last year’s Special 301 filing and as is apparent from year 2001 results, BSA’s experience on the civil front has been limited, not in large part because of the difficulties in obtaining permission to perform *ex parte* searches.

Delays in Both Criminal and Civil Cases Continue

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.

The motion picture industry, led by FOTA, believes the solution 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. Currently FOTA has over 2,700 cases pending in the criminal courts. In 2000, there were over 2,000 cases that were pending at the end of that year. It can take between four and five years for a case to be decided. This problem will continue to grow as anti-piracy organizations become more successful. The more cases that are filed, the greater the backlog. The problems are systemic and can be found throughout the Polish courts, regardless of whether you are dealing with a criminal or civil case. Even if pirates are raided, arrested, and charged, there is no expectation that the court system will resolve their case within the next five years.

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. 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. However, this 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 noncontroversial 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 ultimately will require additional resolution. The second copyright bill contained numerous controversial provisions to which the copyright industries objected. Presently this bill is dead, but could be taken up again in the context of further planned amendments to implement the EU Copyright Directive.

Poland's government has changed dramatically with the elections in October 2001. The special government Task Group (led by the Ministry of Culture) has been preparing an 80-page paper together with the anti-piracy groups in Poland (including ZPAV and FOTA) which is to be presented to the government in February 2002. This paper is very favorable to the issues of rights holders. It is unclear how the new government will react to this paper, but the anti-piracy groups involved with it are pleased with the finished product.

Deficiencies in the 1994 Copyright Act: 1994-2000

A brief review of Poland's copyright law is necessary for context. 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. Poland took its four-year TRIPS transition period, thus most of the TRIPS obligations came into effect on January 1, 2000. 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 the transition. Thus, before the 2000 copyright law amendments, several key features of the Polish IPR regime were not compatible with the TRIPS obligations, specifically:

- the point of attachment for the protection of foreign sound recordings (TRIPS articles 3 and 14) had to be clarified. Poland needed to change its copyright law to include 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. (This 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.
- The law did not appear to permit civil *ex parte* searches, a particularly useful tool used by the software industry (and a TRIPS requirement).

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. 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). However, there were numerous substantive problems and deficiencies in this 1999 legislation.⁴

Poland missed its TRIPS implementation deadline of January 1, 2000 because no such copyright legislation was adopted. At the time, a number of Polish legal 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. Self-execution 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.

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. 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 noncontroversial (TRIPS-related) provisions and the other containing more controversial provisions. Splitting the bill was accomplished in order to ensure more rapid consideration of the noncontroversial elements of

⁴ A litany of these deficiencies was outlined in IIPA's 2001 Special 301 report and is not repeated herein.

this legislation. By the end of February 2000, the Culture Committee agreed to bifurcate the bill, and the noncontroversial copyright bill passed shortly thereafter.

Mostly TRIPS-Complaint Amendments Adopted in June 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 noncontroversial bill. Here is a summary of the key accomplishments of this legislation:

- corrected the longstanding TRIPS retroactivity problem;
- 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;⁵
- permitted *ex officio* actions by Polish authorities;
- 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, and will no doubt have to be revised once the EU implements the treaties;
- A similar situation 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.
- permitted 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 this June 2000 legislation:

- The law 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. The new amendments established more extensive mandatory collective administration, thereby removing the right holders’ choices of how to receive

⁵ 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. The copyright law’s penalties are generally strong in relation to local market conditions, with the levels of fines available reaching up to US\$175,000.

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 in the law. Although there was at least one grant of a civil *ex parte* search request in 2001, because of the delays and difficulties in obtaining a grant, the implementation of civil *ex parte* searches in Poland is deficient vis-à-vis Article 50 of TRIPS.
- No amendments were made to narrow the overbroad exceptions regarding library use and anthologies in the Polish copyright law.

Ratification of the Two WIPO Treaties

Poland should be encouraged to ratify both the two WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). We note that 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. As mentioned above, Poland's 2000 amendments to its copyright law did address some of the WIPO treaties' issues, but further amendments will be required (e.g., in the area of technological protection measures, for example), especially to comply with the new EU directives. Reports from the Ministry of Culture indicate that Poland may be developing a set of draft amendments to the copyright law in the April 2002 timeframe.

Withdrawal of Poland's Reservation to Article 12 of the Rome Convention

Poland currently has taken an exception to Article 12 of the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), 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 its 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.

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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

QATAR

EXECUTIVE SUMMARY

IIPA recommends that Qatar be reported on the Watch List.

Qatar must take steps to address piracy of business software that is causing economic loss to the business software industry. Qatar, in contrast to other Gulf States where the business of piracy has become more difficult, is an attractive haven for software piracy in the region.

Qatar's law still 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 \$4.2 million in 2001.

QATAR: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	0.5	30%	0.5	25%	0.5	30%	1.0	50%	2.0	95%	2.0	99%
Sound Recordings / Musical Compositions ¹	NA	NA	0.2	25%	NA	NA	0.3	27%	0.5	55%	0.5	65%
Business Software Applications ²	3.5	84%	3.0	81%	3.5	80%	1.8	84%	2.1	87%	3.0	91%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	0.2	NA	0.0	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS ³	4.2		3.7		4.0		3.1		4.6		5.5	

¹ This percentage represents the overall piracy level for sound recording and music piracy in Qatar.

² BSA loss numbers and piracy levels for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss and level figures were also reported as preliminary, at \$3.3 million in losses and 79% piracy levels in Qatar. These numbers were finalized in mid-2001, and are reflected above.

³ The loss number in 2001 does not take into account negligible losses to the recording industry, which are not available at this time. In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Qatar were \$4.0 million. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 2), estimated total losses to the U.S. copyright-based industries in Qatar in 2000 are adjusted to \$3.7 million.

PIRACY IN QATAR

Business software piracy is extremely common in Qatar. End-user piracy by both private enterprises and Qatari government entities continues. The government of Qatar is well aware of the need for all its departments, ministries and agencies to purchase licenses for the software that they use. Despite this knowledge, the Qatari government has yet to legalize its software. It is also aware of the need to apply the copyright law against private enterprises that use unlicensed software but has not taken any action whatsoever against known end-user pirates.

Retail piracy of business software also exists on a large scale in Qatar, and the Copyright Bureau has done precious little to address the problem. Since 1998, only two raids have been conducted against business software piracy: one by the Copyright Bureau against a computer store that was illegally loading software on the hard disks of computers sold by the store (so-called “hard-disk loading” piracy) and one by the police against a reseller shop in Doha. Neither of these raids has resulted in any penalties being meted out. There has been no action of any kind against software piracy in 2001. In 2001, bowing to pressure from the industry, the Copyright Bureau agreed to take action against software piracy, whereupon the business software industry provided a list of known end-user and retail pirates in Qatar (similar to a list provided to the Copyright Bureau two years ago, which led to no results). However, no actions were taken against these infringers by the Qatari government and, to the best of our knowledge, no action was taken against any software pirates in Qatar in 2001. Qatar continues to be a safe haven for those dealing in illegal copies of software.

Qatari officials (including those in the Ministry of Commerce (MOC)) need to begin coordinating and conducting raids against retail shops selling pirated software. In addition, the authorities need to confront the problem of end users engaged in the illegal use of business software. Such steps are critical to the establishment of ongoing cooperation with representatives of companies that are selling 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. The business software industry has repeatedly expressed its willingness to help in this regard, but these offers have been rejected by the Copyright Bureau.

The following is a partial list of the kinds of enforcement activities Qatari officials should commence immediately:

- Systematic surprise inspections at least every six months of shops that sell copyright-protected works, including 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 experiences from enforcement officials, who appear to work hard to avoid taking any kind of enforcement action against blatant piracy. The severity of the business software piracy situation in Qatar is well known to the authorities, and the Qatari government could take steps to substantially decrease the

extremely high rate of piracy. However, the government has demonstrated little public will to fight piracy.⁴

One substantial step 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. This process of legalization should be completed at an urgent pace if the Qatari government wishes to demonstrate its seriousness about raising the level of respect for intellectual property rights in Qatar. Such actions would also serve to create a ripe atmosphere for the promotion of the IT industry in Qatar.

The Qatari government must ensure that the Copyright Bureau 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 had begun in Qatar in 2000, and that certain international consultants are reviewing the draft for TRIPS deficiencies. IIPA is not aware of any developments on that front in 2001.

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.

⁴ For example, at a conference sponsored by the World Intellectual Property Organization (WIPO) in Cairo in 2000, the head of the Copyright Bureau opined that any enforcement action against end user software piracy would be a breach of Qatari sovereignty.

- 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.

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 and to fully modernize its copyright law, including taking into account new technologies. 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. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits (as of the date of this filing), and is certain to go into force very soon.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY

The copyright industries continued to confront very high piracy rates and losses in Romania during 2001 because of systemic inaction by government authorities, a pattern that has repeated itself over the past few years. Improvements made to the copyright and criminal laws in the mid-1990s, combined with some cooperation from the police for some industries, still have not been enough to reduce rampant piracy. Overall, Romanian anti-piracy efforts remain woefully underfunded and a low government priority. For several years, the Romanian government has pledged to commit anti-piracy resources to conduct effective enforcement, but those promises have gone unfulfilled. Besides a lack of resources, the absence of clear lines of authority within the government has hampered effective copyright enforcement. IIPA renews its call to the Romanian government to clearly define the organizational responsibilities for copyright enforcement to combat the high piracy rates, and especially the growth of pirate optical media now widely available in the Romanian markets. Romania must meet its long-overdue TRIPS Agreement enforcement obligations and take actions to deter piracy. In addition, Romania should implement the two WIPO digital treaties and correct omissions in the copyright law (in particular, the lack of civil *ex parte* search authority). The motion picture industry continues its opposition to the state-mandated hologram sticker program for its products. As a result of these continuing problems, IIPA recommends that Romania remain on the Watch List in 2002.¹

ROMANIA: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	6.0	65%	6.0	60%	6.0	60%	6.0	50%	10.0	50%	20.0	90%
Sound Recordings / Musical Compositions	14.0	70%	11.0	55%	25.0	85%	20.0	90%	15.0	90%	15.0	85%
Business Software Applications ²	NA	NA	17.1	77%	9.8	81%	17.6	86%	12.4	84%	8.3	86%
Entertainment Software	NA	95%	6.9	91%	NA	NA	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA	NA	NA
TOTALS	22.0		43.0		42.8		45.6		39.4		45.3	

¹ For more details on Romania's Special 301 history, see appendices D and E to this filing.

²BSA loss numbers for 2001 are considered preliminary, and are not available at this time. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates were identified as preliminary. BSA finalized these figures without change in mid-2001.

COPYRIGHT PIRACY

Optical Media: Importation of Piratical Goods and Domestic Production

The copyright industries in Romania are faced with the importation of large quantities of pirate audiocassettes and CDs, videos, and CD-ROMs containing entertainment and business software. Most of this material is produced in and imported from Russia, Ukraine and other neighboring countries. An estimated 60% of the pirate CD material is coming from Ukraine (as inventory from past years piratical production there). Perhaps 15-20% of the pirate market is the result of small CD-R operators. The two main entry points for pirate material are Siret (by truck and train) and Galat-Reni (by boat) along the Danube. It is estimated that 20% of the illegal material enters Romania from the former Yugoslavia, with Russia being an additional source. The Business Software Alliance (BSA) reports that most of the CDs containing illegal business software are copies made in Bucharest of Ukrainian master CDs.

Poor border enforcement, and little or no effective police and prosecutorial activity, have allowed piracy to continue unabated in this manner. Additionally, the law governing the protection of intellectual property under customs provisions is inefficient and ineffective; it cannot properly regulate the transport of pirated material, and does not provide for adequate notification of rights holders regarding searches and seizures.

Last year (2000), for the first time, the recording industry reported production of CDs in Romania, mostly of Rumanian repertoire. However, local pirate CD production is not the main problem in Romania. The Kanami CD plant was issued a SID code and has been using it since last year.

Piracy Levels Remain High Across All Industry Sectors, and Internet Piracy Is Reported

For the motion picture industry (the Motion Picture Association, MPA), the major problems in Romania are still video, broadcast and cable television piracy. The video piracy rate, once 100%, has decreased markedly to approximately 60% in 2001 in the wake of limited legitimate market entry and a series of police actions under the 1996 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. MPA and its local distributors continue to oppose the state-mandated hologram sticker that must be placed on audiovisual works (see discussion below). Cable television is widely available in Romania and inexpensive, at only US\$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, dubbing them into Romanian. Some stations also broadcast pirate videos. MPA notes that there have been some notable successes undertaken against TV piracy in Romania.

The MPA reports that Internet piracy could become a major problem, especially because the Romanian law is silent or unclear on important Internet rights. 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 other markets are transshipped from Ukraine. Romanian law does not forbid parallel importation, so a significant number of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) are 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 US\$6 million in 2001.

The motion picture industry continues to improve its local anti-piracy activities. In 1999, a local anti-piracy organization (ARA) was organized by the motion picture industry (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. Immediately after a February 2000 ARA-MPA sponsored seminar for police, ORDA and Customs officials, several successful raids and seizures took place. In November 2001, ARA was renamed ROACT (Romanian Organization Against Copyright Theft), and elected as its president, Senator Sergiu Nicolaescu, a former chairman of the Senate Cultural Committee and a film director with significant copyright and anti-piracy experience.

The primary problem confronting the recording industry continues to be the flood of illegal material (CDs and cassettes), most of it from Ukraine, that comes into Romania due to poor border enforcement. The recording industry had some 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 was 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 declined from 85% in 1999 to 55% in 2000, and estimated losses also dropped. However, initial optimism at the start of 2001 proved premature. Due to a sharp increase in CD piracy, including CD-R piracy, the overall music piracy level for 2001 rose to an estimated 70%, with U.S. trade losses estimated at \$14 million. The lack of deterrent penalties, the continued dismissal of cases by prosecutors for "lack of social harm" and the absence of a deterrent threat against pirates from the Central Economic Police responsible for IPR crimes were all a step in the wrong direction. In fact, the music pirates in Romania do not feel threatened. And, as in the other industries, the recording industry reports successes at the seizure level, but few prosecutions.

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 in the market. 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 industries are aware of any specific action or pronouncement that the government may have made on this important matter.

With respect to business software, the Business Software Alliance (BSA) reports high levels of piracy among small businesses using 5-10 computers and state-owned companies. Small

businesses justify their piracy as a matter of ignorance of the copyright laws and insufficient funds to pay for legal software. Some state-owned companies apparently continue to use pirated software based on their perception that political cover and immunity from police investigations will shield them. Hard-disk loading for individuals and small company piracy represent major channels of business–software losses in Romania. Regarding Internet-based piracy of business software, one trend in Romania is advertisements online, asking potential end users to request software by sending an e-mail message to an address given in the advertisement. Estimates for 2001 business software piracy losses and piracy levels in Romanian are not yet available.

The Interactive Digital Software Association (IDSA) estimates that piracy levels of entertainment software in Romania rose to 95% of the market in 2001. IDSA reports that pre-recorded CD-ROMs 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, which are transported for sale in Romania due to lax border enforcement there. Reports indicate that Russian organized crime groups ship much of this material. For example, pirate industrial copies (silver) of games for the new PlayStation2® platform already has half (50%) of the Romanian market, with the Far East being the source of this piracy. In addition, there are disk-burning syndicates that produce and distribute material (with the use of advertisements) via the mail in Romania. Some estimates place the CD-R market for burned games (gold discs) at almost 70% of the market. In sum, the entertainment industry is confronted with a moderately good law that is rarely enforced. Estimated U.S. trade losses for videogame piracy in Romania for 2001 are not available.

Piracy of U.S. books, especially textbooks and popular fiction, continues at a moderate level in Romania, amounting to an estimated loss of \$2 million.

COPYRIGHT ENFORCEMENT

In light of the scope of its piracy problem, Romania has not undertaken enough enforcement activity since its new copyright law entered into effect in June 1996. Romania has still not met its TRIPS enforcement obligations two years after the transition period ended (January 1, 2000). This inaction 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 has the appropriate willpower. Right after the copyright law was adopted in 1996, the Romanian government undertook a series of very effective raids directed at audio and video piracy. But that was a phenomenon that lasted only a few months; since then, on-the-ground enforcement has not reached an appropriate level to address the wide scale piracy problem. In addition, effective enforcement is hampered due to prosecutorial indifference and the lack of police resources to pursue large-scale pirate operations.

Hologram Decrees and Mixed Anti-Piracy Results

Two decrees were issued requiring the affixation of holograms to certain copyrighted products. 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. Second, on August 31, 2000, a decree (a so-called "emergency ordinance") was enacted bringing software and audiovisual works under a stickering program. The software industries were able to get amendments passed to make that decree acceptable to them in order to help police act 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 ordinance and the resultant stickering program. (The ordinance was actually initiated by local motion picture representatives, but in an entirely different form). The motion picture industry objects to the program because it is a state-mandated (that is, an 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 territories (such as in 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 went into force on February 1, 2001 (although there are reports it has not been fully implemented yet). ROACT (formerly ARA) continues to fight against the stickering system administered by ORDA (and the Ministry of Culture). Rather than accept a state-organized system, ROACT is now working to amend the emergency ordinance so that it or another nongovernmental organization could manage a voluntary program. It is unclear why the stickering system was forced upon the audiovisual industry. It requires 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. Until the two houses of Parliament (the Senate and Chamber of Deputies) agree to reject the ordinance, it remains applicable under the Romanian Law of Ordinances.

The ordinance, as amended, also introduced new penalties for IPR infringements and 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 can 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.

Although there was some discussion in a Parliamentary commission of extending the mandatory stickering regime to business software, such a measure did not progress in 2001. The BSA remains opposed to extending the stickering regime to business software.

Record producers purchased 16,400,000 holograms in 2001, compared to 15,584,000 in 2000. However, the hologram program did not result in productive monitoring of the production or importation of sound recordings, as was hoped. In fact, as expected, the holograms were placed on illegal products. Holograms were delivered to small companies that pretended to be producing music but, in fact, were engaged in the illegal trafficking of the holograms. There were also reports of counterfeit holograms being used, and legitimate holograms having been stolen. Most of these holograms were found on pirate products. Nevertheless, the recording industry continues to support the use of holograms. But that is only the case if the local industry group, UPFR, can

remain in charge of the administration of the hologram program. IIPA urges the government of Romania to prevent ORDA from seeking any legislative changes that would unrightfully exclude UPFR from the administration of the hologram program; the recording industry initiated this program and must be permitted to continue to administer it.

Criminal Enforcement In Romania Is Abysmally Ineffective

Lack of Clear Lines of Authority, Lack of Resources, Lack of Results

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. For years, provisions have languished that would amend the Copyright Act to add enforcement responsibilities to other agencies in addition to those granted 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. Resource scarcity 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. There are reports that some agencies, such as the Ministry of Finance and the Competition Office (enforcing the 1996 competition law) still conduct isolated anti-piracy actions.

ORDA's working relationship with the police is frustrated by poor communication, a lack of clear authority, and a lack of resources, all of which significantly hinder effective enforcement. In addition, effective enforcement is seriously frustrated by ORDA's attempt, through a proposal of legislative changes, to completely sideline the rightholders' representatives in the area of enforcement. By excluding the rightholders' organizations, ORDA is gravely undermining an enforcement system that is already weak and often ineffective.

The blurred lines of authority within the government have hampered effective enforcement. 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. 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, pending consideration for a number of years, 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" (the administrative decrees, discussed above) that were passed in 2000. Furthermore, ORDA has succeeded in getting amendments adopted that further exclude local copyright industry representatives.

As noted in the IIPA filing last year, 2000 could have 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, ARA (now ROACT) and local U.S. Embassy officials worked together to create a monthly roundtable where copyright issues raised by the music, software, and audiovisual industries, would be brought to the attention of the proper

officials in the Romanian government. This group still meets, but ORDA representatives have not attended recent meetings.

So, 2001 was a disappointing year. ORDA is actively trying to exclude UPFR, the recording industry group from any effective enforcement activity duties. This is especially frustrating because ORDA's own enforcement actions do not compare well with those carried out by the police in cooperation with UPFR. ORDA must not be able to succeed in excluding UPFR from its administration of the hologram program. For 2001, the recording industry reports that its 288 actions with ORDA resulted in the seizure of 11,671 pirate music CDs and 15,059 pirate audiocassettes, resulting in fines amounting to US\$167,000 (5.02 billion ROL). In working with the police, the recording industry reports 3,198 field operations, which resulted in 341 actions.

The business software industry continues to report good relations with Romanian police, but despite police assistance, piracy continues to flourish. The BSA reports that the Romanian police were very active in 2001 in undertaking enforcement actions. Romanian police raided 247 end-users and 55 resellers in 2001, which is about 100 more than the number of raids carried out in 2000. The police seemed a bit more willing to conduct raids on end user companies in 2001. There were at least seven raids on companies with 25 or more computers (in one case, the target had 55 PCs). However, raids on smaller end users were more common, continuing trends in recent years in which it has been suspected that police unwillingness to undertake raids of large end users stems from the political influence wielded by such targets and their owners. Most of the resellers targeted by the police in 2001 were street resellers of CDs containing illegal software. BSA also reports that ORDA was responsive to complaints regarding piracy during 2001; however, ORDA does not have a sufficient number of inspectors to deal with the volume of business software piracy cases.

Few Prosecutions and No Deterrent Sentences

In 2001, the copyright industries (especially the software industry) began to receive some cooperation from the police to conduct raids and seizures of infringing product, but all industries report they had virtually no prosecutorial support even for the few raids and seizures that were conducted. There have still been no reports of any effective (i.e., non-suspended and not for time already served) jail terms imposed to date in Romania for copyright piracy – four years after the new laws were enacted.

The recording industry reports that there have been more cases of criminal prosecutions under the 1996 law than in the past, even though many cases are still dismissed due to a lack of public interest (the “no social harm” threshold). Of the 347 criminal cases involving recording piracy brought in 2001, the police forwarded 287 files to the prosecutors, and the recording industry claimed damages in all of these cases. The prosecutors dropped 132 of these cases. Twenty-two cases reached the court, with penalties ranging from suspended jail sentences to criminal fines.³

³ The breakdown of these 22 recording cases in 2001 is as follows: 4 convictions – 6 months imprisonment, suspended; 1 conviction – 1 year and 6 months imprisonment, suspended; 1 conviction – 1 year imprisonment, suspended and with an appeal filed; 10 convictions – with undetermined criminal fines; 1 acquittal; 3 convictions – with undetermined criminal fine and with an appeal filed; 2 cases still to be tried.

The BSA reports some progress in enforcement by the courts during 2001. Of 302 raids conducted, 280 cases were commenced. There were seven judgments during 2001 involving illegal use of business software; however, most of these are expected to be appealed. In one case that may not be further appealed, the Ploiesti Court of Appeals affirmed a lower court's judgment convicting a reseller for piracy, ordering the reseller to pay a US\$200 criminal fine and to pay damages to the software producers. The case was the first instance of a conviction that was affirmed at two higher levels of the appeals courts. In another case, a group of four end-users were found guilty of, among other things, criminal association and illegal reproduction of software. The sentences imposed were from one year to 1.5 years imprisonment, and were not suspended. However, time already served (while under arrest) was subtracted from the sentences. This case represents the first instance of actual imprisonment in a case involving software piracy in Romania. However the defendants have appealed the judgment. The software industry's experience shows that these judgments, even of minor fines, require a considerable exertion of effort and time to obtain, and 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 18 to 36 months. This lengthy period naturally remains a cause for concern.

In contrast with the progress made by the other industries in criminal actions, MPA reports that there have been no prosecutions or decisions rendered in audiovisual cases in 2001. Last year, the motion picture industry assisted on 151 criminal raids, of which only four cases commenced.

Civil Remedies Still Fail to Provide Effective *Ex Parte* Search Authority

Even though there are civil and administrative remedies available, they are not used in practice. This 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. However, the glaring TRIPS deficiency is the lack of an effective civil *ex parte* remedy.

The BSA confirms that no civil *ex parte* searches were granted in Romania in 2001. There are still no provisions in the copyright act to actually provide for civil *ex parte* search orders in the 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 rights holders 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 permit police (*ex parte*) searches, but these provisions are not used effectively. In order to comply with the TRIPS Agreement, civil *ex parte* search provisions must be made to work effectively, and the police must engage in criminal searches. In order to ensure that the software industry (in particular) can rely on civil, as opposed to criminal, laws to enforce its rights, civil *ex parte* provisions need to be clearly included in Romania's Copyright Act.

With respect to civil damages, BSA reports that in 2001, it did apply for civil damages in conjunction with some criminal cases. Some US\$40,775 was received in either settlements or judgments.

Border Measures Must Be Strengthened

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, because it is far too easy for pirated product, including optical media, to be imported into and exported out of Romania.

At last report, the Romanian government had 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 may 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 IPR smuggling and piracy. The government of Romania must commit more resources to combat this problem effectively.

LEGAL REFORM AND RELATED ISSUES

In 1996, Romania became a member of the World Trade Organization. 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 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).

Romania currently participates in the U.S. Generalized System of Preferences (GSP) program.⁴ 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 as required under that program.

Copyright Act of 1996

The Copyright Act of 1996 strengthened penalties for copyright infringement. The law provides criminal fines ranging from 200,000 Romanian ROL to 10 million ROL (U.S.\$6 to U.S.\$315) 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 and are now too low to effectively deter piracy, particularly by criminal organizations in Romania.

⁴ In 2000, \$77.1 million of Romania's imports to the U.S. benefited from the GSP program, accounting for 16.4% of its total imports to the U.S. For the first 11 months of 2001, \$93.4 million of Romanian goods (or 19% of Romania's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 32.8% increase over the same period last year.

Three actions could stabilize and improve the dearth of prosecutions and deterrent sentences. First, fines should be tied to more stable figures to avoid the effects of hyperinflation. Second, ORDA's exclusive authority to investigate and identify pirate product (Article 142) needs to be interpreted more expansively. ORDA has a small staff (which has been increased to 10 investigators) to cover the whole country; they are not capable of properly handling all investigations. Third, 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, could 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 police with the proper (*ex parte*) search authority, but these searches have not been undertaken as needed.

As mentioned above, there are no express provisions in the copyright act to actually provide for civil *ex parte* search orders in the Romanian law. 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. As noted above, no civil searches were executed in 2001, so they cannot be said to work effectively. There also 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 provision currently requires cinemas to get prior authorization from and to compensate authors of music performed in publicly exhibited films; this is unusual and hinders film distribution in Romania. A second provision unfairly divides performance royalties and will further hurt the film distribution business, and will have an adverse market impact.

WIPO Treaties

Romania officially ratified both of the new digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), by depositing its instruments of ratification with WIPO in February 2001. This was a very positive step. The ratification and eventual implementation of the appropriate laws will protect against Internet and other forms of digital piracy, and encourage e-commerce. Efforts are now underway to make all of the necessary amendments to the laws of Romania to comply with the treaties.

The copyright law does correctly provide 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 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. 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, 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.

On June 8, 2001, the Romanian government and WIPO signed a bilateral “Program of Cooperation” in which WIPO will assist the Romanian government in modernizing its IP system. Among the various actions to be taken, WIPO reported that activities will include “initiatives to upgrade the intellectual property enforcement system in Romania, intensified training in intellectual property, and concrete assistance to combat piracy of music, software, and audiovisual materials.”

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

SAUDI ARABIA

EXECUTIVE SUMMARY¹

IIPA recommends that Saudi Arabia remain on the Watch List.

Despite some signs of progress against piracy in 2001, lack of transparency (and deterrence) in enforcement actions carried out by the government, a TRIPS-incompatible copyright law, and procedural hurdles to judicial enforcement continue to characterize the situation in Saudi Arabia. Raids on retail establishments and on duplication sites and storage areas continued in 2001, and the Saudi government has taken some other positive measures to protect copyright, including largely cleaning up video piracy in Riyadh. The Ministry of Information has also actively carried out raids and implemented the License Certification Program (by which business are required to demonstrate that they use only legal software as a requirement to obtain or keep their business licenses) – a first in the Gulf region; the Ministry is to be commended for having taken such positive steps. Strong efforts have also been made to legalize software usage in the education sector. However, because much unfinished work remains to be done, and because high piracy levels continue to result in damage to U.S. copyright owners, Saudi Arabia should remain on the Watch List.

In 2002, the Saudi authorities should continue work in raiding retail establishments, storage areas and duplication sites replete with piracy, especially in the Eastern and Western Provinces, but must also do more to concentrate on larger points of distribution (including borders), and most importantly, points of production of piracy. While the issuance of regulations in 2000 on the legalization of software usage by companies was an extremely positive step, the Saudi government should take further steps to ensure that its own government entities, as well as the companies covered under the 2000 regulation, use legal software and have put into place adequate software management procedures. To address the transparency problem in Saudi Arabia, IIPA understands that the Saudi authorities are interested in training on data collection and reporting enforcement cases as they proceed. Our industries stand ready to work with the Saudi government to devise reporting and data-keeping strategies, which will be mutually beneficial in fighting piracy. Finally, the Saudi government is well aware of the need to revise its intellectual property laws to bring them into conformity with the TRIPS Agreement prior to WTO accession, and should also take steps to protect copyright in the digital age, by joining (and implementing) the two recent WIPO treaties, the WIPO Copyright Treaty (WCT), which will go into force on March 6, 2002, and the WIPO Performances and Phonograms Treaty (WPPT), which will go into force soon. The Saudi government is commencing a number of initiatives intended to enhance global electronic commerce;² accordingly, it is timely for the Saudi government to,

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

² Press reports indicate that the Kingdom is currently spending over US\$6 billion for the installation of digital lines and expansion of satellite networks, wireless local loop systems and long-haul fiber-optic connections. An additional 116,000 new

likewise, modernize its legal structures to ensure that protection is afforded to content over digital networks. The treaties provide an adequate legal basis for such protection.

U.S. trade losses in Saudi Arabia due to piracy amounted to over \$171.7 million in 2001.

SAUDI ARABIA ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	45%	40.0	65%	40.0	65%	32.0	50%	32.0	50%	41.0	50%
Sound Recordings / Musical Compositions ³	12.0	42%	8.0	55%	12.0	45%*	12.0	45%*	15.0	45%*	17.0	40%*
Business Software Applications ⁴	NA	NA	17.7	62%	31.8	64%	30.9	73%	17.0	74%	28.0	74%
Entertainment Software	115.7	83%	28.0	NA	20.2	59%	21.4	68%	21.3	70%	20.0	64%
Books	14.0	NA	14.0	NA	14.0	NA	9.0	NA	9.0	NA	9.0	NA
TOTALS	171.7		107.7		118.0⁵		105.3		94.3		115.0	

COPYRIGHT PIRACY IN SAUDI ARABIA

Saudi Arabia remains the largest potential market for all of the copyright industries in the Middle East; it also continues to be a market hard hit by copyright piracy. Piracy concerns include the following:

- **Retail Piracy:** Retail piracy of optical media (including audio CDs, CD-ROMs and “home-burned” CD-Rs), audiocassettes, books and photocopied pirate copies, continues to exist at piracy levels that indicate some lack of deterrence and that close the market to legitimate

Internet users, growing at an exceptional rate of 8% per month, are stimulating the demand for the continued modernization and expansion of the Kingdom’s communications infrastructure and equipment. See Javid Hassan, *Efforts under way to develop Riyadh as a major IT center*, Arab News, February 3, 2002, at <http://www.arabnews.com/Article.asp?ID=12526>.

³ The 2001 losses due to piracy of sound recordings are for U.S. repertoire only. The 2000 and 2001 levels of piracy referred to are that for international repertoire (and for overall level of piracy for 1996-1999, as indicated by *). The overall piracy rate in 2000 was 40%.

⁴ BSA loss numbers for 2001 were not available at the time of this report. In IIPA’s February 2001 Special 301 submission, BSA’s 2000 loss and level figures were reported as \$28.8 million and 62%. These numbers were finalized in mid-2001, and are reflected above.

⁵ In IIPA’s 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Saudi Arabia were \$118.8 million. Because of the adjustment to reflect BSA’s final 2000 statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in Saudi Arabia in 2000 are adjusted to \$107.7 million.

products. Copies of pirate (retail) optical media are available in Saudi markets, mainly imported from other parts of the Middle East, Pakistan, as well as Taiwan, Indonesia and Malaysia. Although the Saudi government 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.⁶

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, many burned inside Saudi Arabia, including in homes. 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) which the Ministry of Information does not have the authority to inspect (see discussion below). Audiocassette piracy also remains a major cause of economic harm to the copyright industries in Saudi Arabia, as pirate audiocassettes continue to account for almost all of pirate unit sales.

- **Book Piracy:** 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, as well as from India (of reprints intended solely for the India market, so-called “India only” reprints). Some commercial and (mainly) photocopy piracy of English language and teaching (ELT) materials continued in 2001 in universities. Some of the new higher education institutions (like the College of Petroleum and Minerals in Dahrhan) reportedly are encouraging the use of legitimate books. Journals are bought direct primarily on CD. There is a report that Jeddah University may buy centrally as of 2002.
- **Business Software Piracy:** IIPA noted the proliferation of pirate street vendors in 2000 and 2001, especially in major cities (the main computer-shopping road in Riyadh has tens of street vendors offering the latest software programs at less than 2% of the retail price), hurting business software companies in their ability to do legitimate business in the consumer and small-business markets.
- **Unencrypted Pirated Broadcasts That 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

⁶ Saudi Arabia remains the worst pirate country for console-based videogames in the Gulf region. While the installed base of consoles runs at 80% of the games market, sales are roughly 40% of the market, meaning the other 40% of games supplying the installed base is pirated.

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 very slowly. As of December 2001, it is estimated that the Saudi Government still has approximately 80,000 personal computers set up, many of which run on pirated software. Despite the fact that the country's leadership repeatedly has instructed all government departments and agencies to legalize their use of software, government entities continued to use illegal copies of software with impunity.
- **Business End-User Piracy:** The unauthorized use of software in a business setting (so-called "end-user" piracy) continues in large, medium and small enterprises.
- **Cable Piracy:** Cable piracy remains a problem in the Kingdom, as pirates in housing compounds illegally distribute broadcasts (sometimes accessed through legitimate subscribers) to multiple villas without right holder authorization. The Ministry of Information has recently issued strongly worded letters to the compounds an effort to reduce the level of cable piracy. The Saudi authorities should now follow-up on these warning letters to make sure that they are being complied with and that the illegal rebroadcasting is stopped.

COPYRIGHT ENFORCEMENT IN SAUDI ARABIA

Notwithstanding some overall improvement in enforcement in Saudi Arabia in 2001, there are two abiding problems in enforcement that the government should address in order to make serious inroads into piracy in the Kingdom: lack of deterrent penalties under the current copyright law (since low fines are viewed by the pirates as no more than a cost of doing business), and lack of transparency in copyright cases (and the absence of right holder representatives in court proceedings).

Enforcement Actions Taken in 2001 Show Some Improvements

In 2001, Saudi authorities continued to take raids, mainly against those establishments engaged in retail piracy, but also increasingly against piracy rings using private villas for production and warehouses filled with pirate videocassettes (and other pirate product). In 2002, the Ministry of Information and the police have orchestrated at least 24 raids against private homes and warehouses that served as duplication sites and storage areas for illegal product. These raids resulted in the seizure of over 300,000 illegal cassettes and CDs and hundreds of recording machines. The new focus on private villas and warehouses is very welcome and it is hoped that the authorities will continue their efforts outside Riyadh, and especially in Jeddah and Damman. Administrative remedies are also being meted out, including some shop closures, and there has been greater public attention and media coverage paid to such enforcement actions. These are all positive steps. The Saudi government also began devoting more resources to fight piracy, another positive step. Specifically, the government reportedly created 70 new jobs in the MOI copyright protection department. However, IIPA has heard that these new staff are dispersed across the country, and overall, MOI remains largely under-staffed.

Overall, raids in 2001 on end-user infringers (businesses engaged in the unauthorized use of software), retail establishments engaged in the sale of pirated books, CDs, VCDs, video game software, audiocassettes and videocassettes, computer shops engaged in the sale of pirate software, training centers and Internet cafes, and many video duplication sites (in conjunction with the police), have made inroads against day-to-day piratical operations, moving many of the pirate operations underground.⁷ For example, major entertainment software companies are conducting raids on a weekly basis, seizing thousands of CDs containing mostly videogames in older formats. One raid in 2001 on the Rajehee Building in the Al Bathaa area hit 22 vendors at once, leading to the seizure of 49,000 pirated discs. There have also been some large seizures of illegal CDs through the points of entry into the Kingdom, but, for example, no known seizures of business software titles. During 2001, the Ministry of Information reportedly confiscated 2,618,230 pieces of CD media (including video game software, audio CDs and VCDs) and 579,667 other illegal works (including books, videocassettes and audiocassettes), but IIPA has received no specifics on these seizures in 2001. Such lack of transparency is not conducive to understanding the improvements in the Kingdom, and fails to deter.

For the motion picture industry, the strengthened efforts of law enforcement in 2001 have caused most visible piracy to disappear from retail shops in Riyadh. In addition, the Ministry of Information (MOI) in conjunction with the Ministry of Interior has greatly increased the frequency of raids against numerous private residences and warehouses once used as pirate duplication and storage areas. At least 24 such raids in 2001 netted the seizure of over 300,000 illegal cassettes, numerous pirate CDs, and recording machines. Piracy rates have actually been reduced in the markets where such actions have been taken (sometimes to as low as 25% for video piracy, mainly in Riyadh). The typical fine for a first-time offender is 10,000 riyals (approximately US\$2,667) with a second-time offender usually receiving a fine of 20,000 riyals (approximately US\$5,333). IIPA understands that 26 video stores and 5 audio stores visited by an MOI team of three enforcement officials were closed down during 2001. The recording industry also reports that some raiding has occurred in 2001, including the seizure of tens of thousands of CDs, and that the authorities have been responsive to tips provided about piracy (in one recent example, a tip led authorities to arrest a courier from Pakistan and seize 8,000 pirated CDs).

For the business software industry, the government continues to run raids against resellers (over 50 shops). However, no fines have been imposed against any of the raided targets in 2000 or 2001. The MOI Decisions Committee is a quasi First Instance Court, yet its processes are non-transparent and totally inaccessible.

The motion picture industry continues to rely in part on Saudi Arabia's successful publication

⁷ One press report indicates that, shortly before Ramadan began in 2001, the MOI had come down heavily on "video libraries" in the Eastern Province, closing down one store, imposing heavy fines, and forcing many pirated CD traders at various locations in Al Khobar to close down their shops. The Gulf Center in Al Khobar has now become a hub of illicit trade, although much of it has reportedly gone underground. The *modus operandi* is such now that there are no showrooms and no displays of CDs, but agents hovering around the parking lot of the Gulf Center look for prospective buyers. CDs are stored in the boots of the cars conveniently parked and once a price is settled on, the pirated CDs are handed over to the buyers. One such seller claimed that he earned about SR3,000 (approximately US\$800) in profits in the eight days of the recent Eid holiday. Saeed Haider, *Eid Holidays a Boon for Video Pirates*, Arab News, Dec. 25, at <http://www.arabnews.com/Article.asp?ID=11507>.

approval system to secure limited anti-piracy protection. The system works through the motion picture industry representative's submission of authorized licensee certificates to the Director General of Publications (DGOP), which works with the MOI to halt the distribution of unapproved titles. These certificates raise the presumption of copyright ownership and distribution authorization for authorized licensees, and heighten requirements for others attempting to obtain approval to distribute the titles involved.

Successful Ministry of Information Decree to Require Legitimate Software Usage by Businesses Should Be Expanded

In 2000, the Ministry of Information issued a decree (establishing the License Certification Program) obliging all media companies and MOI contractors to prove that they use only legal software in order to renew their business licenses or win contracts with the Ministry. The Ministry also conducted a nation-wide campaign in 2000 and again in 2001, sending letters to end-users all over Saudi Arabia, announcing the decree and urging them to ensure that all software used is legal. MOI then proceeded to carry out inspections against several enterprises that did not respond positively to these letters. 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 now encourage the Saudi government to expand this excellent program to other industry sectors.

In addition, several conferences have addressed the topic of software piracy, including the participation of several government and private sector companies. In April 2001, the MOI issued warnings in the press regarding anyone selling illegal product at the COMDEX show in Jeddah. The MOI said they would have inspectors available at the show, that companies should be prepared to prove that all goods for sale are legal, and that there are no incidents involving the unauthorized loading of hard disks on computers. Several stalls were closed in 2001. Notwithstanding these positive efforts of the Ministry of Information in Saudi, it remains unlikely that the overall piracy situation will change until deterrent judgments are meted out regularly against pirates. Also, it should be noted that the police/Ministry of Interior did not take a single action against software piracy in 2001. This is a situation that desperately needs to be addressed in 2002.

Lack of Transparency in Enforcement and Court Cases

The enforcement system in Saudi Arabia continues to suffer from a general lack of transparency regarding the running of raids, raid results, and the handling of court cases. The reporting system in Saudi Arabia used to provide right holders with only aggregate data on fines (but even that cursory report has not been forthcoming of late), but regular publicizing of sentences and fines does not occur. As a consequence, raids/fines lose their value as a deterrent, as pirate retailers have no fear that they will be singled out if caught.

After providing "intelligence" on raid targets, right holders still find it extremely difficult to get confirmation that an action has been taken. Such lack of transparency is counterproductive, since right holders are often in the best position to assist authorities in various aspects of the raid, for example,

identifying their members' product, and identifying indicia of illegality. Once raids have been taken, the industries do not generally learn about the results in individual raids. The MOI apparently considers the publication of specific violations and penalties as an additional sanction. To address the transparency problem in Saudi Arabia, IIPA understands that the Saudi authorities are interested in data collection and reporting mechanisms for enforcement cases as they proceed, from the raid. Our industries stand ready to work with the Saudi government to devise reporting and data-keeping strategies, which will be mutually beneficial in fighting piracy.

Most cases in which a raid has occurred never end up in the courts in Saudi Arabia, but are subject to an administrative proceeding at the MOI. In such proceedings, the MOI will generally serve notice to the raided shop of a violation of the copyright law, and a case is prepared before an MOI committee that acts as an administrative tribunal, the procedures and decisions of which are kept secret. Copyright owners sometimes learn that a store has been fined after the fact, but only the store itself knows the size of the fine. There is no case information given and no way to track the sentencing of a particular defendant. In addition, there is no representation of the right holder in that administrative proceeding. This creates a totally untenable situation for right holders: The only way to appeal a sentence or decision of the MOI Committee to the Board of Grievances (the appellate body) is to get a decision from the MOI Committee. However, the MOI Committee has not to IIPA's knowledge published any judgments in the past two years (or at least has not alerted the right holders), so right holders have been unable to use this judicial procedure.

SAUDI ARABIA'S LAWS REMAIN OUT OF SYNC WITH INTERNATIONAL STANDARDS

Saudi Arabia's copyright law (effective January 12, 1990) provides some basic protections for U.S. right holders (Saudi Arabia joined the Universal Copyright Convention (UCC) in 1994, extending protection to foreign (UCC members') works). In terms of enforcement, the law provides for the possibility of compensatory damages to be paid to right holders, criminal fines (albeit too low, even when doubled for recidivists), the possibility of seizure of infringing goods, and the closure of shops engaged in piracy (for up to 15 days; 90 days for recidivists). No jail terms are provided in the Saudi copyright law.

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. Saudi Arabia must amend its copyright law to make it TRIPS-compatible before being admitted to the World Trade Organization (WTO).⁸

Amendments needed for the Saudi copyright law to provide TRIPS-level protection include the following:

⁸ Saudi Arabia began procedures to join the World Trade Organization (WTO) in May 1996. This process has been arduous and is incomplete. The Saudi Government is nonetheless currently working with the WTO to amend its laws in accordance with Berne Convention and TRIPS requirements.

- 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 international agreement or treaty would remove all legal doubt.
- 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 doubt.
- 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, and must be reexamined specifically with regard to computer programs or to other works in digital format. Under Berne, exceptions 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 number of personal use copies that can be made under the exception (i.e., one copy for personal and private use), which is clearly violative of Berne.
- 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 violates the Berne Convention and TRIPS violation, and should be deleted (or curtailed significantly through implementing regulations so that it comports with TRIPS/the Berne Convention).
- 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 US\$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 WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly. 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

2002 SPECIAL 301 REPORT

SOUTH AFRICA

EXECUTIVE SUMMARY¹

IIPA recommends that South Africa be placed on the Watch List.

Piracy in South Africa continues to cost the country jobs, tax revenues, and the possibility of developing its creative community.² Pirated videogames and illegally photocopied books decimate the market, destroying the chances for the software companies and publishers to prosper. The courts continue to give low priority to copyright infringement cases, and although prosecutors are becoming somewhat more active, and more cases have proceeded to court, the number of convictions remains low, and penalties remain non-deterrent. The proof regarding the overall inadequacy of the enforcement system in South Africa is contained in the high piracy losses and levels in the publishing and software sectors. The inadequacies come notwithstanding some successful campaigns against piracy by the business software and motion picture industries. Both industries report relatively good cooperation with the police in achieving raids, accompanied by some self-help measures.³

The government of South Africa has proposed several legislative amendments, two of which may run afoul the WIPO Performances and Phonograms Treaty. Another bill expected out shortly will deal with the liability of Internet service providers, and IIPA is hopeful that the government of South Africa has taken a vertical approach to copyright infringements, providing incentives for cooperation between right holders and service providers in fighting piracy online; such an approach is necessary in order for South Africa to meet its international obligations. Finally, a fourth bill expected in 2002 will hopefully close gaps in South Africa's copyright regime that currently leave it short of meeting its TRIPS obligations.

In 2002, the government of South Africa needs to do the following:

- Create a special IPR enforcement unit under a high-level department (such as the Department of Trade and Industry) to coordinate copyright enforcement throughout South Africa.
- Step up enforcement efforts by the Police Services (with decreased turnover of these forces) and prosecutors against commercial book and entertainment software pirates, in addition to continued cooperation with the recording, business software, and motion picture industries (including

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

² Anti-piracy work in South Africa has also led to tangible improvements for the country. For example, proceeds from anti-piracy funds collected on behalf of the software company Microsoft, have been used to establish a "digital village" in Rabie Ridge near Alexandra in Johannesburg, and plans are afoot to launch further "digital villages" in Khayelitsha and Paarl in the Western Cape. "14,770 Jobs Lost Due To Software Piracy – Microsoft," Asia Intelligence Wire, Woza Internet, Jan. 3, 2001.

³ For example, in 2001, the business software industry conducted a "Truth or Dare" campaign, in which they learned of over 600 companies having over 60,000 desktops that used unauthorized business software. Also, significant case preparation work was done in 2001 by the motion picture industry's investigatory group.

stepped-up activity against the age-old problem of informal operators trading from illegal video outlets in private residences).

- Invigorate South African Customs to seize pirated copyrighted goods at the borders.
- More strongly enforce the Counterfeit Goods Act against commercial piracy (including passage of needed technical amendments to facilitate better enforcement).
- Provide TRIPS-compatible evidentiary presumptions in the law, including clear presumptions of copyright subsistence and ownership.
- Provide that *ex parte* civil search (Anton Piller) orders are easier to obtain and enforce in line with TRIPS Articles 41 and 50.
- Pass amendments to bring the copyright law into compliance with TRIPS (including by providing stronger legal deterrents to copyright infringement, criminalization of corporate end-user piracy, pre-established civil damages, etc.), and to take into account new norms at the international level, including those in the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Reform the judicial system either to allow for quicker dispositions or create a separate commercial court to handle intellectual property cases.

Total estimated losses due to piracy of U.S. copyrighted works in South Africa rose to \$124.6 million in 2001.

SOUTH AFRICA ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	12.0	15%	12.0	10%	12.0	10%	12.0	16%	12.0	10%	12.0	12%
Sound Recordings / Musical Compositions	NA	NA	11.0	13%	NA	NA	12.0	40%	3.0	20%	3.0	20%
Business Software Applications ⁴	67.5	55%	44.2	45%	68.4	47%	74.9	49%	54.8	48%	40.2	49%
Entertainment Software	26.1	57%	22.4	70%	NA	NA	22.2	NA	15.3	NA	NA	NA
Books ⁵	19.0	NA	21.0	NA	20.0	NA	21.0	NA	20.0	NA	22.0	NA
TOTALS ⁶	124.6		110.6		100.4		142.1		105.1		77.2	

COPYRIGHT PIRACY IN SOUTH AFRICA

Serious copyright piracy of videogames and books harm the entertainment software and book-publishing industries in South Africa, and while some enforcement efforts have been forthcoming in the area of business software piracy, that industry continues to suffer the greatest losses of any copyright industry sector. Piracy phenomena include the following:

- **Book Piracy.** Book publishers continue to experience rampant (and increasing) piracy of their materials in South Africa. Photocopy piracy of whole books and chapters and high priced reference books on university campuses in South Africa is endemic.⁷ Many pirated versions of books, both “India-only” reprints, as well as commercial offset copies, from India or Pakistan arrive in South Africa via Mauritius. It is estimated that 30-40% of the market is supplied by pirated product, while about 50% of academic textbooks are illegally photocopied. Rampant photocopying still exists in educational institutions. 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.
- **Retail Piracy.** The retail markets for entertainment software (including all formats, like console-based videogames on CD, personal computer games, and cartridge-based videogames), business software, sound recordings, and CD-ROMs of published materials, remain largely

⁴ BSA loss numbers for 2001 are preliminary. In IIPA’s 2001 Special 301 report, the preliminary losses and levels due to piracy of business software for 2000 were reported as \$62.6 million and 47%, respectively. These levels were finalized in mid-2001, and are reflected in the chart above.

⁵ Total piracy of published materials has gone up in South Africa, but losses were reduced to US\$19 million due to devaluation of the South African Rand.

⁶ In IIPA’s 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in South Africa were \$129.0 million. Because of the adjustment to reflect BSA’s final 2000 statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in South Africa in 2000 are adjusted to \$110.6 million.

⁷ Funding for universities is lower in absolute terms, as the South African Rand lost about 40% of its value in 2001.

pirate. For example, it is estimated that 80% of the console-based videogame market is pirate, while 60% 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. In 2001, video piracy in the retail sector of South Africa shows only slight increases (roughly 15%, compared with 10% in 2000), particularly in the greater Johannesburg region. Most pirate videos are sourced from pirate VCDs and DVDs which come into South Africa at the Johannesburg International Airport with much of the duplication taking place in private homes. 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 (no more than half a dozen machines), but are well organized and active (part of the “syndicate”) throughout the Western Cape and Durban. 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. Flea market piracy one of the largest problems, with the majority of offenders being citizens of South Africa who realize that there will be no criminal or civil consequences for their actions.

- **Internet Piracy.** There has been a marked increase in Internet piracy over the past three years, with an estimated 20% of the videogame market now being lost to pirate downloading of “warez” (pirate) copies of games. The Internet as a mechanism for the spread of piracy is slowly being accepted by the South African public. The piracy encountered thus far is all hard goods sales of VCDs, DVDs, and CD-ROMs. The product is being sold via online auction sites as well as advertising sites (i.e., hard goods advertised for sale on the Internet). Streaming and downloadable media is not an option at this time in South Africa as only 56k modems are being utilized, and it still takes too long and is too cumbersome a procedure to download films in South Africa.
- **Pirating-at-Home.** One of the biggest piracy problems in South Africa involves informal operators trading from illegal video outlets in private residences. These “home dealers” in the Cape Flats and Kwa-Zulu Natal border prey on major revenue centers, disrupting legitimate business and inhibiting market expansion. These informal video outlets carry between 100 to 500 videos in stock, usually all back-to-back copies. They affect the legitimate retailers in the surrounding areas.
- **Music/Sound Recording Piracy.** 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.

COPYRIGHT ENFORCEMENT IN SOUTH AFRICA

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 1999

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS ⁸
Number of Raids conducted	8	231
Number of cases commenced	2	17
Number of defendants convicted (including guilty pleas)	1	10
Acquittals and Dismissals		3
Number of Cases Pending		4
Total number of cases resulting in jail time	0	0
Suspended Prison Terms		2
Maximum 6 months		2
Over 6 months		
Over 1 year		
Total Suspended Prison Terms		2
Prison Terms Served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Prison Terms Served (not suspended)		
Number of cases resulting in criminal fines	1	6
Up to \$1,000	1 (\$250)	6
\$1,000 to \$5,000		
Over \$5,000		
Total amount of fines levied	\$250	\$1700

⁸ The vast majority of raids against sound recording piracy are carried out on street vendors who trade in pirate audiocassettes. When dealing with offenders trading in counterfeit CDs (including CD-R), criminal charges are laid. As a consequence of the backlog of cases that prosecutors have to face, however, they are more inclined to take cases in which they can obtain a guilty plea, so they do not have to take a case to trial. In this regard, sentencing is determined by the Criminal Procedure Act, which provides for a paltry maximum fine of R1,500 (approximately US\$130) per offence, whereas, the copyright law provides for a R5,000 (approximately US\$435) maximum fine per article.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	MOTION PICTURES ⁹	SOUND RECORDINGS
Number of Raids conducted	1	90 (67)	177
Number of cases commenced	1	88 (56)	18
Number of defendants convicted (including guilty pleas)		9 (7)	13
Acquittals and Dismissals		1 (1)	1
Number of Cases Pending		222 (92)	4
Total number of cases resulting in jail time		0	0
Suspended Prison Terms		0	0
Maximum 6 months		0	
Over 6 months		0	
Over 1 year		0	
Total Suspended Prison Terms		0	
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		10	13
Up to \$1,000		10	13
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied			\$1280

⁹ For motion picture industry statistics, the figures in parentheses relate to raids, cases, etc., against piracy of console-based videogames.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	MOTION PICTURES ¹⁰
Number of Raids conducted	9	92 (41)
Number of cases commenced	2	85 (45)
Number of defendants convicted (including guilty pleas)		6 (12)
Acquittals and Dismissals		15 (6)
Number of Cases Pending	3	286 (119)
Total number of cases resulting in jail time		0
Suspended Prison Terms		0
Maximum 6 months		0
Over 6 months		0
Over 1 year		0
Total Suspended Prison Terms		0
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		18
Up to \$1,000		18
\$1,000 to \$5,000		0
Over \$5,000		0
Total amount of fines levied		

In 2002, the South African government should focus on its international enforcement obligations, and look to the creation of a special IPR enforcement unit under a high-level department (such as the Department of Trade and Industry) as a first step in devising a coordinated response to piracy. Such a body will oversee, for example, the provision of greater resources in the way of staffing and funding of, as well as stepped up enforcement efforts by, the Police Services (SAPS), ensure that specially-trained officers are not lost to attrition, and ensure that prosecutors increase activities against piracy. The increasing problem of pirated and unauthorized imports at the borders demands an invigorated response from South Africa's Customs service, and results in the way of mass seizures of imports of pirated and unauthorized copyrighted goods at the borders must be forthcoming. Stronger enforcement of the existing laws, including the Counterfeit Goods Act (with needed technical amendments), will send a signal to pirates that they must clean up their act or face the consequences.

Some Raiding, But Few Deterrent Results

While the police are faced with severe personnel shortages, liaison with the Police Services remains generally satisfactory for both the motion picture and business software industries. In 2001, some raids were taken against piracy of motion pictures, with some positive results.¹¹ Some

¹⁰ For motion picture industry statistics, the figures in parentheses relate to raids, cases, etc., against piracy of console-based videogames.

¹¹ For example, the motion picture industry's anti-piracy organization in South Africa, SAFACT, obtained the largest DVD seizure in its history on Nov. 26, 2001 at Johannesburg International Airport, with the assistance of Customs (3,200 pirate DVDs on a flight from Malaysia, valued at US\$32,000.). The importer, is under investigation. Interestingly, regarding the modus operandi of the pirate, the shipments were separated into discs and labels, and the labels were all in English but contained typographical errors, e.g., on the label for "America's Sweetheart," the logo for Columbia appears but the name listed is "Twentieth Century Fox," the star of "The Mummy Returns" is listed as "Brendan Eraser," etc.

raids, including by the Commercial Crime Unit (CCU) of the Police, against street vendors have resulted in some seizures, but usually, the results are extremely short-lived: in most cases, the hawkers are back out within days of the raid, selling pirated product again with impunity. The CCU is the only police unit authorized to conduct these kinds of raids and they are vastly understaffed. In addition, the National Commissioner of the unit has stated that counterfeiting crimes are not a priority for them.

Both the motion picture and entertainment software industries have had to resort to a privately-funded body to assist them in fighting piracy, often training the enforcers themselves, with some degree of success.¹² 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 also works with SAFACT to bring some criminal prosecutions against entertainment software pirates.¹³

In addition, the motion picture industry is attempting to use other statutes to protect its rights, including the Proceeds of Crimes Act and the tax laws. The Proceeds of Crimes Act, which the Department of Justice recently began enforcing, can be employed to go after criminal syndicates, as it empowers special units under DOJ to “attach” all assets owned by syndicate members, unless they can prove the property attached was accumulated through legal means. While these cases are usually reserved for very high profile matters, and have not included any offenders of intellectual property rights, there is a test case pending under this Act which involves a cooperative effort between SAFACT and a major business software publisher. Inland Revenue Service (IRS) inspectors are also now being informed of all raids on private pirate homes, in order to raise more funds for government efforts.¹⁴

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 upward of three years or more.¹⁵ This inability to prosecute and finalize criminal cases has the effect of fostering recidivism, because as the criminal cases move along at a glacial

¹² Some IIPA members provided training sessions and workshops given to individual police units in 2001 throughout the country, and the copyright industries remain ready to provide assistance to police forces and Customs.

¹³ In 2001, SAFACT took part in 133 raids, of which at least 60% related to the entertainment software industry. Reported seizures include 7,380 pirate videocassettes, 5,469 pirate VCDs, 6,741 pirate DVDs, as well as 62,747 counterfeit PlayStation® games. Unfortunately, there are still reports of clearly pirated goods being returned to the infringers in certain instances.

¹⁴ In 2001, an Internet piracy syndicate was referred to the Special Investigative Unit. The police and the Special Investigation Unit are working closely together on the matter. It appears that the syndicate was importing personal computer CD-ROM games from Malaysia and advertising them for sale on their website.

¹⁵ The entertainment software industry has brought several cases in the past few years. In one case commenced in 1999, after the raid, the prosecutor set the “Admission of Guilt” fine at US\$50,000 so the defendant would not plead out, but defendant got out on bail and kept selling pirated goods. Waiting for a court date, the defendant was raided twice more, and eventually brought harassment lawsuits against the copyright-owner company and the Police (stating the raids were unlawful and the goods seized were not pirated). The Police decided not to defend the harassment action, and returned the goods to the defendant and closed the file. In the other raids, no prosecutions have ensued.

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. A specialized court with specially-trained judges and prosecutors would ensure that they are familiar with technologies being used by, and the *modus operandi* of, pirates. IIPA understands that a special commercial crimes court has now been established in Pretoria. This court hears intellectual property matters as well as other commercially related crimes, and that some of the prosecutors have attended the training that was held concerning the implementation of the Counterfeit Goods Act. This is a positive development.

One bright spot in 2001 involves increased cooperation/communication with prosecutors, and as a result, a slight increase in the number of cases going to court.¹⁶ However, the number of convictions is low, at least in part because defendants (non-South African nationals) leave the country before the cases are heard. Also, police became less interested in pursuing intellectual property cases in 2001 because their efforts did not result in convictions or deterrent sentences by the courts (the means by which their job performance is evaluated). A pirate who has been raided and charged goes back to his activities the next month. IIPA remains optimistic that its cooperation with the Cape Town Attorney General, for example, concerning prosecutions under the Counterfeit Goods Act, will act to set valuable precedents for actions under the Act, once the practical impediments to the Act's implementation can be remedied through technical amendments (see discussion below).

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.¹⁷ 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

¹⁶ The business software industry reports a case of two pirates arrested by SAPs while trying to sell pirated CD-ROM games and pirate DVDs of motion pictures. After investigation of the case, the accused were both found guilty and sentenced to a suspended prison sentence and a fine of R10,000 (approximately US\$870).

¹⁷ 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. The lack of presumptions continues to be a major impediment in the ability of right holders to effectively protect their rights in South Africa. 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 (also a TRIPS violation, 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. 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 Articles 50 and 41 of TRIPS), right holders have few prospects for effective civil prosecution against end-user piracy. On one positive note, Section 11 of the Counterfeit Goods Act created a statutory Anton Piller order. IIPA is hopeful that the courts will grant Anton Pillers under Section 11 of that Act.

End-User Piracy and Government Software Management

Two issues particularly important to the software industry involve tackling end-user piracy (unauthorized use of software in a business) and ensuring that governments take adequate steps to implement adequate software management in their own agencies. The business software industry has continued its fight against corporate end-user software piracy, reaching a number of positive results in 2001.¹⁸ However, deficiencies in the copyright law make court litigation a slow and expensive process, and it is uncertain whether court-awarded damages will be sufficiently high to constitute a real deterrent. Until this situation is rectified, the fight against end-user piracy will not be won.

There have been some positive developments in 2001 regarding government software management. In 2001, the business software industry arranged for an audit of one national government department to take place. That department agreed to enter into a software asset management policy and undertook to use legal software going forward. Further progress is anticipated on a local level, as the business software industry is currently allowing local government municipalities across South Africa a “truce period” within which they can legalize their software without fear of legal action. The municipalities will be encouraged to implement software asset management policies to ensure continued use of legal software. However, progress remains piecemeal, with no formal support from the South African government. The South African government, on a national basis, needs to swiftly 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 throughout all branches of government. IIPA also hopes that the State Information Technology Agency (SITA) will implement

¹⁸ In addition, the industry reports that a good number of settlements with infringers were reached in 2001.

policies to ensure that there is proper allocation for legal software in all information technology infrastructure deals.

COPYRIGHT LAW AND RELATED ISSUES

Forthcoming Amendments Hopefully Will Bring the Copyright Act Closer to Compliance with TRIPS

The South African Copyright Act (No. 98 of 1978) remains TRIPS-deficient in several respects.¹⁹ A bill released in 2000 proposed a number of important improvements, particularly, criminal sanctions for end-user piracy, statutory damages, TRIPS-compatible presumptions relating to copyright subsistence and ownership, narrower fair dealing provisions, and other important changes. However, the Copyright Amendment Bill presented to parliament in April 2001 did not include any of these amendments. The business software industry made written and oral submissions before Parliament bringing these omissions to the attention of the Portfolio Committee on Trade and Industry. The Department of Trade and Industry has indicated that the amendments which were not included previously will be included in a separate bill and should be tabled before Parliament in April 2002. While this is encouraging news, such indications have been made on many previous occasions but have not been followed through by government.

Among the TRIPS-incompatibilities in the current Act that must be addressed in the upcoming amendments are the following:

- TRIPS-incompatible presumption of subsistence (of copyright) and ownership (TRIPS Article 9.1).²⁰
- Failure to expressly criminalize end-user piracy (i.e., unauthorized use of copyrighted works in a business setting) (TRIPS Article 61).²¹

¹⁹ Under South Africa's WTO membership, it is obligated to comply with the copyright provisions of TRIPS, both substantive (Articles 9-14) and enforcement (Articles 41-61) (both on the books and in practice), which incorporates Articles 1-21 of the Paris (1971) text of the Berne Convention. Thus it is anomalous that South Africa currently adheres to Articles 1-21 of the Brussels (1948) text of Berne, and South Africa should adopt the Paris text. In addition, South Africa should be encouraged to join the Geneva (phonograms) Convention.

²⁰ Legal presumptions on the subsistence of copyright are essential to the effective enforcement of copyright and related rights. The Copyright Act includes no presumption of subsistence of copyright or ownership, and thereby places unreasonable evidentiary burdens on right holders to demonstrate both subsistence of copyright and ownership. Sections 17-20 and 139 of Ireland's copyright law provide for the subsistence of copyright, and provide a good model for amendments to the South African Copyright Act.

²¹ "End-use" software piracy usually involves: 1) the purchase of licenses to use original copies of software packages; and 2) the installation of copies on additional computers or the distribution to large numbers of employees over network servers without obtaining further licences. It enables management to avoid paying for needed software tools, thereby damaging the domestic South African software industry. Companies and managers that engage in or tolerate end-user piracy are subject to criminal penalties in virtually every major country in the world including the United Kingdom, the United States, and every country of the European Union. The South African Copyright Act should be amended so that it expressly criminalizes end-user piracy. Ireland passed legislation in 2000 (the "Copyright and Related Rights Act 2000") which criminalizes end-user piracy (under Section 140), liable on conviction to a fine up to £1,500 (approximately US\$1,665) and/or imprisonment for up to one year.

- Some overly broad exceptions to protection (TRIPS Articles 9.1, 13).²²
- The principle of national treatment is not currently the basis for the distribution of levies for private copying (TRIPS Article 3).

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 (*cf.* TRIPS Article 50). In addition, the measure of civil damages available under the Copyright Act, which is an amount equal to a “reasonable royalty,” may not constitute a deterrent to further infringement (TRIPS Article 45, Article 41). Statutory damages would be a welcomed addition to the panoply of remedies available, given the inadequacy of current civil damage awards, and the difficulty in proving damages in many copyright cases in South Africa. Finally, many IIPA members report that criminal penalties imposed in copyright infringement cases have been inadequate to deter piracy (TRIPS Article 61).

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.

Two Bills Introduced in 2001 Would Run Afoul the Requirements of the WIPO Performances and Phonograms Treaty

In addition to the forthcoming amendments to the Copyright Act (which will be intended to bring South Africa’s law into compliance with TRIPS), in April 2001, two separate Bills, the “Copyright Amendment Bill” B73-2001, Government Gazette No. 22249 (24 April 2001), and the “Performers’ Protection Amendment Bill” B74-2001, Government Gazette No. 22249 (24 April 2001), were published in the official gazette. The Copyright Amendment Bill provides for new rights to producers of phonograms, including a “broadcasting” right, a right of “transmi[ssion] in a diffusion service” (which is broadly defined in the Copyright Act and could include Internet transmissions), and a “right to play the sound recording in public.” B73-2001, § 2 (amending Section 9 of the Act). However, a new Section 9A has been proposed, that would provide, “[i]n the absence of an agreement to the contrary,” a right of remuneration is to be paid by the person doing the “broadcasting,” “diffus[ing],” or “play[ing] in public,” which is to be freely negotiated (proposed Section 9A(1)(b)), or in the absence of agreement, to be determined by the Copyright Tribunal (proposed Section 9A(1)(c)). This amounts in practice to a compulsory license as to broadcasts, diffusions, and public “play[ing]” of a sound recording, and is inconsistent with Article 14 of the WIPO Performances and Phonograms Treaty, at least to the extent “diffusion” includes making available a sound recording to the public as that phrase is understood in the WPPT. The Performers’ Protection Amendment Bill provides analogous provisions.

²² Particularly damaging to the book publishing industry, exceptions to protection include old Regulations enacted in response to the academic boycott during the apartheid era. These Regulations offered the possibility of extensive photocopying under a literal reading, and they are in conflict with the provisions of the Act, which prohibit any act under the guise of fair dealing that would substitute for or undermine the legitimate exploitation of the work by right holders. Clearly such copying undermines the legitimate exploitation of the work by right holders. Now university departments have developed the habit of providing students with extensive course packs of photocopied extracts without permission. Such anachronistic exceptions, which are also clearly out of line with South Africa’s TRIPS obligations, should be appropriately narrowed.

The government of South Africa must modify this provision to ensure that it provides neighboring rights owners with adequate legal rights to control the principal means of transmission, including the making available to individual members of the public. It should also be noted that the licensing of transmissions, rather than the sale of physical products, is likely to be the principal source of revenue for record companies and performers in the future. Subjecting such transmissions to compulsory licenses, or establishing mere rights of remuneration for transmissions, such as are proposed in the South African legislation, is simply inadequate. It is an issue of the foremost importance that rightholders in sound recordings enjoy exclusive rights with respect to all communications, and in particular digital transmissions, regardless of whether these are "on-demand" or non-demand. In the digital world, there are no meaningful distinctions between "on-demand" and "non-demand" communications, since even non-demand communications are searchable, and hence programmable. It would violate the WPPT to apply a compulsory license to on-demand communications. It would violate common sense and fairness to apply such a regime to non-demand communications that are equally adept at delivering recorded music in programmable form. Given that interactivity can be achieved at either the transmitting or receiving end of communications, it is irrational to distinguish between services on the basis of how the functionality is achieved. Simply put, modern legislation must ensure that record companies and performers have the exclusive right to control all digital transmissions.

Forthcoming “Electronic Communications and Transactions Bill” Will Deal with Internet Service Provider Liability, and May Attempt to Implement Certain Requirements of Most Recent WIPO Treaties

IIPA understands from the Department of Trade and Industry that it plans to submit the “Electronic Communications and Transactions Bill,”²³ that will deal with the issue of Internet service provider (ISP) liability, and may also attempt to implement certain aspects of the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). 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 will permit content owners to provide for the security of their property online, essential for successful electronic commerce. South Africa is a signatory to the WIPO treaties, and IIPA looks forward to reviewing legislation intended to implement the obligations of the WCT and the WPPT, paving the way for ratification of the treaties. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly, so the requirements of the treaties constitute new international norms. While many of its neighbors have already partially implemented the treaties, South Africa’s implementation and ratification of the WCT and WPPT are welcomed and necessary events to the greater awareness and emphasis on these recent norms throughout sub-

²³ *Bill on Internet Due Soon*, Business Day/All Africa Global Media, October 4, 2001 (in which Dillo Lihlokoe, Department of Communications’ Director of E-Commerce said that the “Electronic Communications and Transactions Bill” was due to be tabled in Parliament within weeks).

Saharan Africa. In preparation for the upcoming legislation, a Green Paper on Electronic Commerce was released by the Department of Communications in November 2000.²⁴

Regarding the “Electronic Communications and Transactions Bill,” IIPA is concerned by statements in the press indicating that the Bill contains a proposal limiting the liability of Internet service providers for “content carried on their networks.” The press article indicates, however, that “[t]here is no clarity on their liability if a subscriber transmits material like pornography or defamatory statements” (the article is silent on liability standards in cases of copyright infringements over the Internet). IIPA reiterates points made in its commentary to the Green Paper regarding copyright infringement and how to approach the issue of Internet service provider liability. It should be noted at the outset that the WIPO treaties themselves do not specifically require national legislation to address the topic of ISP liability. If South Africa legislates on this topic, the enforcement provisions of TRIPS, specifically, Article 41, provide a roadmap for dealing with the issue of ISP liability. Under Article 41 of TRIPS, South Africa must provide “enforcement procedures . . . so as to permit effective action against any act of infringement of intellectual property rights covered by this agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” The WIPO treaties contain virtually identical provisions requiring effective enforcement procedures against infringements of the rights provided therein. In the emerging digitally networked environment, it is self-evident that, in order to fulfill these international obligations, South African laws must extend to the activities of Internet and online service providers through which copyright infringements are carried out.

Today, a single infringer can and does employ the networks and services of service providers to reproduce, make available, and communicate to the public copyrighted materials without authorization. Similarly, in the course of these activities, service providers themselves may engage in widespread acts of unauthorized reproduction, making available, and communication to the public. There will be many instances in which the party initiating this chain of infringements is anonymous, and his location and identity may be unknown to the right holder and to enforcement authorities. Furthermore, even a party who is located outside of South Africa may employ the resources of South African service providers to enable widespread infringements within South Africa. Under these circumstances, unless the right holder has at his disposal effective means to encourage (or, if necessary, to compel) a service provider to cooperate in the detection and resolution of instances of online infringement, it cannot be said that “effective”, “expeditious”, and “deterrent” procedures are available, as required by TRIPS.

Accordingly, South Africa must have in place a legal and enforcement regime that gives incentives for cooperation between right holders and service providers in order to meet its international obligations. Both the U.S. implementing legislation of the WIPO treaties as well as

²⁴ IIPA submitted its comments to the Green Paper in March 2001, noting that: South Africa must bring its Copyright Act into compliance with TRIPS and improve its enforcement system to meet its obligations under the enforcement provisions of that Agreement; South Africa should not miss the opportunity to introduce amendments to implement the WIPO “Internet” treaties, the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”), followed by swift ratification of the treaties; and if South Africa decides to deal with the issue of service provider liability, it must adopt a balanced system that gives incentives to service providers to establish good business practices, including cooperation with right holders, with respect to protecting against copyright infringements over their facilities. IIPA also directly responded to certain questions raised in the Green Paper regarding the importance of protecting temporary copies under the reproduction right, and the need to ensure that necessary changes are made to exceptions to protection so that they will continue to satisfy the “tripartite” test of the Berne Convention and TRIPS Agreements, even when applied in the digital world.

the European Union E-Commerce Directive identify certain functions performed by service providers – including carriage, caching and hosting – in the course of which they may commit, or become responsible for, infringing activities. It specifies the circumstances under which service providers may avoid monetary liability for these infringements, but preserves the authority of national courts to issue injunctions against service providers to terminate or prevent infringements.

The press reports on the forthcoming Bill also state that it covers issues like “copyright,” and IIPA looks forward to reviewing and commenting on those proposals (IIPA understands that once the Bill is tabled, the public will be given another opportunity to comment).

Counterfeit Goods Act Slowly Being Implemented

The Counterfeit Goods Act (CGA) entered into force in 1999, but as of February 2002, there has not been a single prosecution or case filed using the Act. The government has begun the process of implementing the Act by appointing 22 inspectors and setting aside three depots to store the goods seized under the CGA. (The three depots are in Johannesburg, Durban, and Port Elizabeth, while Cape Town still does not have a depot.) Amendments passed in October 2001 reportedly removed the requirement of having to apply to the High Court for confirmation of raids which were done under the authority of a search warrant. The government has been made aware of the industry’s desire for swift implementation.²⁵ Under the Act, copyright pirates charged with trading in counterfeit goods face penalties of R5,000 (US\$435) per infringing item or, alternatively, a prison term of up to three years per infringing article.

Generalized System of Preferences

South Africa currently participates in the Generalized System of Preferences program, a U.S. trade program that offers 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 2001 \$475.8 million of products into the United States without duty (representing 11.4% of its total imports into the U.S.).²⁶ 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.

²⁵ The inspectors appointed 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 occurred in six major cities during April and May 2001. Not only were the Department of Trade and Industry inspectors trained, but also the vast majority of the SAPs commercial crime branch (the police), certain prosecutors, customs officials and depot managers. Over 500 officials in total attended the trainings.

²⁶ By contrast, in 2000, South Africa imported \$583.2 million of products into the United States without duty (13.9% of its total imports into the U.S.).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

THAILAND

EXECUTIVE SUMMARY¹

IIPA recommends that Thailand remain on the Watch List, and that an out-of-cycle review be conducted later this year to determine the government's progress on:

- passage and date certain for implementation of an effective optical media law;
- a directive from the Prime Minister to all relevant IPR enforcement agencies to prioritize IPR enforcement in Thailand;
- maintenance of the 12 Special Task Forces Established in August 2001 for IPR Enforcement;
- continuing to conduct proactive raiding and prosecutions against optical media factories; and
- successful raiding of at least 200 large-scale distributors or warehouses, and retail infringers, per month.

Thailand has seen exponential growth in its capacity for production of optical media (CDs and other media that can be read by an optical device such as a laser), and is nearing levels not seen except in places like China, Taiwan and Hong Kong in terms of high concentration of CD plants.² In addition to escalating optical media piracy, which decimates the domestic markets and provides pirated product for export, pirated optical media (including VCDs and DVDs) continues to be imported into Thailand. Domestic piracy rates remain high for all industry sectors, for example, 76% of all applications software in Thailand is pirated, giving Thailand the fifth highest piracy rate in the Asia-Pacific region for that sector.³ Unauthorized use of software applications in business settings (so called "end-user" software piracy) runs rampant in Thailand, with little government assistance in addressing the problem. Piracy in Thailand is also linked with foreign criminal organizations in Asia.

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

² Cf. George Ripley, *Bleak House: Thailand's Faltering CD Industry*, Oto-Online, at <http://www.oto-online.com/mar01/thai.html> ("[d]uring the South East Asian Economic Miracle, Thailand was one of the region's leaders for optical disc technology. Today paints a different picture, with piracy ripping the guts out of Thailand's CD industry. Despite concerted government action, falling revenues are now driving content holders to consider the alternatives.")

³ Even weeks before the launch date of the operating system Windows XP in Thailand, pirate copies were being sold in the thousands at Bangkok's Pantip Plaza and elsewhere, for as little as US\$2.70, as the vendors had found ways to circumvent the new security features. *Thai Pirates Crack Microsoft's New Windows System*, New York Times Online, www.nytimes.com, November 12, 2001.

While the enforcement authorities in Thailand generally have been responsive in facing the challenge of fighting retail piracy, and have cooperated well in acting against small-time pirates, these efforts fall short of what is required to lower piracy to acceptable levels. There were even some raids and cases brought in 2001 against some of the most egregious pirate optical media plants. In addition, the specialized Intellectual Property and International Trade Court continues to mete out convictions, and 2001 saw the first case of a defendant serving time in jail for copyright piracy in Thailand. Unfortunately, piracy rates have not decreased significantly, and Thailand's production of pirate optical media has increased.

In 2002, IIPA looks to the government of Thailand to develop an integrated National Plan that will go toward allocating resources and taking decisive action to improve the piracy situation in Thailand. The government must take decisive steps immediately to tackle devastating optical media piracy. Passage of the draft optical media law, with minor changes necessary to make it world-class legislation, should proceed quickly, followed by swift implementation. Establishment of a specialized IPR investigation unit (directly under the control of the Prime Minister or other designated Minister) or the promotion of the Copyright Unit in the Economic Crimes Investigation Division (ECID) to a department (which would give it greater manpower to raid sources of production of piracy, including *ex officio* raids, as well as catching and bringing to justice the kingpins of the pirate trade), will be crucial to the government's success. Customs must work to locate and identify optical disc or other production factory owners and machinery used for producing infringing materials. The Department of Revenue should investigate the financial status of each entity investigated and determine, for example, the taxes paid by those identified producers. A sustained public relations campaign should be waged, declaring a war on piracy, and explaining how buying pirated products helps criminals and hurts Thailand. The Department of Education should take a lead in sending a strong message that the use of pirated copyrighted goods (including pirated software) in educational institutions is wrong.

Thailand enjoys benefits under the Generalized System of Preferences (GSP) program, a U.S. trade program which affords duty-free entry to many of a country's imported goods, subject to the requirement that it provide "adequate and effective" copyright protection. In June 2001, six copyright-based associations – Association of American Publishers, Inc. (AAP), AFMA, Interactive Digital Software Association (IDSA), Motion Picture Association of America, Inc. (MPAA), National Music Publishers' Association, Inc. (NMPA), and Recording Industry Association of America, Inc. (RIAA) – submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners.⁴

Estimated trade losses due to piracy in Thailand were more than \$136.3 million in 2001.

⁴ Those deficiencies include: the growing optical media piracy problem in Thailand; the lack of effective optical media legislation and cable regulatory controls/broadcast legislation; the failure to aggressively pursue criminal prosecutions in the copyright area; the failure to impose more deterrent sentencing by the courts; and the failure to pay adequate attention to Internet piracy trends in Thailand.

THAILAND: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	24.0	65%	24.0	60%	21.0	55%	19.0	50%	19.0	50%	19.0	65%
Sound Recordings / Musical Compositions ⁵	16.6	45%	15.6	45%	6.0	40%	9.1	35%	15.0	40%	10.0	40%
Business Software Applications ⁶	38.6	76%	42.7	79%	66.5	81%	39.4	82%	75.5	84%	153.8	82%
Entertainment Software ⁷	29.1	93%	130.5	98%	116.3	95%	93.5	92%	86.4	85%	75.0	82%
Books	28.0	NA	33.0	NA	33.0	NA	28.0	NA	32.0	NA	32.0	NA
TOTALS ⁸	136.3		245.8		242.8		189.0		227.9		289.8	

COPYRIGHT PIRACY IN THAILAND

Optical Media Pirate Production for Domestic Consumption and Export Has Rapidly Proliferated in 2001

The most serious piracy problem in Thailand today, and the one that most seriously afflicts the copyright industries, is optical media piracy: the unauthorized mastering, 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 entertainment and videogame products, audiovisual works, recorded music and literary material. The number of plants and production lines has rapidly proliferated in 2001. For example, where there was only one DVD plant as of April 2000, there were as of April 2001 at least nine known DVD production facilities. Regarding overall optical media operations, industry sources indicate that there are at least 100 known plants in operation, with well over 200 optical media production lines (both manufacturing lines and mastering machines), with an annual capacity of over 1 billion

⁵ In IIPA's February 2001 Special 301 submission, the recording industry's loss figure was \$16.0 million, but this was adjusted later to \$15.6 million.

⁶ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss figure of \$47.0 million and levels figure of 78% were also reported as preliminary. These numbers were finalized in mid-2001, and are reflected above.

⁷ IDSA's loss number for 2001 does not include production for export but only in-country consumption of pirated entertainment software. The loss number for 2000 included both production for export as well as in-country consumption of pirated entertainment software.

⁸ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Thailand were \$250.5 million in 2000. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 6), and because of the adjustment to the recording industry's loss estimates (see footnote 5), the estimated total losses to the U.S. copyright-based industries in Thailand in 2000 are adjusted to \$245.8 million.

discs per year.⁹ Meanwhile, the legitimate domestic demand is only an estimated 60 million units per year.¹⁰ Some plants 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.

It is obvious that Thai pirate production, besides completely dominating the domestic market, also now fuels a thriving export trade. For example, in 2001, the recording industry reports that Italian customs authorities seized 66,000 pirated music discs originated from Thailand. Another 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.¹¹ 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 rapid growth of optical media production capacity in Thailand (including the surge in DVD capability) indicates that Thailand is becoming a major center of optical media production and distribution in the Asia-Pacific region. In fact, it is becoming increasingly clear that foreign criminal organizations are targeting Thailand as the next hub of pirate optical media production for export. Foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China and Malaysia. It is an inescapable conclusion that Thailand has been targeted for major investment by foreign pirate syndicates and that they intend to develop this market as a priority project in 2002. Initially financed from abroad, these 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.¹²

⁹ In addition to the over 100 known plants today are “underground” plants,” including at least two to three plants set up on the border of Thailand and Myanmar, one on the border of Thailand and Cambodia, and one on the border of Thailand and Laos, as well as two plants in Haad-Yai, one in Phuket, and some 15 others hiding in the industrial areas, on the outskirts of Bangkok and neighboring provinces, like Nakorn Pratom, Samut-Prakarn, Patumthani, Nonthaburi, Cha-seang-sao, and Samut-Songkram. Industry has recently learned that 80 optical disc “quality control systems” have been purchased recently in Thailand. Usually, one plant will own one quality control system. Capacity is calculated by some basic assumptions, including that a plant only operates 26 days each month, with the aggregate production capacity being 500,000 discs per month.

¹⁰ In 1998, by contrast, there were about 10 optical media plants in Thailand with 15 - 20 manufacturing machines with a capacity of 40 million discs per year. In 1999, there were 20 plants with 30 - 40 machines, capable of producing 80 - 120 million discs per year. In 2000, there were approximately 50 plants with 100 replicating machines, capable of producing nearly 200 - 300 million discs per year (legitimate consumption and export in Thailand ran at 15 - 20 million discs per year).

¹¹ *PS Software Seizure*, Game Week, April 3, 2001.

¹² The criminal organizations increasingly rely on children and students as retailers, since persons under 15, according to the law, cannot be investigated unless both a police officer and a public prosecutor participate. Some have even opined that while in the process of investigation of a juvenile, there must be a video recording of the whole process, an extra burden that makes these investigations almost impossible to carry out. More recently, regular office personnel engage in the distribution of pirated copies to their co-workers in the workplace.

Retail (and Other) Piracy Decimates the Domestic Market in Thailand

Piracy in all forms decimates the domestic market in Thailand. Most of the sales spots are well-known to authorities, and despite constant raiding, continue operations, such as in Mahboonkrong, Tawanna, Pantip Plaza, Klongtom, Banmore, Nondhaburi Pier, Tawanna, Bang-kapi and Klongtom. The following are some examples of the cornucopia of pirated goods/services available in Thailand:

- **Pirate Optical Media.** Pirate DVDs now make up 40% of the available pirate movie product in Thailand, and heavy enforcement of VCD source piracy in 2001 did little to affect the movement of DVD into the country.¹³ The motion picture industry also estimates that 70% of the video CDs (VCDs) within the Thai market are pirate.¹⁴ Such piracy destroys the theatrical market in Thailand, since DVDs and VCDs of films that have not yet been released in Thai cinemas are readily available. The going price for pirate VCDs and DVDs is about US\$2-3 and US\$4-10, respectively. Pirate market share for recorded music in optical media formats also continued to fill an estimated 45% of the total market for 2001. Where pirated CDs were once sold only in inner-city areas in Bangkok, in 2001, vendors of such goods appeared in outlying areas such as Sri Nakharin Road, Rangsit and Bang Khae. Infringing music discs also appeared in traditional markets upcountry such as Phitsanulok, Sukhothai, Chiang Mai, Chiang Rai, Buri Ram and Surin. In 2001, many traders whose businesses had failed due to the economic downturn switched to selling pirated CDs. Piracy of music has also become an increasingly organized business. For the entertainment software industry, 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 driven street prices down to the level of US\$0.75 per piece for CD-ROMs for use in Sony PlayStation® consoles, for instance. One positive development is that reportedly the vendors in Mahboonkrong who used to sell copied PlayStation® and Sega Dreamcast® games have stopped dealing in this contraband.
- **Analog Piracy.** Pirate videocassette and audiocassette formats can also 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 (as well as optical disc formats) in night markets, selling from catalogs and photo spreads and keeping their inventory in a separate location to frustrate enforcement efforts.¹⁵

¹³ There has been a recent growth in the number and titles of DVDs available in the local market. Of the 112 sample retail outlets visited recently, all carried pirate discs, and approximately 40% of the total number of discs available were pirate DVDs. The current title array of high quality DVDs found elsewhere in the region (Malaysia and Thailand) are available in Bangkok.

¹⁴ The damage to the theatrical market is further increased by the fact that 90% of pirate VCDs now have a soundtrack in the Thai language.

¹⁵ 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. 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 against duplicators and distributors are needed to move videocassette piracy levels downward.

- **Corporate End-User 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. Many small and medium-sized businesses, as well as the vast majority of educational institutions, use pirated software or software without licenses.
- **Internet Piracy.** 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 websites that take orders for pirate CDs, CD-ROMs and VCDs. The problem of sales of illegally copied games on CD-ROM through websites based in Thailand is on the increase. Gamers and “hackers” are increasingly putting together websites offering free downloads of newly released games. As Internet usage grows in Thailand (there are now 15 Internet service providers and an estimated one million Internet users in Thailand), Internet piracy will increase. The recording industry reports that the number of infringing sites containing unauthorized MP3 files is still smaller than those in some neighboring countries, but is on the increase. Nine cease-and-desist letters were sent out in 2001, with positive responses received for only two letters.
- **Cable 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 45%, a sharp increase over 2000 (35%).
- **Public Performance Piracy.** Unauthorized public performances of motion pictures remains unchecked, as, for example, hotels outside Bangkok still transmit unauthorized videos over in-house movie systems. Most bars in tourist areas openly exhibit videos without authorization. A growing number of bars and restaurants have also added “private” rooms to illegally screen MPA member company product. Half of all public performances of major motion pictures in Thailand are now unauthorized, a sharp increase over 2000 levels (35%).

COPYRIGHT ENFORCEMENT IN THAILAND

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS ¹⁶
Number of Raids conducted	52	479
Number of cases commenced ¹⁷	50	280
Number of defendants convicted (including guilty pleas)	49	280
Acquittals and Dismissals	1	199
Number of Cases Pending ¹⁸	19	210
Total number of cases resulting in jail time	31	35
Suspended Prison Terms		
Maximum 6 months	-	32
Over 6 months	3	1
Over 1 year	28	1
Total Suspended Prison Terms	31	34
Prison Terms Served (not suspended)		
Maximum 6 months	-	1
Over 6 months	-	-
Over 1 year	-	-
Total Prison Terms Served (not suspended)	-	1
Number of cases resulting in criminal fines	31	35
Up to \$1,000	3	24
\$1,000 to \$5,000	27	9
Over \$5,000	1	2
Total amount of fines levied ¹⁹	\$119,086 (Bt 5,358,900)	-

¹⁶ These statistics are estimates only, as the data was gathered from manual searches of court files.

¹⁷ This figure includes 10 cases in which the alleged offenders fled the scene of the raid. These 10 cases may be dropped at a later time if the alleged offenders are not located.

¹⁸ This figure does not include cases that have been sent on for appeal.

¹⁹ This figure reflects all fines levied by the court against the defendants in these cases. These fines include those for both Copyright Act infringement as well as all other offences.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	16	1,549
Number of cases commenced ²⁰	16	668
Number of defendants convicted (including guilty pleas)	13	1,410
Acquittals and Dismissals	-	881
Number of Cases Pending	5	-
Total number of cases resulting in jail time	11	55
Suspended Prison Terms		
Maximum 6 months	-	47
Over 6 months	-	-
Over 1 year	11	6
Total Suspended Prison Terms	11	53
Prison Terms Served (not suspended)		
Maximum 6 months	-	2
Over 6 months	-	-
Over 1 year	-	-
Total Prison Terms Served (not suspended)	-	2
Number of cases resulting in criminal fines	11	55
Up to \$1,000	-	29
\$1,000 to \$5,000	11	25
Over \$5,000	-	1
Total amount of fines levied	\$48,166 (Bt 2,167,500)	-

Strong Response to the Challenge of Optical Media Piracy

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. Notwithstanding those vigilant enforcement efforts, lowering piracy levels have not resulted, since the magnitude of the problem has grown at a disproportional rate to the level of enforcement activity, and since powerful criminal forces have hindered effective enforcement.²¹

²⁰ This figure includes four cases in which the alleged offenders fled scene of the raid. These four cases may be dropped at a later time if the alleged offenders are not located.

²¹ Several anecdotes indicate the difficulty of the Thai authorities' task, while demonstrating the seriousness of their efforts to tackle piracy in Thailand. IIPA learned in July 2001 that a Thai national was sentenced to a period of one year and 15 days in prison in relation to a warehouse case (involving the seizure of 150,605 VCDs); unlike many other cases, the sentence in this case was not suspended by the court, and the defendant is serving time in prison. This sentence is a positive sign of increasingly deterrent penalties. In another recent case, on October 30, 2001, the Royal Thai Police (with assistance from motion picture industry representatives) raided a clandestine illegal optical disc factory operating out of a house in Nondhaburi province (approximately 15 miles from Bangkok), seizing a DVD line used to make pirate DVDs of recent U.S. film titles. This marked the first seizure of an illegal DVD line in Thailand. During the raid, police found a secret door leading to a tunnel that connected the illegal factory to the kitchen of a nearby house. Police discovered that a rail inside the one-meter-wide tunnel was used to carry the printed optical discs from the factory to the house for packaging and distribution. Police arrested five persons, including one who was hiding inside the tunnel. The sheer number of plants and amount of pirated product being produced in Thailand, and the sophistication of the pirates' operations, present enormous challenges to Thai authorities over the coming months.

The Thai authorities have responded with some actions against optical media piracy in 2001, conducting successful raids against 17 separate factories (including six VCD factories) between January and July 2001.²² Only four optical media plants were raided during the whole year to address music piracy. Numerous raids planned by the record industry against CD plants were compromised due to information leaks, normally after a search warrant had been issued. However, even the level of raiding contemplated before the leaks is nowhere near enough to have a deterrent effect. 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 of optical media pirate production. 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. That the pirate optical media problem in Thailand has grown so rapidly in the face of such unprecedented levels of enforcement, prosecution and sentencing demonstrates the enormous profits to be made in the piracy business, and the tenacity of the criminal syndicates determined to reap those profits.

Raiding Reaps Seizures, But Few Cases Achieve Deterrent Results

Raiding on other establishments dealing in piracy, mainly pirate retailers, has also reaped huge seizures and led to many criminal prosecutions in 2001. For example, the motion picture industry reports that from July 2000 to October 2001, 1,078 raids were run involving 1,000 individual offenders, resulting in the seizure of 336,584 pieces.²³ Over 626 cases arose from those raids, leading to hundreds of convictions for copyright piracy. In a recent public demonstration, Thai authorities on December 18, 2001, steamrolled 303,231 units (worth Bt 90 million, or approximately US\$2 million) of pirated VCDs and other pirated products.²⁴

The situation has been less promising with respect to retail business software (applications) piracy. For example, the business software industry conducted 16 raids with police at Pantip Plaza between October and December 2001, seizing close to 12,000 pirated discs. However, these and other raids carried out in 2001 have had only a negligible impact on reducing the number of outlets engaging in software piracy, due to lenient sentencing (with suspended prison sentences and low, nondeterrent fines) and increasingly cunning nature of the pirates.²⁵ Of the approximately 30 cases

²² In 2000, there were 16 optical disc factory raids with 846,639 pirated discs seized. In the first quarter of 2001 there was a marked reduction in seizures, with only 99,874 pirate discs seized. As of September 2001, MPA has been involved in raids on 10 pirate factories.

²³ Other industries report fairly consistent numbers. For example, the recording industry reports an average of 156 raids per month against sound recording piracy in the first half of 2001 (mainly at the retail level), with the number of raids dropping off precipitously in the last quarter of 2001 (with as few as 66 raids in November 2001). Government statistics from the Department of Intellectual Property (DIP) indicate that in 2001, they were handling a total of 2,515 copyright cases, including over 1 million discs seized (although it appears that these statistics include actions commenced previous to 2001).

²⁴ *Copyright – Crackdown Crushes B90M in Fake Goods*, Bangkok Post, Dec. 18, 2001, at 10.

²⁵ When vendors suspect that a customer is working for copyright owners and is conducting a pre-raid check, they will sell that customer a blank CD (so that it won't be used as evidence against the Economic Crimes Investigation Division). The pirate distributors have been known to follow customers until the vendor is sure they are not informants, then switch the blank with the correct CD. In addition, in response to increased and regular raids, some vendors now accept orders at shops in retail centers, but will only deliver the actual CDs by mail the day after the purchase. During some raids, pirates simply abandon their shops before the police arrive, leaving a meager seizure but avoiding arrest and the subsequent fine.

that were resolved by the courts in 2001, not one prison sentence was served; all were suspended. Fines averaged US\$3,200, simply a cost of doing business, and not seen as a deterrent.

The troubling reality is that Thai authorities fail time and again to go after the big-time pirates implicated in the raids. When an arrest is made as the result of a raid, regardless of whether the defendant is merely an employee (or “lackey”) of the head of the piratical operation, the investigation ceases. The masterminds behind massive retail piracy rings in Thailand are left untouched despite the fact that their shops have been raided numerous times. Other problems abound, including leaks prior to raids on small pirates near the Cambodian border, inappropriate pressure and threats on right holders if cases are not discharged, and lack of sustained enforcement action.²⁶

Steps Taken Against Institutional End-User Piracy

The problem of institutional unauthorized use of software applications in businesses and educational institutions in Thailand continues to be responsible for severe revenue losses to the business software industry, and the reduction of such is a key priority. The industry hosted several software asset management seminars in Thailand in 2001 to educate local businesses on licensing issues. To their credit, government authorities (the Department of Intellectual Property, and the Economic Crimes Investigation Division) co-sponsored these seminars, which helped send a stronger message to participants. Nevertheless, government authorities do not proactively secure compliance by taking sustained steps to eradicate corporate end-user software piracy. Government will and public awareness campaigns to change attitudes toward intellectual property rights will go a long way toward changing the current situation. 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 2002. The other abiding problem is that most enforcement officers in the judicial system (police, prosecutors and judges) lack good knowledge of computers and related complex technical issues, resulting in discomfort with handling such cases. In the case of prosecutors, this problem is largely due to the fact that prosecutors assigned to IP courts are transferred in and out periodically. Longer postings would assist in alleviating this problem.

With respect to management of software practices within the Thai government, very little progress was made in 2001. In 1998, the Thai government reissued an Executive Order requiring all government agencies to use legitimate and licensed software. In 1999, the industry held a series of seminars for government officials in Bangkok, co-hosted by the Ministry of Science and Technology and the National Electronics and Computer Technology Center (NECTEC). The seminars were well received, and NECTEC announced its intention to be the first agency to implement software asset management (SAM) procedures and adopt good licensing practices. However, nothing happened in 2000-2001. The Thai government needs to revitalize its efforts to implement the Executive Order in 2002.

²⁶ For example, recently, five or six ECID officers were deployed to investigate Pantip Plaza every day in order to help suppress the sale of illegal CDs. This tactic was used in 1999 when police officers, copyright owners and Department of Intellectual Property officers constantly surveyed Pantip Plaza. However, as with the 1999 surveillance program, the recent action to monitor a known pirate hot-spot will not succeed unless it results in a sustained enforcement effort.

Beginnings of a Coordinated National Enforcement Plan

The Thai government began to coordinate its IPR enforcement activities in 1999 when, in the wake of the “PM scandal,” the Department of Intellectual Property (DIP) 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. Those early moves toward enforcement coordination were positive, but now, Thailand needs to reinvigorate enforcement. In large part this is due to the changing nature of piracy in Thailand (both in terms of scope and in terms of the organized and criminal nature of the pirate enterprises involved). In 2002, IIPA looks to the government of Thailand to develop an integrated National Plan on enforcement of copyright.

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. Establishment of specialized IPR investigation units throughout Thailand, and the promotion of the Copyright Unit in the Economic Crimes Investigation Division (ECID) to a department would be steps in the right direction.²⁷ Even the ECID at present lacks the necessary resources to wage a nationwide fight against piracy, since it only has roughly 50 officers to conduct enforcement, in no way sufficient to tackle the piracy problem on a large scale. Customs and Foreign Trade Departments (which should control, for example, the importation of CD machinery), Domestic Trade, Revenue and Consumer Protection agencies need to be more fully integrated into the overall enforcement effort (to implement the Copyright Law, Customs Law, Tax Law, Consumer Protection Law and the Sticker Price Law to stamp out piracy). Ad hoc programs will not work.²⁸ 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.

A National Plan on enforcement of copyright must contain the following key elements:

- Swift passage and immediate implementation of the draft optical media law, with minor changes necessary to make it world-class legislation.
- Establishment of a specialized IPR investigation unit (directly under the control of the Prime Minister or other designated Minister) or the promotion of the Copyright Unit in ECID to the status of a Department, which is larger than a Division. There are unofficial reports that the Thai government is proposing the transfer of the ECID to the Ministry of Justice, which would

²⁷ The Department of Intellectual Property (DIP) has openly stated that it has no role in taking enforcement actions, asserting that its role in protection of copyright is merely as a coordinator between the enforcement agencies. The Law on Governmental Administration stipulates that the DIP is mainly responsible for IPR promotion and registration. Thus, the DIP interprets this to mean that it has no direct responsibility over suppression activity. This position is ultimately unhelpful to the establishment of national coordination, and thus, a department that does have the ability to address operational concerns, like resource allocation, training, effectiveness, etc. should be established in Thailand.

²⁸ For example, IIPA understands that in June 2001, DIP announced that it would issue a new logo to be used by approved brand-name products. The logo would be owned by the department, and brand owners would apply to use it for a fee. The mark is intended as one of “authentication.” This project is now reportedly on hold due to the changes in the DIP, and no further progress has been reported.

purportedly give it greater manpower to raid sources of production of piracy (including *ex officio* raids).²⁹

- Increased authority for Customs to take steps to locate and identify optical disc or other production factory owners and machinery used for producing infringing materials, taking raids and seizing equipment and the products of piracy.
- Increased authority in the Department of Revenue to investigate the financial status of each entity investigated and determine, for example, the taxes paid by those identified producers.
- Commencement of a continuous public relations campaign, explaining how buying pirated products helps criminals and hurts Thailand.
- Movement by the government and the Department of Education to ensure the legalized use of copyrighted goods (including business software) in business settings, educational institutions, and government entities.
- Linkage of anti-piracy campaigns with anti-corruption and anti-drug campaigns (recognizing that the proceeds of piracy are used in both of the latter activities, to the detriment of Thai society).
- Better training to understand and deal with Internet-based piracy, perhaps by designating a specialized cybercrime and Internet piracy unit.³⁰

Procedural/Systemic Hurdles in Enforcement

There are many procedural and systemic hurdles that right holders face in seeking adequate enforcement in Thailand, both in raids and in court proceedings. The following are just some illustrative examples:

- **Lengthy Process to Obtain Search Warrant and Unavailability of Nighttime Searches:** Normally, the process of obtaining a search warrant in Thailand takes about half a day, which is

²⁹ The centralized body established should examine and fix resource allocation problems. For example, in 2001, Assistant Commissioner-General of the Royal Thai Police, Pol. Lt.-Gen. Nopadol Somboonsub, was quoted as saying his agency lacks adequate budget and staff for effective enforcement. At present, his division has only 60 to 70 full time investigative staff. For 2002, the division has requested 11 million baht (approximately US\$251,400) to buy equipment and increase payments to staff in order to improve morale and efficiency. Such resource re-allocations, which IIPA believes are warranted, should be overseen by the Thai government in an overall strategy, so there is no waste or duplication of efforts and resources. Several IP-related units have been established within the past year. On August 9, 2001, the Prime Minister issued Order No. 249/2544, setting up a "Prevention and Suppression of Intellectual Property Infringement Committee" to deal with piracy problems directly for the first time. Two other bodies, the "Joint Committee for Suppression of Intellectual Property Violations," and the "Intellectual Property Suppression Unit," were established. There is some question, however, as to the permanence of these units, and it remains the case that these units are drastically under-resourced.

³⁰ Such an enforcement arm should also promote public awareness of the need to respect intellectual property rights in cyberspace, and in particular, the Department of Intellectual Property should work with Internet Service Providers (ISPs) to develop best practices and regulations that will encourage ISPs to cooperate with copyright owners to detect and deal with infringements taking place online.

very lengthy, especially when particularly egregious activities are occurring. More serious is the fact that courts are extremely reluctant (unless there is an emergency and the court strongly believes that the crime is being committed at that time) to issue warrants for nighttime searches, notwithstanding that most perpetrators commit piracy at night.

- **Destruction or Loss of Evidence in (or After) Raids:** Even when search warrants are obtained, infringers engage in evasive techniques, and destroy evidence before the search can actually be run (e.g., by refusing entry). Delaying the authorities for 10 minutes gives pirates enough time to destroy all exhibits and evidence, through grinding machines which are specially designed to destroy CDs. Other high-tech devices such as hidden cameras help warn the pirates and prolong delays to raids. Another technique used by infringers is to keep few illegal items on the premises, and keep some legitimate copies of copyrighted works around to show the authorities that they are “clean.” After the raid, it is difficult for copyright owner to access seized materials for further investigation or review of copyright titles. Another problem faced is administrative: Documentation supplied to investigators after a raid, and in preparation for prosecution, has sometimes gone missing, thereby creating duplication of work and further delays.³¹
- **Leaks to Defendants:** Much more serious problems, particularly as they reflect poorly on the Thai authorities, are leaks to defendants and, in some cases, destruction of evidence. For example, often when an address for a raid is shown on the search warrant request, the raid fails due to leaks. Interestingly, the larger the raid, the more likely it is that there will be a damaging leak. In addition, it is reported that sometimes, evidence seized in raids is “lost” or otherwise altered after a raid.
- **Evasive Techniques of Defendants:** Another disturbing problem involves the attempt to catch the key players in a criminal pirate enterprise, and resistance among enforcement officials in Thailand to aggressively pursue such defendants. Evasive techniques used by pirates (fake names and addresses) lead enforcement authorities to settle for catching a “lackey,” while the key pirates always manage to remain free. In some cases, it is reported that Thai authorities prefer to close a case when one person has been arrested, regardless of whether the key perpetrator has been caught. This phenomenon must not be allowed to occur when it comes to enforcing against optical media piracy, since it is absolutely essential that the directors, owners, and financiers of such operations be brought to justice.
- **Burdensome Requirements with Respect to Presumptions of Subsistence of Copyright and Copyright Ownership:** Once past the raid, copyright owners are being asked to provide all information on the works seized, including all proof of subsistence of copyright as well as proof of ownership, including certificate of incorporation, and powers of attorney translated into Thai. The lack of presumptions (of subsistence and ownership) in the law should be remedied.
- **Identification Card Requirement:** A new administrative requirement for copyright owners, announced in November 2001, stipulates that any representative of a right holder must register with and obtain an identification card from the DIP. Since November, enforcement agencies have refused to take raiding actions for some right holders whose representative did not

³¹ In late 2001, ECID officers admitted mislaying documentation for ten cases from raids done in 1999, requesting fresh sets of documents.

produce the ID card. The Thai government should ensure that this new requirement does not become overly burdensome to right holders.

- **Other Documentary Burdens:** Other documentary requirements in the Thai court system simply add to the burdens of right holders in Thailand. The requirement that documents be notarized and legalized is extremely burdensome. Thailand is not party to the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents, and should be encouraged to take steps to become a member.

Continued Progress Toward Deterrent Sentences by the Intellectual Property and International Trade Court

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 and to serve as a model for the region. 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, the IP&IT Court has processed cases expeditiously, thus addressing one of the main shortcomings of the old system.³² Not only are defendants starting to serve actual jail time as compared to previous suspended sentences, but fines have also been increased. In addition, manufacturing equipment used in pirate production is also being forfeited. The IP&IT Court is one of the true success stories in the entire region. IIPA and the industries continue to be interested in the development of this Court as a model for the region, and look to devise strategies for further enhancing its effectiveness.³³

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 and 2001 have been breakthrough years for the court, as exemplified by the 15 unsuspended jail sentences it imposed on operatives of pirate optical media factories during 2000. It also sentenced a total of seven defendants to jail in three cases (one of them in March 2001) involving pirate warehouses and distribution centers, and imposed prison terms in three retail piracy cases as well, all without suspending the custodial sentences (however, the three retail pirates received suspended sentences from the Supreme Court, and six of the seven other defendants' cases still await decision by the Supreme Court).³⁴ The U.S. government should closely monitor the cases still on appeal to ensure that the lower courts'

³² For example, in 2000, the court disposed of 4,059 IPR criminal cases (out of a total of 4,719 cases received); this indicates that backlogs were quite minimal. The motion picture industry reports criminal convictions in 87 of the 89 criminal cases it initiated during 2000, and two other cases successfully resolved in January 2001; by the end of March 2001, criminal convictions had been obtained in a further 21 cases. The business software industry did not have such positive results, as 20 of 51 cases commenced in 2000 still remain unresolved.

³³ For example, in April 2001, the motion picture industry participated in the "1st Intellectual Property Summit on Administration of Justice in IP Cases" in Thailand. Thirteen judges for the IP&IT court and seven judges from the Supreme Court participated in the event. One of the key ideas that came out of that event was the development of a database of defendants to identify recidivists in the future.

³⁴ On March 14, 2001, the Central IP&IT Court sentenced Mr. Prapas Sangun-Nam, the defendant in a warehouse case involving total seizures of 150,605 pirate VCDs (40,105 pirate VCDs of U.S. major motion pictures). The defendant was initially sentenced to two years and one month imprisonment, but the court reduced the punishment by half due to his guilty plea. No appeal was lodged by the defendant against the sentence, and he is currently serving his sentence.

imposition of prison sentences has a deterrent effect. The court must continue firm sentencing practices, particularly 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.

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 mixed signals regarding Thailand's commitment to fulfill its international obligations regarding the fight against copyright piracy.³⁵ It is worth reiterating that it falls largely upon the IP&IT 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,³⁶ civil, and administrative procedures and remedies.

COPYRIGHT LAW AND RELATED ISSUES

Priority Must Be Placed on Passage of Good Optical Media Legislation

The most urgent and threatening problem in Thailand is the exponential growth of optical media piracy. Legislation to control the production of optical media (including CDs and other media capable of being read by an optical reading device such as a laser) was drafted by the Department of Intellectual Property in the Ministry of Commerce in October 2000, and approved by the Thai Cabinet in late January 2002. The bill is now reportedly before the State Council for

³⁵ Two of the cases involved book piracy, a chronic problem in Thailand. In one case, the Supreme Court upheld a fine imposed by the IP & IT Court on a shop (owned by Somsak Thanasansenee) engaging in massive photocopying of textbooks, and ordered the forfeiture of the photocopying machines used to commit the offense. *Appellant fails to overturn copyright conviction*, IP Asia, July/August 2000, at 7. In a second case, the Supreme Court reversed the acquittal ordered by the IP & IT Court of the defendant (Konakchai Petchdawongse) shop owner who stockpiled photocopies of textbooks, and imposed a fine of Bt100,500 (approximately US\$2,400 at then prevailing exchange rates, although reportedly, this fine was subsequently reduced to BT67,000 (US\$1,600)), and ordered the forfeiture of the equipment. Periera, "Supreme Court sets out what's allowed in reproduction of copyrighted text," IP Asia December 2000/January 2001, at 41. To the contrary, the Supreme Court overturned a conviction against defendant Atec Computer and its director, who in 1999 had been fined a total of BT1,050,000 (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. "IPR Court Continues Hard Line on Pirates," Bangkok Post, July 7, 1999. The Court ruled, that because the Microsoft investigator had ordered the computer (with the illegal software), a "trap purchase," Microsoft could not have been an injured party, and indeed, had "facilitated" the offense. "Thai Supreme Court Rules against Microsoft," The Nation (via Newsbytes News Network), Nov. 6, 2000. 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 the ability of right holders to conduct an effective fight against piracy.

³⁶ For example, IIPA understands that, according to Thai copyright law, half of a fine upon conviction is supposed to be paid to the copyright owner as compensation. However, courts often delay payments, on the pretense that they need to ascertain the identity of the true copyright owner. They rarely ever hand over the compensation to the copyright owner's legal representative, even with a valid power of attorney. The strict interpretation by the courts means copyright owners, particularly foreign copyright owners, and their representatives, experience great difficulties in receiving compensation.

review.³⁷ This issue must take a top priority on Thailand's legislative agenda. 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.³⁸

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. IIPA has had a chance to review a draft from June 2001, but has not yet fully analyzed later drafts, including the draft that is before the State Council, which has some changes from the earlier draft. The key features of the June 2001 draft include a licensing requirement for manufacturers of CDs and other "optical disc products" (including CD-R and CD-RW),³⁹ the control of machinery and production of machinery for use in the manufacture of such products, source identification (SID) code requirements for all CDs and other "optical disc products," and search and seizure authority, including a warrantless search. Criminal penalties for production of optical media without a license are up to four years' imprisonment and/or a fine of up to Bt 800,000 (approximately US\$18,235). Failure to obtain a license to produce or import machinery is punishable by imprisonment of up to ten years and/or a fine of up to "five times the value of machinery imported and confiscation of the machinery," and lesser penalties are provided for various other offences.⁴⁰ IIPA understands that the latest Bill that is before the State Council resolved some of the known issues, but that some others still remain. Based on our reading of the earlier draft, we note the following as potential problem areas.

- **No Express License Requirement for Production of Masters/Stampers:** While a license is required to produce optical media under the proposed law, express coverage of production of masters and stampers is not currently provided. This shortcoming can be overcome through a generous interpretation of the definition of "compact disk product" or "machinery," or through express coverage in regulations. (The SID code requirement (Section 13) is expressly made applicable to moulds, original stampers, and compact discs produced.) It is extremely important that producers of stampers/masters be required to obtain a license to produce them, and that stampers and masters be covered under import requirements. Failure to cover stampers/masters in this way will result in an inadequate law with respect to optical media production.
- **Grounds for Rejection of Application for License:** Section 10 allows the Minister to "use his discretion" (alternatively translated as "exercise his consideration") to reject an application for a

³⁷ If no amendments are requested by the State Council, the bill would then be forwarded for submission to the House of Representatives. The time frame for consideration by the State Council is believed to be approximately three months.

³⁸ Indeed, one extremely positive development took place on August 10, 2001, when the Deputy Minister of Commerce ordered the Department of Foreign Trade to halt the import of machines for production of optical discs for 12 months, except where their import has been directly certified by a copyright owner. This step will hopefully ensure that there is no gap (with respect to control of imports of optical disc machinery) between now and the moment the optical media law goes into effect (under the current draft, six months from the date the law is published in the official gazette), assuming the law is passed soon.

³⁹ Section 8 provides that a separate license must be obtained for each of the premises that are to engage in manufacture.

⁴⁰ For example, production of optical media without SID code, or production of optical media in any place other than that specified in the license, is punishable by up to six months' imprisonment and/or a fine of up to Bt 400,000 (approximately US\$9,118).

license if: 1) the applicant or related persons have “received final court judgment as being the offender under this Act or the [copyright law]”; 2) the applicant knew or should have known he has committed a copyright law offence at the place specified in the application (regardless of whether anyone has been penalized for that offence); or 3) false statements were made on the application or other document. The grounds set forth should be sufficient for rejecting the application, and should not be subject to the discretion of the Director-General of the DIP.

- **Transfer of Production License:** Section 21 permits transfer of a license when made in writing and “registered with the Director-General” of the DIP (and additional conditions may be imposed on the transferee). IIPA asserts that licenses should be non-transferable, or at least should only be transferred upon the approval of the DIP. Section 21 of the draft should be revised to clearly express the need for prior approval of transfers
- **Grounds for License Revocation:** Section 22 provides that licenses shall be revoked if 1) the grounds for rejection of a license application are present (see discussion of Section 10 above); 2) the licensee ceases operations in Thailand; or 3) the licensee violates any other conditions imposed. Again, as with Section 10, the grounds set forth in Section 22 should be sufficient for revocation of the license, and should not be subject to the discretion of the Director-General of the DIP.
- **Reporting Requirement for and Definition of “Plastic Seeds”:** While failure to report “importation” of “raw materials” is a punishable offense in the latest draft, a separate provision calling for the mandatory reporting of 1) the type of, and volume of possession or import, including place of storage of, “plastic seeds,” and 2) the “distribution, disposal or transfer of plastic pellets,” is not subject to any penalty. Also, the term “plastic seeds” should be expanded to “raw materials,” that term should be defined to include “optical grade polycarbonate” or any other raw material whose physical properties make it suitable for the manufacture of optical discs.
- **Inspections and Seizures:** Sections 27-29 provide for inspections (including warrantless searches) and seizures of suspected violating items and documents, etc. They do not provide for forcible entry in case of resistance; this should be provided for.
- **Grandfathered Plants Not Subject to Grounds for Rejection of License:** Under Sections 58-61, plants already in existence or already having imported machinery can receive import licenses or licenses to continue producing simply by complying with certain formalities (and, seemingly, without regard to whether they have been or are engaged in piracy). For example, under Section 59, anyone in possession of machinery for use in producing “CD products” may submit an application within 90 days of the effective date of the law (or within 90 days of receiving an import license, which is also subject to a grandfather provision), and will receive a license to produce optical media without regard to whether that “grandfathered” applicant has been convicted of copyright piracy or is engaging in copyright piracy (since Section 10(1) and (2) do not apply to “grandfathered” plants). This provision, as to the 100 known optical media plants (and other “underground” plants), practically gives them a “free ride” even if they have previously been convicted of piracy or are currently engaged in piracy.
- **Penalties Should Be Doubled for Recidivists:** The penalty provisions (Sections 42-51) should include doubling of penalties for recidivists.

Copyright Act Revisions/WIPO Treaties

An amended Copyright Act went into effect in Thailand on March 21, 1995. The Thai government ratified the Berne Convention on September 2, 1995, and its TRIPS obligations (substantive and enforcement) with respect to copyright went into full effect on January 1, 2000. However, the amended Copyright Act still does not fully meet the standards of the Berne Convention and TRIPS. We understand that a working committee, including the Department of Intellectual Property and Deputy Commerce Minister Suvran Valaisathien, was formed at the end of 2001 to consider amendments to the Copyright Act. The following issues are reportedly being considered:

- Whether penalties in the copyright law should be increased.
- Whether Section 66 of the current law, which stipulates that copyright cases may be settled, should be deleted. Regardless of whether this provision is deleted, it should always remain an option for a right holder and a defendant to enter into mutually agreed-upon terms to dispose of a case outside the courts.
- Whether the law should impose “landlord” liability, i.e., whether the lessors of premises where infringing activities take place should also be made responsible for the unlawful acts of their tenants.⁴¹

Thailand, which participated actively in the negotiations that led to the adoption of the World Intellectual Property Organization treaties (the WIPO Copyright Treaty, WCT, and the WIPO Performances and Phonograms Treaty, WPPT), should also move promptly to ratify and implement those treaties. The WIPO treaties provide copyright owners with the rights they need to protect their works in the digital environment, and also protect technological protection measures used by copyright owners to protect their works. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly. By updating its copyright regime for the digital age, Thailand would position itself as a leader within the ASEAN community in the adoption and implementation of modern intellectual property regimes. The drafting committee is apparently considering what changes would be needed in order to bring the law into compliance with the WIPO treaties, including amending some definitions, including terms like “communication to the public,” “distribution,” “public performance,” and adding a new definition for “making available to the public.”

Enactment of Cable Regulatory Controls and Broadcast Legislation is Long Overdue

Enactment of cable regulatory controls and broadcast legislation is long overdue and is necessary to afford protection for the broadcast, transmission and retransmission of copyrighted programming. 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. The draft broadcast legislation

⁴¹ One initiative outside of legislation that is reportedly being considered by the enforcement authorities in Thailand would be to have the owners of the shopping centers terminate leases of pirate shops if they do not convert to selling legitimate product.

contains provisions prohibiting signal theft and the production or distribution of signal theft-related devices, punishable by up to one year imprisonment and a fine of up to Bt 2 million (US\$46,070). Stronger penalties are needed if this law is to be effective.

Other legislation passed in January 2000 – the Frequencies Management Act – creates a National Broadcasting Commission, but selection of its members has been delayed. IIPA does not have an update on the status of these appointments, but if not already in place, this commission should be appointed promptly and given the power to fight cable piracy.

Generalized System of Preferences

As noted, Thailand enjoys benefits under the Generalized System of Preferences (GSP) program, a U.S. trade program which affords duty-free entry to many of a country's imported goods, subject to the requirement that it provide "adequate and effective" copyright protection. In June 2001, six copyright-based associations – Association of American Publishers, Inc. (AAP), AFMA, Interactive Digital Software Association (IDSA), Motion Picture Association of America, Inc. (MPAA), National Music Publishers' Association, Inc. (NMPA), and Recording Industry Association of America, Inc. (RIAA) – submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners. Those deficiencies include: the growing optical media piracy problem in Thailand; the lack of effective optical media legislation and cable regulatory controls/broadcast legislation; the failure to aggressively pursue criminal prosecutions in the copyright area; the failure to impose more deterrent sentencing by the courts; and the failure to pay adequate attention to Internet piracy trends in Thailand.⁴² In the first eleven months of 2001, \$2.1 billion in duty-free goods entered the U.S. from Thailand duty free under the GSP Program (approximately 15.1% of its total exports to the U.S.).⁴³ On July 4, 2001 it was widely reported in the Thai media that the Prime Minister had ordered the Commerce and Interior ministers to launch strict measures to stop the spread of pirated optical discs.

Thailand has been subject to a prior GSP IPR review. In January 1989, President Reagan revoked some of Thailand's GSP trade benefits for its failure to provide adequate and effective copyright protection and enforcement. After Thailand made progress in adopting a new copyright law and creating a specialized IPR court, GSP benefits were partially restored in August 1995. In June 1998, the U.S. restored virtually all of Thailand's GSP benefits as the Thai government committed to an ambitious action plan for better enforcement against piracy.

⁴² In a recent visit to Bangkok by U.S. Assistant Secretary of Commerce, William Lash, the Assistant Secretary stressed that it would be difficult for Thailand to continue to 'enjoy further tariff breaks from the United States until the government stops the massive proliferation of intellectual property violations.' Natalie Suwanprakorn, *Thai-U.S. Trade - Piracy Crackdown Missing Link*, Bangkok Post, Jan. 23, 2002, at 1.

⁴³ In 2000, \$2.2 billion in duty-free goods entered the U.S. from Thailand under the GSP program (approximately 13.5% of its total exports to the U.S.).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 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 three 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, political and economic instability in Venezuela also appear to be adding incentives to steal copyrighted materials. IIPA recommends that Venezuela remain on the Special 301 Watch List.¹

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 2000, \$744.8 million in Venezuela's imports to the United States benefited from the GSP program, accounting for 4.3% of its total imports to the U.S. For the first 11 months of 2001, \$595.2 million of Venezuelan goods (or 4.5% of Venezuela's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 13.1% decrease over the same time period last year.

VENEZUELA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	65%	25.0	65%	30.0	65%	35.0	65%	40.0	70%	40.0	85%
Sound Recordings / Musical Compositions	54.0	62%	30.0	62%	30.0	62%	15.0	35%	15.0	35%	5.0	22%
Business Software Applications ²	19.7	58%	16.9	58%	46.4	60%	55.6	62%	44.2	64%	42.4	68%
Entertainment Software	NA	NA	47.0	78%	50.9	70%	53.8	73%	54.3	74%	54.0	70%
Books	20.0	NA	22.0	NA	21.0	NA	20.0	NA	20.0	NA	23.0	NA
TOTALS	118.7		140.9		178.3		179.4		174.5		164.4	

COPYRIGHT PIRACY IN VENEZUELA

Piracy in Venezuela has remained at high levels for all the copyright industries. Estimated losses have been over \$115 million per year, for each of the last five years. Continuing economic instability in this country may be adding incentives to pirate copyrighted materials.

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 as low as \$4. Pirates also act as assemblers, building computers and selling 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. The estimated 2001 trade losses due to piracy of business applications software in Venezuela are \$19.7 million, with a piracy level of 58%.

Home video piracy is pervasive in Venezuela, supplied by large-scale laboratories with national distribution systems. Counterfeit packaging is common. Pre-home video window release piracy is standard. An estimated 50% of the illegal videos seized in Venezuela are copied from prerelease video screener cassettes intended for use only in the U.S. Many of the estimated 400 "legal" retail video stores in Venezuela perform small-scale back-to-back copying of legal videos purchased.

² BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$45.5 million at 58% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

Television piracy in Venezuela has decreased due to raids and investigations carried out by the MPA Venezuela program in the last four years. Nevertheless, pay-TV piracy remains an MPA concern in Venezuela, because the generally deteriorating economic situation is expected to lead to an increase in cable piracy.

Pirate cable systems with large numbers of subscribers continue to operate in cities where no legal cable company yet exists. Resorts, condominiums, hotels and other commercial and domestic establishments consistently retransmit unauthorized programming, with seasonal increases during special events or holidays.

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 legitimate markets in Venezuela. Estimated U.S. trade losses due to audiovisual piracy in Venezuela remained at \$25 million for 2001.

The piracy situation for the book publishing industry in Venezuela remains dire. It is now mostly concentrated at the collegiate and university level. Illegal photocopying is a major problem, especially of texts and English language study materials. No limits appear to be placed on photocopying in and around universities. By some reports, an estimated 30-45% of the university market is supplied by infringing materials. In contrast, at the primary and secondary school level, piracy has declined as schools, especially private ones, insist on legitimate materials. Commercial piracy of some trade books are beginning to appear in locally pirated editions. Estimated trade losses due to book piracy in Venezuela dropped slightly, to \$20 million for 2001.

For the sound recording industry, 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. Over the last year, piracy in the CD-R format (recordable CDs) rose and has taken over the market. As a result, while the level of music piracy in Venezuela remained at a high 62%, estimated losses due to piracy skyrocketed to \$54 million in 2001.

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) and piracy are not available for 2001.

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.

Ineffective and Non-Deterrent Criminal Enforcement

Intellectual property protection agencies are hampered by political and economic limitations. Venezuela's economic situation has spawned severe social problems and has contributed to the degeneration of public safety, straining the resources of law enforcement. The government has not supported the fight against piracy, hampering copyright industries' ability to work with the *Guardia Nacional*, and the Judicial Technical Police has been reduced.

COMANPI has lost its effectiveness as a copyright anti-piracy force.

For several years after its creation in 1996, COMANPI, a specialized brigade of the Judicial Technical Police, charged with making investigations and bringing criminal prosecutions of copyright infringers, in cooperation with the private sector, was relatively effective, 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.

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 reduced the staff available for copyright actions, which was why COMANPI was established in the first place. There are only eight agents, who specialize in copyright and industrial property issues. There has been no increase in the human resources made available, despite the dramatically increased caseload.

Additional funding, personnel and resources from the Venezuelan government would bolster COMANPI's ability to take additional action. BSA has relied on the judiciary to initiate search actions.

The *Guardia Nacional's* effectiveness has been blunted by resource constraints.

The *Guardia Nacional*, one of the administrative tax agencies, supports the BSA campaign and conducts actions. However, these actions are initiated for tax evasion instead of copyright infringement. This administrative procedure is not optimal for carrying out raids against resellers.

MPA's efforts to conduct video anti-piracy actions with the *Guardia Nacional* using tax evasion as the basis for actions (instead of copyright infringement) also have been blunted by the severely limited resources which the government of Venezuela has made available for the fight against piracy.

The recording industry reports little progress on the enforcement front in 2001. The few actions conducted in 2001 were the result of working with the *Guardia Nacional*. COMANPI is no longer a viable enforcement agency for these actions. The Venezuela judiciary is not close to

taking infringement cases seriously. APDIF Venezuela (the recording industry's anti-piracy organization) continues to work on music piracy cases that often are lost due to a lack of response from the Special Prosecutor, or because of the excessive amount of time it takes to obtain a search order.

SAPI has limited enforcement powers.

The Venezuelan government created a new intellectual property office, SAPI (*Servicio Autonomo de Propiedad Intelectual*) in 1997. SAPI has very limited powers: no ability to order seizures or close businesses, and its fines are very low. Despite this, BSA has a close working relationship with SAPI's Copyright Office (DNDA). DNDA has agreed to issue administrative notifications to pirates and has provided public support for the BSA's enforcement campaigns. SAPI shouldn't be considered as a part of the enforcement structure of Venezuela due to its lack of empowerment and resources.

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 the retention of evidence 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 2001, the situation remained unchanged: There is still only one overburdened prosecutor. Obviously, IPR cases are not a priority for the Public Ministry.

Unwarranted Delays 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.

For example, one copyright company finally obtained resolution to its six-year litigation. In April 2001, Nintendo of America finally obtained resolution to a civil copyright infringement case

(originally filed in July 1995) when the Venezuelan Supreme Court rejected the defendants' appeal.³ The court also imposed a fine on the defendant's attorney, and found that he should be investigated because the numerous appeals were filed in a malicious manner for the purpose of delaying the execution of the decisions by the lower court.

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 two to five (or more) years until the case is finally resolved. On the end-user piracy front, BSA initiated 34 civil actions in 2001. The majority of these targets, 23 in all, settled with the BSA; 10 targets were clean; and BSA filed damages actions against one target.

Judicial Failure to Impose Deterrent Penalties

In 1999, Venezuela adopted a new Code of Criminal Procedure (CCP). This law established specialized courts (*tribunales colegiados*) 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.

³ Here is the detailed procedural history of this case. In 1995, 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 continued to distribute counterfeit Nintendo video game products. On February 14, 1997, the Court seized over 2,500 counterfeit Nintendo hardware and software products. By March 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 all 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. In July 2000, 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. This 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. This judgment was appealed to the Supreme Court.

Ineffective Border Measures

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.⁴

Putting aside the substantive provisions, the Venezuelan copyright law needs an urgent update of its penal sanctions. The provisions contained in articles 119 to 121 do not provide deterrent penalties for piracy. Sanctions for piracy should be increased to five years to get effective jail-time sentences.

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 its 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. Some 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 business software.

Customs Law Reform

⁴ 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.

The Venezuelan Senate passed customs legislation in 1998 which reportedly included provisions 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 searches and seizures are not being conducted.

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.

ENFORCEMENT STATISTICS IN VENEZUELA

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	SOUND RECORDINGS
Number of Raids conducted	103
Number of cases commenced	6
Number of defendants convicted (including guilty pleas)	0
Acquittals and Dismissals	0
Number of Cases Pending	0
Total number of cases resulting in jail time	0
Suspended Prison Terms	N/A
Maximum 6 months	N/A
Over 6 months	N/A
Over 1 year	N/A
Total Suspended Prison Terms	N/A
Prison Terms Served (not suspended)	N/A
Maximum 6 months	N/A
Over 6 months	
Over 1 year	
Total Prison Terms Served (not suspended)	0
Number of cases resulting in criminal fines	0
Up to \$1,000	0
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied	

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of civil raids conducted	34	0
Post Search Action		N/A
Cases Pending	1	N/A
Cases Dropped	10	N/A
Cases Settled or Adjudicated	23	N/A
Value of loss as determined by Rightholder (\$USD)	N/A	N/A
Settlement/Judgment Amount (\$USD)	N/A	N/A

APPENDIX D

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990 – 2001) & IIPA'S 2002 SPECIAL 301 RECOMMENDATIONS

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990-2002) AND IIPA 2002 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation 2002	OCR Result 2001	USTR PLACEMENT											
			2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Argentina	PWL		PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL
Armenia	WL (GSP)		WL (GSP)	WL										
Australia	IIPA OO				WL	WL	WL	WL		WL	PWL	PWL	PWL	
Austria						OO	OO							
Azerbaijan	WL		WL	WL										
Bahamas	IIPA OO	WL	OCR	OCR										
Bahrain	OFF				OFF	WL	WL	WL	WL					
Belarus	WL		WL	WL	WL	OO								
Bolivia	WL		WL	WL	WL	OO	WL	OO						
Brazil	PWL (GSP)		WL (GSP)	WL	WL	OFF	WL	WL	PWL	OO	PFC	PWL	PWL	PWL
Bulgaria	WL					PWL	WL	OO	OO					
Canada			WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL
Cambodia	IIPA OO													
Chile	WL		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
CIS														
Colombia	WL (OCR)		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	PWL	PWL	PWL (OCR)	WL	WL	WL	WL	WL	WL					
Croatia	IIPA OO													
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 (GSP)	PWL	PWL	PWL	WL	OO						
Ecuador	WL			WL	WL	PWL	PWL	WL			WL	WL		
Egypt	PWL		PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL
El Salvador	WL			OCR				WL	WL	WL	WL	WL		
Estonia	WL				OFF	OO								
European Union			PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
Georgia	WL	OFF	OCR											
Germany					OFF	OO	OO	OO	OO	OO		WL	WL	
Greece	IIPA OO		WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Guatemala	WL		WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL		
Honduras						WL	WL	OO	OO	OO				
Hong Kong					OFF	WL	WL	OO						
Hungary	WL		PWL	WL	WL	OO	OO				PWL	PWL	WL	
India	PWL		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL
Indonesia	PWL		PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Ireland				WL	WL	WL	WL	OO						
Israel	PWL		PWL	PWL	PWL	PWL	WL	OO	OO	OO				

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990-2002) AND IIPA 2002 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation 2002	OCR Result 2001	USTR PLACEMENT											
			2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Italy	WL		WL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL
Jamaica			WL	WL	WL	WL								
Japan			OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL
Jordan					WL	WL	WL	OO	OO					
Kazakhstan	WL (GSP)		WL (GSP)	WL	OFF	OO								
Kuwait	PWL		WL	WL	PWL	PWL	WL	WL	OO					
Kyrgyz Republic	WL	OFF	OCR											
Laos	IIPA OO													
Latvia	IIPA OO		WL	WL	NONE									
Lebanon	PWL + OCR + GSPP		PWL	WL	WL	OO								
Lithuania	WL	WL	WL (OCR)	WL	NONE									
Luxembourg							WL							
Macau	IIPA OO		WL	WL	PWL	PWL								
Macedonia	IIPA OO													
Malaysia	WL (OCR)	WL	PWL (OCR)	PWL	OR									WL
Mexico	IIPA OO				WL	OO	OO	OO						
Moldova	WL			WL										
Myanmar	IIPA OO				NONE									
Netherlands						OO								
New Zealand			WL		WL							WL	WL	
Nicaragua					OFF	OO	OO	OO						
Oman				WL	WL	WL	WL	WL	OO					
Pakistan	PWL + GSPP		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority	OFF			OCR	NONE									
Panama					OFF	OO	WL	OO		OO				
Paraguay	306 Monitoring		306	306	306	PFC	PWL	WL	OO	OO		WL		
Peru	WL		WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL		
Philippines	PWL (OCR)		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 Monitoring		306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL
Qatar	WL			WL	WL	WL	OO	OO	OO					
Romania	WL		WL	WL	WL	OO	OO	OO	WL					
Russian Federation	PWL (GSP)		PWL (GSP)	PWL	PWL	PWL	PWL	WL	WL	OO				
San Marino							WL							
Saudi Arabia	WL		WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL
Slovakia			WL											
Slovenia			OFF	OCR										

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990-2002) AND IIPA 2002 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation 2002	OCR Result 2001	USTR PLACEMENT											
			2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
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	IIPA OO			WL	WL	OO				WL	WL	WL	WL	WL
Sweden					WL	WL	WL							
Taiwan	PWL (OCR)		PWL	WL	WL			OO	WL	WL	PWL	PFC	WL	WL
Tajikistan	WL		WL	WL										
Thailand	WL + OCR + GSPP		WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL
Tunisia						OO								
Turkmenistan	WL		WL	WL										
Turkey	PWL (GSP)		WL (GSP)	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL
UAE			WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	
Ukraine	PFC (GSP)		PFC (GSP)	PWL	PWL	WL								
Uruguay	PWL + GSPP		PWL	WL	WL	OO	OO							
Uzbekistan	WL (GSP)		WL (GSP)	WL										
Venezuela	WL		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	IIPA OO		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.
 GSP: GSP Review Underway
 GSPP: GSP Petition Pending
 IIPA OO: IIPA Other Observations

APPENDIX E

IIPA HISTORICAL SUMMARY
OF
COUNTRIES' SPECIAL 301 PLACEMENT

HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS

**Prepared by the International Intellectual Property Alliance
February 2002**

ARGENTINA

Argentina has been on the Special 301 lists since 1989, fluctuating between the Watch List and the Priority Watch List. 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." In the April 30, 2001 Special 301 announcement, the USTR noted that despite inadequate implementation of a 1998 law criminalizing software piracy, Argentina strengthened its copyright laws by "ratifying the latest act of the Berne Convention."

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" copyright protection. 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 2000, \$218.4 million of goods from Argentina entered the U.S. under the GSP duty-free code, accounting for roughly 7% of its total imports to the U.S. For the first 11 months of 2001, \$108.8 million of Argentine goods (or 6.6% of Argentina's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 9.4% decrease 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 none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. 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.

In 2001, IIPA recommended and USTR agreed to place Armenia on the Watch List. In the 2001 Special 301 submission, IIPA regrouped 10 of the 12 CIS countries (excluding Russia and Ukraine for much more serious piracy problems) due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 announcement, USTR noted that “Armenia has several remaining steps to take in order to fulfill its intellectual property commitments under the 1992 U.S.-Armenia Trade Agreement and to become TRIPS consistent in preparation for accession to the WTO.”

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. In February 2000, the administration accepted IIPA’s petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan, and on May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in Armenia, Kazakhstan or Uzbekistan.

In 2000, \$10.1 million of Armenian goods entered the U.S. under the GSP duty-free code, accounting for nearly 45% of its total imports to the U.S. For the first 11 months of 2001, \$13.8 million of Armenian goods (or 46% of Armenia’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 47.3% 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 nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In its May 30, 2000 Special 301 announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.

In 2001, IIPA recommended and USTR agreed to place Azerbaijan on the Watch List. In the 2001 Special 301 submission, IIPA regrouped 10 of the 12 CIS countries (excluding Russia and Ukraine for much more serious piracy problems) due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 announcement, USTR noted that “Azerbaijan has yet to fulfill its intellectual property commitments under the 1995 U.S.-Azerbaijan Trade Agreement,” citing failure to adhere to the Geneva Phonograms Convention as well as weak criminal provisions for IP violations.

THE BAHAMAS

The Bahamas has made very little progress in meeting the commitments it undertook in an exchange of letters between its government and the U.S. government dated October 26 and November 9, 2000, or to implement its commitments contained in a letter of April 2000. Those series of commitments involve the need for legal and regulatory reform of Bahamas' copyright law and regulations which created a overbroad compulsory license for unauthorized re-transmission by cable television systems of any copyrighted work transmitted over its territory, including encrypted transmissions. Such provisions violate the Bahamas' obligations under the Berne Convention. In 2001, the IIPA recommended that the Bahamas be placed on the Watch List in order to monitor the promises made in the bilateral agreement. In its April 30, 2001 Special 301 announcement, USTR announced that an out-of-cycle review would be conducted. On February 12, 2002, USTR announced the outcome of the out-of-cycle review and placed Bahamas on the Watch List. USTR pointed to the failure of the Bahamas to amend certain objectionable provisions in its copyright law, and made clear "that the key concern remains the existence of provisions in the Bahamian law allowing for compulsory licensing to Bahamian cable operators of retransmission of premium cable television programming." Bahamas' efforts to amend the copyright law, address remaining problems in its regulations, and engage rightsholders in the regulatory process have not resulted in concrete action to satisfy its bilateral commitments.

The Bahamas currently participates in the Caribbean Basin Initiative (CBI). It is also a beneficiary country under the Caribbean Basin Trade Partnership Act (CBTPA), but is currently ineligible to receive CBTPA trade benefits. One of the CBI discretionary criteria requires that the Bahamas 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 2000, \$74.4 million in Bahamian goods entered the U.S. under the CBI, representing 27.3% of the Bahamas' total imports to the U.S. For the first 11 months of 2001, \$68.8 million in Bahamian goods (or 25.2% of the Bahamas' total imports to the U.S. from January to November) entered under the CBI, representing an increase of 3.5% over the same period last year.

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. One of

the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. In 2000, \$61.8 million of goods from Bahrain entered the United States under the GSP duty-free code, accounting for 18% of its total imports to the U.S. For the first 11 months of 2001, \$53.2 million of goods from Bahrain (or 14.6% of Bahrain's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

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 nearly all of the CIS countries had failed to meet 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, Belarus was placed on the Other Observations list. The next year, Belarus was elevated to the 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, USTR kept Belarus on the Watch List in 2000.

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. GSP benefits for Ukraine were withdrawn in 2001. GSP benefits were withdrawn from Belarus for reasons unrelated to intellectual property matters.

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, USTR has kept Bolivia on the Special 301 Watch List since 1999.

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" copyright protection. IIPA never received notice of any formal action on its 1995 GSP and ATPA petitions, and thus concluded that they were not accepted.

In 2000, \$5.8 million of goods from Bolivia entered the U.S. under the duty-free GSP code, accounting for 3.1% of its total imports to the U.S. Another \$61.5 million of Bolivia's imports to the U.S. received benefits under the ATPA program, accounting for 33.4% of its total imports that year. For the first 11 months of 2001, \$6.2 million of Bolivian goods (or 4.1% of Bolivia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 26.4% increase over the same time period last year. Another \$52.4 million of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2001, representing a decrease of 5.8% from the same period last year.

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."

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."

The USTR noted in its April 30, 2001 press release that "[t]he serious copyright piracy problem shows little sign of abatement." Despite this, the USTR was "pleased to see the establishment of an Inter-Ministerial Committee To Fight Piracy pursuant to the Presidential Decree of March 2001."

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, a hearing was held, and the review remains underway. In 2000, \$2.1 billion of goods from Brazil entered the United States under the duty-free GSP code, accounting for 15% of its total imports to the U.S. For the first 11 months of 2001, \$1.8 billion of Brazilian goods (or 13.6% of Brazil's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 6.9% decrease over the same time period last year.

BULGARIA

By 1995, it was clear that not only had Bulgaria failed to carry out its intellectual property protection obligations under the 1991 bilateral agreement with the United States, but the Bulgarian government had begun to play a direct role in massive piracy. One of the compact disk plants was operated by the government in partnership with a leading pirate company; another was operating on land leased by the government; and both were churning out pirated sound recordings for export into Russia, Europe, and other markets. Accordingly, in February 1995, IIPA asked USTR to designate Bulgaria as a Priority Foreign Country and to withdraw Bulgaria's preferential trade benefits under the Generalized System of Preferences (GSP) program.

Faced with the prospect of sanctions under Special 301, and aided by a change in government in Sofia, Bulgaria moved quickly to address the issues highlighted in IIPA's filing. On the eve of USTR's Special 301 decision, the U.S. and Bulgaria exchanged letters in which Bulgaria promised to accede to the Geneva Phonograms Convention "on a priority basis" and to protect U.S. sound recordings published in the last 50 years; to establish a title verification system to prevent piracy of compact disks, laser disks, CD-ROMs and videos; and to enact deterrent criminal penalties applicable to a broad range of infringements, including inflation-adjusted fines and

mandatory destruction of pirate product. In response to these commitments, USTR listed the country on the Special Mention list without otherwise ranking it for Special 301 purposes for 1995.

In 1996, the IIPA filing commended Bulgaria's enactment of criminal sanctions and its accession to the Phonograms Convention, but noted that other critical commitments, such as title verification, had not been met, and that real enforcement against piracy was virtually nonexistent, while high volume pirate CD production continued unchecked. IIPA recommended that Bulgaria be placed on the Special 301 Watch List. In its April 30 report, USTR listed Bulgaria on the Special Mention list, noting that a title verification decree had just been issued, but criticizing lax enforcement and increased exports of pirate product. It scheduled an out-of-cycle review (OCR), which concluded on October 2, 1996. At that time, Ambassador Barshefsky placed Bulgaria on the Watch List, citing the lack of progress in suppressing the production and export of pirate CDs and CD-ROM products. In its 1997 filing, IIPA called for elevating Bulgaria to the Priority Watch List because of its continued failure to enforce its laws aggressively against the unauthorized production and world-wide export of CD-based products, and the overall lack of criminal prosecution. IIPA noted that deterrent penalties remained absent from the Bulgarian law, although the primary problem was the lack of effective enforcement, not the legal framework. As the piracy problem escalated in 1997 with a production capacity level of over 40 million units, USTR announced an out-of-cycle review (OCR). Upon completion of the OCR in January 1998, Bulgaria was elevated from the Watch List to the Priority Watch List because of its persistent failure to take any meaningful action to eliminate the massive volume of exported pirate music CDs and CD-ROMs. In that January out-of-cycle review and again in its February 1998 301 submission, IIPA recommended designation of Bulgaria as a Priority Foreign Country (PFC) because of the longevity of the problem, and the lack of political will to shut down the production and export of illegal goods.

With the possibility looming of a PFC designation in April, the Bulgarian authorities finally took action in February and March 1998, to control the production and distribution of pirate CDs by Bulgarian plants by closing all of the plants and re-opening them only upon compliance with the newly introduced Plant Licensing Decree. The United States government decided to keep Bulgaria on the Priority Watch List in April, and to conduct a six-month out-of-cycle review in 1998 to monitor the progress and success of these production controls. Satisfied that progress was being made, USTR announced in November 1998 that it was moving Bulgaria to the Watch List, a placement supported, albeit cautiously, by IIPA. At the time of the announcement in November 1998, both USTR and IIPA agreed that title verification had to be significantly improved, and that additional controls on optical media production were required. In USTR's April 1999 Special 301 announcement, progress in Bulgaria was noted, and in recognition of its "firm commitment to effective enforcement" of its IPR laws and its roles as serving as "a model for other economies which are at risk of developing unwanted production capacity of pirated optical media," Bulgaria was removed from all Special 301 lists.

In 2000, \$15.3 million of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 6.6% of its total imports to the U.S. For the first 11 months of 2001, \$18.6 million of Bulgarian goods (or 5.8% of Bulgaria's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 33.5% increase over the same time period last year.

CHILE

Chile has been on USTR's Watch List throughout the 1990s. In 2001, the IIPA recommended that Chile be placed on the Watch List due to continued high piracy levels. USTR placed Chile on the Watch List in 2001, noting in its April 30, 2001 Special 301 announcement that "Chile's intellectual property laws are not fully consistent with its international obligations." The announcement pointed specifically to Chile's failure to enact TRIPS compliant legislation. As well, USTR noted that "[i]nadequate enforcement against piracy and counterfeiting also remains a serious problem."

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" copyright protection. In 2000, \$419.3 million in Chilean imports to the United States benefited from the GSP program, accounting for 12.9% of Chile's total imports to the U.S. For the first 11 months of 2001, \$451.9 million in Chilean imports to the United States benefited from the GSP program, or 15.1% of Chile's total imports to the U.S. between January and November.

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 nearly all of the CIS countries had failed to meet 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, 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 remained on the Priority Watch List. In the April 30, 2001 Special 301 announcement, USTR announced that on March 12, 2001 it had designated Ukraine as a Priority Foreign Country, noting that it made the decision "due to its persistent failure to take effective action against significant levels of optical media piracy and to implement intellectual property laws that provide adequate and effective protection."

In June 1999, IIPA filed a petition with 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 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 Armenia, Kazakhstan, or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters. GSP benefits were withdrawn from Ukraine in 2001.

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 against 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 although the Colombian Attorney General had 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 remained on the Watch List in 2000 in large part because of insufficient enforcement of copyright laws and high piracy levels. USTR's April 30, 2001 Special 301 announcement notes that "current enforcement efforts and penalties have not proven to be a significant deterrent."

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. One of the discretionary criteria of these programs is that the country provide "adequate and effective protection of intellectual property rights." In 2000, \$66.2 million of Colombian goods entered the United States under the GSP program, accounting for 1% of its total imports to the U.S. \$826.6 million of Colombian goods entered the U.S. under the ATPA program, accounting for 12% of its total imports to the U.S. For the first 11 months of 2001, \$53.9 million of Colombian goods (or 1% of Colombia's total imports to the U.S.

from January to November) entered the U.S. under the duty-free GSP code, representing a 13.6% decrease over the same time period last year. \$707.5 million of Colombian goods entered the U.S. under the ATPA program for the same period, accounting for a 7.8% decrease over last year.

COSTA RICA

Costa Rica was placed on the Special 301 Watch List in 1995, for problems associated with inadequate patent protection and inadequate copyright enforcement. In its May 1, 2000 Special 301 announcement, 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 the April 30, 2001 Special 301 announcement, Costa Rica was placed on the Priority Watch List. The USTR noted that "there is growing concern regarding the lack of effective enforcement activity by the Government of Costa Rica." The United States "urge[d] Costa Rica to improve coordination of enforcement activities between public prosecutors and investigators; appoint special prosecutors to take on intellectual property cases; create a coordinated nationwide plan for defending and enforcing IP rights; and improve enforcement-related training at all levels of government." In addition, the announcement noted that "[t]he United States will conduct an OCR in the fall to assess Costa Rica's legislative enforcement." On October 31, 2001, USTR announced its decision regarding the out-of-cycle review. Because "little progress has been made on the four-point list of enforcement-related actions in USTR's April 30 announcement," Costa Rica remains on the Priority Watch List.

In 2000, \$55.3 million of Costa Rican goods entered the U.S. under the GSP, accounting for 1.6% of its total imports to the U.S. Under the CBI, Costa Rica had \$601.4 million worth of goods enter the U.S. in 2000, accounting for 17% of its total imports to the U.S. In 2000, \$15.6 million of Costa Rican goods entered the U.S. under the CBTPA. For the first 11 months of 2001, \$388 million of Costa Rican goods entered the U.S. under the CBTPA. For the first 11 months of 2001, \$54.9 million of Costa Rican goods (or 2% of Costa Rica's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an 8.5% increase over the same time period last year. For the first 11 months of 2001, \$542.3 million of Costa Rican goods entered the U.S. under the CBI, representing a decrease of 1.9% from the same period last year.

CYPRUS

Cyprus was on the Special 301 Watch List from 1991 through 1994. 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, 2000, or 2001.

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 was on the Watch List in 1998, 1999 and 2000. 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 does not appear on any 301 list.

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. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection. In 2000, \$280.4 million of Czech goods entered the United States under the duty-free GSP code, accounting for 26.2% of its total imports to the U.S. For the first 11 months of 2001, \$330 million of Czech goods (or 32% of the Czech Republic’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 29.9% 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 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, 2000, and 2001. 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 the April 30, 2001 Special 301 announcement, the USTR noted that "[t]here have been substantial improvements in the copyright area, especially with the passage of TRIPS-conforming law and the impressive efforts on the part of the National Copyright Office (ONDA). Nonetheless, there continues to be concern with respect to the enforcement of the new copyright law, and enforcement coordination between ONDA and the police remains poor."

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 owners, a key criteria of both programs. IIPA's petition was accepted by USTR in February 2000 and hearings were held shortly thereafter. The review remains ongoing. In 2000, \$48.6 million of Dominican goods entered the U.S. under the duty-free GSP code, accounting for 1.1% of its total imports to the U.S. For the first 11 months of 2001, \$33.6 million of Dominican goods (or 0.9% of the Dominican Republic's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 21% decrease over the same time period last year. In 2000, \$805.3 million entered under the CBI, accounting for 18.4% of its total imports to the U.S. For the first 11 months of 2001, \$747 million of Dominican goods entered under the CBI, representing a

%1.2 increase over the same period last year. In 2000, \$47 million of Dominican goods entered under the CBTPA. For the first 11 months of 2001, \$1.4 billion of Dominican goods entered under the CBTPA.

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 it 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...” Currently, Ecuador does not appear on any list.

In 2000, \$28.6 million of goods from Ecuador entered the U.S. under the duty-free GSP code, accounting for 1.3% of its total imports to the U.S. For the first 11 months of 2001, \$24.7 million of Ecuadorian goods (or 1.4% of Ecuador’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 1% increase over the same time period last year. In 2000, \$247.6 million of goods entered under ATPA, accounting for 11% of its total imports to the U.S. In the first eleven months of 2001, \$213.5 million entered under the ATPA, representing a 3.2% decrease over the same period last year.

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 2001, 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. In the April 30, 2001 Special 301 Announcement, USTR noted insufficiencies in Egypt's copyright law which appeared inconsistent with the country's TRIPS obligations. In addition, the USTR voiced concern regarding "Egypt's approval of fraudulent licenses to distributors of pirated copyright works, which facilitated pirate operations while hampering legitimate producers."

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. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. In 2000, \$26.3 million of Egyptian goods entered the U.S. under the duty-free GSP code, accounting for 2.8% of its total imports to the U.S. For the first 11 months of 2001, \$20.6 million of Egyptian goods (or 2.5% of Egypt's total imports to the U.S. from January to November) 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, where it remained 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 at that time, El Salvador remained off all 301 lists. El Salvador was not placed on any list in 2001.

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 2000, \$20.8 million of Salvadoran goods entered the U.S. under the duty-free GSP code, accounting for 1.1% of its total imports to the U.S. For the first 11 months of 2001, \$10.7 million of Salvadoran goods (or 0.6% of El Salvador's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 46.2% decrease over the same time period last year. In 2000, \$41.9 million of goods entered the U.S. under the CBI. For the first 11 months of 2001, \$52 million entered under the CBI, representing a 23.9% increase over the same period last year. In 2000, \$26 million goods entered under the CBTPA. For the first 11 months of 2001, \$852 million entered under the CBTPA.

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, 2000, or 2001.

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. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. In 2000, \$11.1 million of Estonian imports to the United States benefited from the GSP program, accounting for 2% of its total imports to the U.S. For the first 11 months of 2001, \$13 million of Estonian goods (or 5.8% of Estonia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 24.9% increase over the same time period last year.

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 none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. 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, but not Georgia. In the April 30, 2001 Special 301 announcement, USTR noted that it would conduct an out-of-cycle review of Georgia in December of 2001. On

February 12, 2002, announced the result of its out-of-cycle review of Georgia. Though USTR decided not to place Georgia on any list, it noted continued deficiencies in copyright protection and enforcement "such as the lack of *ex officio* authority. . . for customs and criminal authorities, as well as the lack of civil *ex parte* search and seizure procedures conducted without notice to the alleged infringers."

Georgia began participating in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries, in 2001. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. For the first 11 months of 2001, \$2 million of Georgian goods (or 7.3% of Georgia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

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 to 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." The IIPA 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, 2000, or 2001.

GREECE

Greece was on the Watch List from 1989 to 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.

The United States filed a TRIPS case against Greece in 1997. 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. In 2000, Greece remains on the Priority Watch List for the sixth consecutive year. In the April 30, 2001 Special 301 announcement, the USTR noted, "Greece has passed new legislation providing for the immediate closure of television stations that infringe upon intellectual property rights, and estimated levels of television piracy in Greece have fallen significantly as a result." However, the announcement points out that "[p]iracy rates for audio-visual works, video games and business software. . . remain high." Greece was removed from the Priority Watch List and placed on the Watch List in 2001.

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, specifically: "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 its April 30, 2001 Special 301 Announcement, the USTR noted that despite amendments to the 1998 Copyright Act, "criminal penalties in cases of infringement of intellectual property, and the provision providing for statutory damages was removed." Guatemala remained on the Watch List in 2001.

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 2000, \$30.5 million of Guatemalan goods entered the U.S. under the duty-free GSP

code, accounting for 1.2% of its total imports to the U.S. For the first 11 months of 2001, \$30.5 million of Guatemalan goods (or 1.3% of Guatemala's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 6.1% increase over the same time period last year. In 2000, \$250 million of Guatemalan goods entered the U.S. under the CBI, accounting for 12.2% of its total imports to the U.S. For the first 11 months of 2001, \$217 million of Guatemalan entered under the CBI, representing a 3.4% decrease (or 9% of Guatemala's total imports to the U.S. from January to November). In 2000, \$14.7 million entered under the CBTPA, accounting for .6% of its total imports to the U.S. For the first 11 months of 2001, \$458 million entered under the CBTPA, representing 19% of Guatemala's total imports to the U.S. for the same period.

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 pirated 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 or 2001.

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 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 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." In 2001, USTR elevated Hungary to the Priority Watch List, largely as a result of its failure to provide adequate protection of "confidential test data submitted by pharmaceutical companies seeking marketing approval."

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. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. In 2000, \$318.4 million of Hungarian goods entered the U.S. under the duty-free GSP code, accounting for 11.7% of its total U.S. imports. For the first 11 months of 2001, \$343.5 million of Hungarian goods (or 13% of Hungary's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 17.3% increase over the same time period last year.

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. In the 2001 Special 301 filing, IIPA recommended that India be placed on the Watch List. In the April 30, 2001 Special 301 announcement, USTR kept India on the Priority Watch List, largely for failures in its patent system. The announcement noted that India’s copyright law was “generally strong,” though “poor enforcement allows rampant piracy.” Further, “piracy of motion pictures, music, software, books and video games is widespread; videos and VCDs are often available on the street before titles even open in cinemas.”

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. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection. In 2000, \$1.1 billion of Indian goods entered the U.S. under the duty-free GSP code, accounting for 10.7% of its total imports to the U.S. For the first 11 months of 2001, \$1.2 billion of Indian goods (or 13.4% of India’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 15.2% 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. In 2001, IIPA recommended that Indonesia be elevated to the Priority Watch List, due to the continuing domination of piracy in the market. The USTR agreed, noting in its April 30, 2001 Special 301 announcement that "[p]iracy levels in Indonesia's enormous market for copyright and trademark goods are among the highest in the world." The announcement points out that "[i]t is becoming increasingly apparent that, as other countries in the region intensify their fight against copyright infringement, audio and video pirates are finding refuge in Indonesia."

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. One of the discretionary criteria of this program is that the country provide "adequate and effective protection for intellectual property rights." In 2000, \$1.4 billion of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 13.3% of its total imports to the U.S. For the first 11 months of 2001, \$1.2 billion of Indonesian goods (or 13.2% of Indonesia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 2.7% decrease over the same time period last year.

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. The Alliance made no recommendation concerning Ireland in its 2001 Special 301 submission. Consequently, the USTR did not place Ireland on any list during 2001.

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. In the April 30, 2001 Special 301 announcement, the USTR noted that “[w]hile the United States is gratified by reports that illicit commercial-sale production of optical media in Israel may have fallen substantially, Israel’s domestic market for copyright goods remains dominated by pirated music, video and software CDs.” In addition, “Israel is part of an enormous transshipment network for pirated versions of Russian-language software, as well as audio and video CDs and cassettes.”

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 antipiracy 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.” In the 2001 Special 301 submission, the IIPA recommended that Italy be placed on the Watch List with an out-of-cycle review based on concerns that Italian authorities may not adequately implement the new Anti-Piracy law. The USTR kept Italy on the Watch List in 2001, noting in its April 30, 2001 Special 301 announcement its own concern about full implementation of Italy's Anti-Piracy law.

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 or 2001.

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. One of the discretionary criteria of this program is that the country provide "adequate and effective protection of intellectual property rights." In 2000, \$10.3 million of Jordan's imports to the United States benefited from the GSP program, accounting for 14.2% of its total imports to the U.S. For the first 11 months of 2001, \$8.3 million of Jordanian goods (or 4% of Jordan's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 11.4% 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 none of the CIS countries had 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 Kazakhstan was placed on the Other Observations list, and the next year, Kazakhstan was removed from the Special 301 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, USTR placed Kazakhstan on the Special 301 Watch List in 2000.

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. The U.S. government has not yet decided whether to withdraw or suspend GSP benefits in Kazakhstan. In 2000, \$325.6 million of Kazakhstan's imports to the United States benefited from the GSP program, accounting for 75.5% of its total imports to the U.S. For the first 11 months of 2001, \$198 million of Kazakh goods (or 61% of Kazakhstan's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, accounting for a 36% decrease over last year.

In 2001, IIPA recommended and USTR agreed to keep Kazakhstan on the Watch List. In the 2001 Special 301 submission, IIPA regrouped 10 of the 12 CIS countries (excluding Russia and Ukraine for much more serious piracy problems) due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 announcement, USTR noted that Kazakhstan “does not clearly provide retroactive protection for works or sound recordings under its copyright law. In addition there is weak enforcement of intellectual property rights in Kazakhstan.”

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 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. Kuwait remained on the Watch List in 2001. In its April 30, 2001 Special 301 announcement, the USTR noted deficiencies in Kuwait’s copyright law making it inconsistent with TRIPS requirements along with inadequate enforcement and high piracy levels.

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 none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. 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 did not put the Kyrgyz Republic on any list. In the April 30, 2001 Special 301 announcement, the USTR noted that it would conduct an out-of-cycle review on the Kyrgyz Republic. On February 12, 2002, announced the result of its out-of-cycle review of the Kyrgyz Republic. Though USTR decided not to place the Kyrgyz Republic on any list, it noted continued deficiencies in copyright protection and enforcement "such as the lack of *ex officio* authority. . . for customs and criminal authorities, as well as the lack of civil *ex parte* search and seizure procedures conducted without notice to the alleged infringers."

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. In 2000, \$133,000 in Kyrgyz imports to the United States benefited from the GSP program, accounting for nearly 6.8% of its total imports to the U.S. For the first 11 months of 2001, roughly \$179,000 of Kyrgyz goods (or 5.6% of the Kyrgyz Republic's total imports to the U.S. from January to November) entered the U.S. under the GSP duty-free code, representing a 34.6% 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, and there is no right of remuneration for the public performance of sound recordings. The IIPA remains concerned about Latvia's inefficient copyright enforcement regime. Latvia remained on the Watch List in 2001. In its April 30, 2001 Special 301 announcement, the USTR noted that "[l]arge volumes of pirated products are transshipped through Latvia from Russia and Ukraine." Local enforcement is poor and "[l]egislation is needed to improve the ability of law enforcement and judicial authorities to combat this piracy, such as providing for adequate civil *ex parte* search remedies."

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. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. In 2000, \$10.4 million of Latvia's imports to the United States benefited from the GSP program, accounting for 3.5% of its total imports to the U.S. For the first 11 months of 2001, \$7.9 million of Latvian goods (or 5.6% of Latvia's total imports to the U.S. from January to November)

entered the U.S. under the duty-free GSP code, representing a 21.3% decrease 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." In the 2001 Special 301 submission, the IIPA recommended that Lebanon be elevated to the Priority Watch List due to a lack of enforcement against copyright piracy, despite passage of the copyright law in 1999. USTR agreed, and elevated Lebanon to the Priority Watch List in 2001, citing continuing piracy problems, particularly cable piracy. In June of 2001, the IIPA filed a request for review of the intellectual property practices of Lebanon. USTR has not yet decided whether to accept the request.

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. One of the discretionary criteria of this program is that the country provide "adequate and effective

protection of intellectual property rights.” In 2000, \$29.5 million of Lebanon’s imports to the United States benefited from the GSP program, accounting for 39% of its total imports to the U.S. For the first 11 months of 2001, \$34.2 million of Lebanese goods (or 41.3% of Lebanon’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 27.3% 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.” In the 2001 Special 301 submission, the IIPA recommended that Lithuania be added to the Priority Watch List due to a lack of on-the-ground enforcement and exploitation of this weakness by pirates to the detriment of other markets in Latvia, Estonia, and Poland, for example. In the April 30, 2001 Special 301 announcement, the USTR placed Lithuania on the Watch List and announced that it would conduct an out-of-cycle review “to assess Lithuania’s enforcement efforts.” On October 31, 2001 the USTR announced the outcome of its out-of-cycle review of Lithuania. USTR kept Lithuania on the Watch List “because of serious on-the-ground enforcement failures.” The announcement notes that “[t]he copyright industries worked for many years to ensure the passage of proper criminal penalties in May 2000; now, after just over one year and only one case, there are factions in Lithuania that want to weaken this law.”

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. One 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 2000, \$3.2 million of Lithuania’s imports to the United States benefited from the GSP program, accounting for 2.5% of its total imports to the U.S. For the first 11 months of 2001, \$11.3 million of Lithuanian goods (or 7.2% of Lithuania’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 342.2% increase over the same period last year.

MACAU

Macau did not appear 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.” In the 2001 Special 301 submission, the IIPA recommended that Macau be kept on the Watch List and an out-of-cycle review (OCR) be conducted, “to evaluate Macau’s enforcement progress.” In its April 30, 2001 Special 301 announcement, USTR kept Macau on the Watch List, noting a concern with “Macau’s failure to convict and sentence manufacturers of infringing intellectual property products.”

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 antipiracy 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.

Despite legislative changes in 2000, the IIPA recommended in its 2001 Special 301 submission that Malaysia remain on the Priority Watch List due to a lack of effective enforcement against pirates. The USTR noted in its April 30, 2001 Special 301 announcement that it had kept Malaysia on the Priority Watch List and would conduct an OCR to assess Malaysia’s enforcement efforts and implementation of its new Optical Disc Act. On October 31, 2001, the USTR announced that it would keep Malaysia on the Priority Watch List as a result of the out-of-cycle review. Though Malaysia has taken significant legislative steps to combat piracy, serious enforcement problems remain, particularly in the courts where “there has been virtually no progress in obtaining prompt convictions and deterrent sentencing of pirates.”

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."

Mexico has not appeared on any Special 301 lists since 2000. For the last two years, the U.S. and Mexican governments have engaged in a series of periodic 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, to other relevant matters. High-level government engagement, by both governments, on copyright matters is required with our trade partner, Mexico.

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 nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. 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, including Moldova.

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 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. In 2000, \$257,000 in Moldavian imports to the United States benefited from the GSP program, representing 0.2% of its total imports to the U.S. For the first 11 months of 2001, \$141,000 of Moldavian goods (or 0.2% of Moldova's total imports to the U.S. from January to November) entered the U.S. under the GSP duty-free code, representing a decrease of 37.8% over the same period last year.

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. In the April 30, 2001 Special 301 announcement, the USTR noted it had placed New

Zealand on the Watch List for a failure to introduce promised legislation banning parallel imports on “newly-released copyright products.”

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.”

One 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 2000, \$57.2 million of Nicaraguan imports to the United States benefited from the CBI program, accounting for 9.6% of its total imports to the U.S. For the first 11 months of 2001, \$60 million of Nicaraguan goods entered the U.S. under the CBI, representing a 14.1% increase from the same period last year. Nicaragua also receives benefits under the Caribbean Basin Trade Partnership Act. One of the CBTPA discretionary criteria requires that Nicaragua provide “protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights described in Section 101(d)(15) of the Uruguay Round Agreements Act.” In 2000, \$274,000 of Nicaraguan goods benefited from the CBTPA program, accounting for less than one half of 1% of Nicaragua’s total imports to the U.S. For the first 11 months of 2001, \$75 million of Nicaraguan goods benefited from the CBTPA program.

Nicaragua did not appear on any Special 301 list in 2000 or 2001.

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. In the 2001 Special 301 submission, the IIPA recommended that Oman be placed on the Watch List. USTR did not place Oman on any list in 2001.

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. One of the discretionary criteria of this program is that the country provide “adequate and effective protection of intellectual property rights.” In 2000, \$49.7 million of Oman’s imports to the United States benefited from the GSP program, accounting for 19.4% of its total imports to the U.S. For the first 11 months of 2001, \$36.7 million of Oman’s goods (or 8.8% of Oman’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 18.7% from the same period last year.

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.” In 2001, IIPA recommended and again USTR agreed to keep Pakistan on the Watch List. In the April 30, 2001 Special 301 announcement, USTR noted that despite new legislation, “[t]he sharp growth in optical media piracy, however, offsets the promising developments in legal infrastructure.” In June of 2001, the IIPA filed a request for review of the intellectual property practices of Pakistan. USTR has not yet decided whether to accept the request.

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 \$93.3 million of products into the United States without duty in 2000 (4.3% of its total imports to the U.S.), and \$98.6 million of products (or 4.7% of Pakistan’s total imports to the U.S. from January to November) into the United States without duty during the first 11 months of 2001.

PALESTINIAN AUTHORITY

IIPA filed its first Special 301 comments on the Palestinian Authority in 1999, over concerns about 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 antipiracy 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. In 2001, noting continuing unrest, the IIPA recommended that USTR conduct an out-of-cycle review of the area when conditions permit. USTR did not place the Palestinian Authority on any list in 2001.

In 2000, \$181,000 of products imported from the West Bank benefited from the GSP program, representing 3.9% of the Palestinian Authority's total imports to the U.S. For the first 11 months of 2001, \$38,000 of products (or 24.7% of the Palestinian Authority's total imports to the U.S. from January to November) imported from the West Bank benefited from the GSP program, representing 96.6% decrease over the same period last year.

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.

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. 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. IIPA made no recommendation on Panama in 2001 and USTR did not place Panama on any list in 2001.

In 2000, \$1.8 million in Panamanian 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 11 months of 2001, \$3.4 million of Panamanian goods (or 1.3% of Panama's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 95% increase over the same period last year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$42.6 million of Panamanian goods entered the U.S., accounting for nearly 14.4% of total imports to the U.S. in 2000. For the first 11 months of 2001, \$32.2 million of Panamanian goods (or 12.1% of Panama's total imports to the U.S. from January to November) entered under the CBI, representing a 19.7% decrease over the same period last year. Under the Caribbean Basin Trade Partnership Act (CBTPA), which has IPR criteria similar to CBI and GSP, \$6,000 of Panamanian goods entered the U.S. in 2000. For the first 11 months of 2001, \$5.5 million of Panamanian goods (or 2.1% of Panama's total imports to the U.S. from January to November) entered the U.S. under the CBTPA.

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 antipiracy 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 achieved, 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 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 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 a 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.”

In 2001, IIPA continued to support the USTR’s Section 306 monitoring of Paraguay. USTR’s April 30, 2001 Special 301 announcement echoes the 2000 announcement, noting inadequate implementation of the MOU and that “Paraguay continues to be a regional center for piracy and counterfeiting and a transshipment point to the larger markets bordering Paraguay, particularly Brazil, where the sales of pirated copyright products in optical media and other formats have been of particular concern.” In 2000, \$18.9 million in Paraguayan imports to the United States benefited from the GSP program, accounting for 45% of its total imports to the U.S. For the first 11 months of 2001, \$9.6 million of Paraguayan goods (or 33% of Paraguay’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP program, representing a 47.5% decrease from the same period last year.

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 2001, IIPA recommended that Peru be put on the Watch List in recognition of noticeable progress INDECOPI has made on copyright issues. The USTR agreed, placing Peru on the Watch List for 2001. In the April 30, 2001 Special 301 announcement, USTR noted that "the Government of Peru took several positive steps in cooperating with U.S. industry on intellectual property protection." The announcement points out that "[d]espite these efforts, however, criminal enforcement remains a problem."

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 2000, \$45.1 million in Peru's imports to the United States benefited from the GSP program, accounting for nearly 2.3% of its total imports to the U.S. For the first 11 months of 2001, \$61.7 million of Peruvian goods (or 3.7% of Peru's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 52.2% over the same period last year. An additional \$846 million of Peruvian products benefited from the Andean Trade Preferences Act ("ATPA") in 2000, accounting for 42.6% of total imports to the United States. In the first 11 months of 2001, an additional \$677.6 million of Peruvian goods entered the U.S. under ATPA, representing a 12.7% decrease 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.

Noting increased pirate production and cross-border distribution, the IIPA recommended in 2001 that the Philippines be placed on the Priority Watch List "to underscore U.S. insistence that these long-standing and serious problems be effectively tackled." USTR agreed and placed the Philippines on the Priority Watch List in 2001. In the April 30, 2001 Special 301 announcement, USTR noted concern that "the Philippines has the potential of becoming a center of pirate optical media production in Asia."

In 2000, \$745.4 million of Philippine imports to the United States benefited from the GSP program, accounting for 5.3% of its total imports to the U.S. For the first 11 months of 2001, \$627.2 million of Philippine goods (or 6% of the Philippine's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 8.8% over the same period last year.

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 2001, IIPA recommended that Poland remain on the Watch List, but that USTR conduct an out-of-cycle review “to ensure that progress continues in Poland on both enforcement and legislative reform.” IIPA recommended that the out-of-cycle review “focus on distinct and tangible improvements made in halting the activities involved in the sale and distribution of piratical materials at the Warsaw Stadium.” Though USTR did not conduct an out-of-cycle review, in the October 31, 2001 Special 301 “out of cycle” decision announcement, continued concern over the large amounts of pirate products in the Warsaw Stadium was noted by USTR. The announcement urged Polish authorities to act immediately to halt the sale of pirated products in and through the stadium.

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 do a 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 2000, \$316.6 million of Poland’s imports to the United States benefited from the GSP program, accounting for nearly 30.4% of its total imports. For the first 11 months of 2001, \$264.7 million of Polish goods (or 31% of Poland’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 8.6% from the same period last year.

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. IIPA recommended that Qatar remain on the Watch List in 2001 for failure to adequately address the piracy of business software and other copyrighted products. USTR did not place Qatar on any list in 2001.

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, 2000, and 2001 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. Despite these concerns, Romania is making legal reform. In February, 2001, Romania deposited with the WTO its instruments of ratification to the new digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT).

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. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection. In 2000, \$77.1 million of Romania’s imports to the United States benefited from the GSP program, accounting for 16.4% of its total imports to the U.S. For the first 11 months of 2001, \$93.4 million of Romanian goods (or 19% of Romania’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 32.8% 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 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

¹ This 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.

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 U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in Russia. In its April 30, 2001, Special 301 announcement, USTR noted certain deficiencies in Russia’s copyright law making it incompatible with 1991 bilateral trade agreement and TRIPS: “[a]mong the deficiencies are: the lack of full retroactive protection for works and sound recordings, the lack of civil *ex parte* search procedures and other enforcement-related deficiencies.” In 2000, \$514.7 million of Russia’s imports to the United States benefited from the GSP program, accounting for 6.6% of its total imports to the U.S. For the first 11 months of 2001, \$359.2 million of Russian goods (or 6.2% of Russia’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 26.1% decrease 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. In 2001, IIPA again recommended that Saudi Arabia be placed on the Priority Watch List, for continued piracy, lack of effective and deterrent enforcement actions, and a TRIPS-incompatible copyright law. In 2001, USTR kept Saudi Arabia on the Watch List.

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.” IIPA made no recommendation regarding Singapore in 2001 and USTR did not place Singapore on any list in 2001.

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 and 2001, South Africa did not appear on any Special 301 list in 2000 or 2001.

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 2000, \$583.2 million of South Africa’s imports to the United States benefited from the GSP program, accounting for 13.9% of its total imports to the U.S. For the first 11 months of 2001, \$ 475.8 million of South Africa’s imports into the United States (or 11.4% of South Africa’s total imports to the U.S. from January to November) benefited from the GSP program, representing a decrease of 10.9% over the same period last year.

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 remained on the Priority Watch List.

In 2001, IIPA recommended that South Korea remain on the Priority Watch List due to continued business software and increasingly sophisticated book piracy, ineffective administrative and criminal enforcement, as well as a lack of any deterrent value for enforcement actions. USTR kept South Korea on the Priority Watch List in 2001, noting that despite increased copyright enforcement programs, it was still too early to determine whether or not they had any effect.

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. IIPA did not make any recommendation regarding Spain in 2001. USTR did not place Spain on any list during 2001.

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, numerous commitments remained unfulfilled such that USTR decided 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 affect the entire Greater China region. USTR agreed, and placed Taiwan on the Watch List in 2000.

In 2001, IIPA recommended 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. USTR agreed, placing Taiwan on the Priority Watch List in 2001. On October 31, 2001, Taiwan passed the Optical Media Management Statute. It brings under the control of the Ministry of Economic Affairs (MOEA) a system of: granting permits to persons/entities engaged in the production of “prerecorded optical discs”; otherwise regulating production of stampers/masters (through SID Code and other requirements); and requiring transparency (i.e., a reporting requirement) with respect to production of “blank” media.

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 nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. 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, including Tajikistan, on the Special 301 Watch List.

In 2001, USTR kept Tajikistan on the Watch List. In its April 30, 2001 Special 301 announcement, USTR noted Tajikistan's failure "to fulfill all of its intellectual property commitments under the 1993 U.S.-Tajikistan Trade Agreement," citing failure to adhere to the Geneva Phonograms Convention as well as "weak enforcement of intellectual property rights" and failure to implement criminal provisions for IPR violations as required by the bilateral agreement.

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, 2000, and 2001 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 June 2001, six copyright-based associations - Association of American Publishers, Inc. (AAP), AFMA, Interactive Digital Software Association (IDSA), Motion Picture Association of America, Inc. (MPAA), National Music Publishers' Association, Inc. (NMPA), and Recording Industry Association of America, Inc. (RIAA) - submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners.

In 2001, \$2.2 billion in Thailand's imports to the United States benefited from the GSP program, accounting for 13.5% of its total imports to the U.S. For the first 11 months of 2001, \$2.1

billion of Thai goods (or 15.1% of Thailand's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 0.7% over the same period last year.

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, nonsuspendable fines and jail terms; issuing a directive to all government agencies to legalize software, starting a public antipiracy 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 2000, \$435 million in Turkey's imports to the United States benefited from the GSP program, accounting for 14.4% of its total imports to the U.S. For the first 11 months of 2001, \$407.7 million of Turkish goods (or 14.3% of Turkey's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP program.

In 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. In 2001, IIPA recommended that Turkey remain on the Priority Watch List. In its April 30, 2001 Special 301 announcement, USTR downgraded Turkey to

the Watch List, noting that “[i]n February 2001, the Turkish Parliament passed amendments to the Copyright Law designed to bring Turkey into compliance with its TRIPS obligations.”

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 nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. 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, including Turkmenistan.

In 2001, USTR kept Turkmenistan on the Watch List. In the 2001 Special 301 submission, IIPA regrouped 10 of the 12 CIS countries (excluding Russia and Ukraine for much more serious piracy problems) due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 announcement, USTR noted Turkmenistan’s failure to provide “protection for U.S. and other foreign sound recordings, nor does it provide protection of pre-existing works or sound recordings under its copyright law.”

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 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. USTR placed UAE on the Watch List in 2001 for concerns over adequate and effective intellectual property protection unrelated to copyright.

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 nearly all of the CIS countries had failed to meet 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 were 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 on Moldova 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 whether to withdraw or suspend GSP benefits in Armenia, Kazakhstan, or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters.

In 2001, IIPA recommended that USTR designate Ukraine as a Priority Foreign Country, due to its continued position as the largest producer and exporter of illegal optical media disks in Central and Eastern Europe. USTR agreed, designating Ukraine as a Priority Foreign Country, on March 12, 2001 for its failure to implement the Joint Action Plan agreed to by then-President Clinton and President Kuchma in Kiev on June 1, 2000. The designation in March commenced a formal investigation of the IPR protection and enforcement failures in Ukraine, consistent with Special 301 legal requirements. On December 20, 2001 that investigation formally ended and the U.S. government announced the imposition of trade sanctions amounting to \$75 million, effective on January 23, 2002 as the result of the continued failure on the part of the government of Ukraine to meet its obligations under the Joint Action Plan, namely to properly regulate optical media production.

The imposition of sanctions in January were in addition to the complete withdrawal of trade benefits to Ukraine under the General System of Preferences program; that suspension was announced on August 10, 2001, effective September 24, 2001.

In its April 30, 2001 Special 301 announcement, USTR noted Ukraine's "persistent failure to take effective action against significant levels of optical media piracy and to implement intellectual property laws that provide adequate and effective protection." In January of 2002, Ukraine passed a deficient law intended to regulate optical media production and distribution (Optical Disc Licensing Bill #8278-1), hoping to avoid sizable, looming trade sanctions. The U.S. government properly reacted to that bill, calling it an insufficient measure and refusing to forestall the trade sanctions or to re-institute the GSP benefits. On January 17, 2002, USTR announced that it would begin implementing trade sanctions against Ukraine on January 23.

In 2000, \$40 million in Ukrainian imports to the United States benefited from the GSP program, accounting for nearly 4.6% of its total imports to the U.S. There are no GSP figures for Ukraine in 2001, as the benefits were withdrawn due to Ukraine's continued failure to provide adequate and effective copyright protection.

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.

In 2001, IIPA recommended that Uruguay be elevated to the Priority Watch List due to the long delay in passing much-needed copyright legislation, the continued high levels of piracy, and inadequate enforcement. IIPA also recommended that USTR conduct an out-of-cycle review to monitor Uruguay’s advances on these copyright issues. In its April 30, 2001 Special 301 announcement, USTR elevated Uruguay to the Priority Watch List, noting Uruguay’s failure to update its copyright law: “Uruguay’s draft copyright legislation has become entangled in legislative wrangling and currently contains numerous shortcomings even in its draft form, most notably the separation from the comprehensive copyright bill of software protection into a stand-alone bill.” In June 2001, the IIPA filed a request for review of the intellectual property practices of Uruguay. USTR has not yet decided whether to accept the request.

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. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection. In August 2000, IIPA filed a petition to review Uruguay’s eligibility to maintain GSP benefits. Unfortunately, the petition was rejected. However, IIPA filed again in 2001. In 2000, \$84.5 million in Uruguay’s imports to the United States benefited from the GSP program, accounting for nearly 27.3% of its total imports to the U.S. For the first 11 months of 2001, \$72.9 million of Uruguayan goods (or 35% of Uruguay’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 4.2% decrease over the same 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 none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. 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, including Uzbekistan.

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 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. The U.S. government has not yet decided on whether to withdraw or suspend GSP benefits in Uzbekistan.

In 2001, IIPA recommended and USTR agreed to place Uzbekistan on the Watch List. In the 2001 Special 301 submission, IIPA regrouped 10 of the 12 CIS countries (excluding Russia and Ukraine for much more serious piracy problems) due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 announcement, USTR noted Uzbekistan's failure to provide "protection for U.S. and other foreign sound recordings, [and its failure to] provide protection of pre-existing works or sound recording" among the defects in need of remedy for Uzbekistan to be in compliance with the 1994 U.S.-Uzbekistan Trade Agreement.

In 2000, US\$166,000 in Uzbek's imports to the United States benefited from the GSP program, accounting for nearly 0.5% of its total imports to the U.S. For the first 11 months of 2001, \$1.8 million in Uzbek imports to the United States (or 3.6% of Uzbekistan's total imports to the U.S. from January to November) benefited from the GSP program, representing an increase of 1,102.6% from the same period last year.

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 2000, US\$744.8 million in Venezuela's imports to the United States benefited from the GSP program, accounting for 4.3% of its total imports to the U.S. For the first 11 months of 2001, US\$595.2 million of Venezuelan goods (or

4.5% of Venezuela's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 13.1% decrease 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. In 2001, IIPA recommended that Venezuela remain on the Watch List. USTR agreed, noting in its April 30, 2001 Special 301 announcement that "Venezuela continues to present a mixed record of success with respect to its protection of intellectual property rights, although in some respects it is gradually moving in the right direction."

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 government efforts to implement the commitments of the Bilateral Copyright Agreement. USTR agreed, and Vietnam maintained its position on the Watch List. In 2000 and 2001, the USTR agreed with IIPA's assessment of continuing IPR problems in Vietnam, and retained Vietnam on the Watch List in both years.