



# **INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

## **2003 SPECIAL 301 REPORT**

**ON GLOBAL COPYRIGHT PROTECTION  
AND ENFORCEMENT**

**SUBMITTED TO THE  
UNITED STATES TRADE REPRESENTATIVE**

**FEBRUARY 14, 2003**

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# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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February 14, 2003

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"), 67 Fed. Reg.  
79683 (Dec. 30, 2002)

Dear Mr. Papovich:

This filing responds to the Request for Written Submissions appearing on December 30, 2002 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 56 separate country reports. We also highlight six initiatives in this letter, and identify seven countries that we have not recommended be on a Special 301 list but which merit ongoing attention by the U.S. government.

## 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, DVDs 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 April 2002, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2002 Report, the ninth 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 industries<sup>1</sup> accounted for 5.24% of U.S. GDP or \$535.1 billion in value-added in 2001. In the last 24 years (1977-2001), the core copyright industries' share of GDP grew at an annual rate more than twice as fast as the remainder of the economy (7.0% vs. 3.0%). Also over these 24 years, employment in the core copyright industries more than doubled to 4.7 million workers (3.5% 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. 1.5%). In 2001, the U.S. copyright industries achieved foreign sales and exports of \$88.97 billion, a 9.4% gain from the prior year. The copyright industries' foreign sales and exports continue to be larger than 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. This protection upon which so much U.S. economic performance rests is under constantly evolving threats, and it is critical to sustaining U.S. economic competitiveness that our response remains flexible, innovative and committed. There are certain sectors of the U.S. copyright community, notably the music sector, that are already witnessing significant declines in foreign sales as a consequence of increased levels and new forms of piracy, and it is essential that we address these problems on an urgent basis.

## **B. OUTLINE OF IIPA'S SPECIAL 301 SUBMISSION**

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

- This letter, which (1) outlines IIPA's recommendations for cross-cutting initiatives to be undertaken by the copyright industries and the U.S. government for 2003; (2) summarizes our submission this year; and (3) points the reader to various appendices.
- Appendix A, which contains IIPA's country placement recommendations, estimated trade losses due to piracy, and estimated levels of piracy;
- Appendix B, which describes our members' methodology for calculating estimated trade losses and piracy levels;
- Appendix C, which includes all the country surveys<sup>2</sup> and at the end lists seven countries that deserve continued U.S. government attention but which have not been placed on the Special 301 lists.
- Appendix D, which provides a historical chart of countries' placement on Special 301 lists by USTR since 1990; and

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<sup>1</sup> 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 that create copyrighted materials as their primary product.

<sup>2</sup> 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 David Johnstone, and our staff, Pam Burchette, Melissa Braford, Michael P. Murphy, and Lauren Braford for their contributions in preparing, producing and distributing this submission.

- Appendix E, which contains the Special 301 histories of the countries that appear as our recommendations this year, and many other countries that have appeared on USTR's lists in the past and are still candidates for monitoring intellectual property practices.

### **C. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2003**

Improving copyright 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 two decades 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, and in many respects, growing, threats in the 21st century. These threats, emanating largely from the growth of digital and on-line technology and the increased organization of commercial pirates, require a renewed commitment to use both the old and new tools available to industry and governments.

In our last four Special 301 filings, IIPA outlined a series of challenges facing the copyright-based industries. This year, we have updated these priorities, but they remain essentially unchanged from 2002.

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.

#### **OPTICAL DISC PIRACY AND ITS EFFECTIVE REGULATION**

Piracy of optical disc products today (along with corporate end-user piracy of business software) causes the greatest losses to the copyright industries and pose the greatest threats to them. Increasingly, all sectors of the copyright industry are using a common set of media to distribute their products worldwide. These "optical disc" products include formats such as compact discs (CD), video CDs (VCD), CD-ROMs, CD-Rs and digital versatile discs (DVD). An explosion in the world's capacity to produce optical disc 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 disc 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 disc 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.

The growth in the number and capacity of optical disc factories around the globe has been staggering. The following chart details that growth in selected countries. It is noteworthy that the greatest optical disc piracy threat is in Asia and Russia which have shown the fastest growth in the number of plants and production lines.

PLANTS (Excluding CD-R)		PRODUCTION LINES		CAPACITY IN MILLIONS
2002	1999	2002	1999	2002

<b>ASIA</b>					
Australia	9	12	19	13	66.5
Cambodia	1		2		7
China	70	72	196	156	686
Hong Kong	93	94	554	414	1939
India	9	8	14	8	49
Indonesia	19	12	36	16	126
Japan	34	34	66	62	231
Korea	31	24	96	28	336
Laos	2	2	2	2	7
Macau	7	26	6	31	21
Malaysia	38	32	86	41	301
Myanmar/Burma	2	4	4	6	14
Pakistan	5	5	12	5	66
Philippines	9	5	23	7	80.5
Singapore	15	17	29	29	101.5
Taiwan	61	41	283	239	1127
Thailand	51	20	102	56	357
Vietnam	2	3	2	3	7
<b>SUB-TOTAL</b>	<b>458</b>	<b>411</b>	<b>1532</b>	<b>1116</b>	<b>5522.5</b>
<b>E. EUROPE/CIS</b>					
Bulgaria	7		9		
Czech Republic	4		24		200
Hungary	2		2		
Kazakhstan	1		1		
Lithuania	1		1		8
Poland	11		49		316
Romania	1		1		10
Russia	26		50		
Ukraine	3		8		30
<b>SUB-TOTAL</b>	<b>56</b>		<b>145</b>		<b>564</b>
<b>W. EUROPE</b>					
Greece	11		11		88
Italy	29		57		459
<b>SUB-TOTAL</b>	<b>40</b>		<b>68</b>		<b>547</b>
<b>LATIN AMERICA</b>					
Argentina	16		31		119.9
Brazil	9		11		453
Chile	2		2		18.7
Columbia	3		10		48
Dominican Rep.	1		1		6.7
Mexico	14		49		295.5
Peru	3		5		16.7
Venezuela	3		4		40
<b>SUB-TOTAL</b>	<b>51</b>		<b>113</b>		<b>998.5</b>
<b>MIDDLE EAST</b>					
Egypt	6		6		25
Israel	7		18		89
Lebanon	1		1		6.7
Saudi Arabia	1		1		20
Syria	1		1		3.5
Turkey	8		18		63
<b>SUB-TOTAL</b>	<b>24</b>		<b>45</b>		<b>207.2</b>
<b>AFRICA</b>					
South Africa	3		7		49
<b>SUB-TOTAL</b>	<b>3</b>		<b>7</b>		<b>49</b>
<b>TOTALS</b>	<b>632</b>		<b>1910</b>		<b>7888.2</b>

The growing optical disc problem confronting the copyright sector demands new and creative solutions. Traditional enforcement mechanisms have not been sufficient to prevent optical disc 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 WTO TRIPS obligation to provide deterrent enforcement against piracy on a commercial scale, every country whose optical disc production facilities are producing significant pirate product must consider creating and enforcing a specialized regulatory framework for tracking the growth of optical disc 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 disc 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 regimes have been established in China, Bulgaria, Hong Kong, Malaysia, Taiwan and Macau, and are under consideration in Thailand, Indonesia and the Philippines. Ukraine has adopted a system of regulatory controls as well, but this law is flawed and must be corrected.<sup>3</sup> Increasingly, pirate optical disc production is migrating from these jurisdictions to new countries that as yet have not adopted these regulatory tools to control this problem. These countries include Russia, Pakistan, India, Thailand, the Philippines and Vietnam and others mentioned in this submission. We urge the U.S. to press every country in the regions most affected by pirate optical disc production and export—including East Asia, South Asia, Russia and the countries of the former Soviet Union—to put comprehensive optical disc regulatory controls into place promptly. Otherwise, pirate syndicates will continue to transfer their optical disc operations across borders in an effort to stay one step ahead of enforcement efforts.

IIPA and its members have produced a model "template" for an effective optical disc law. In addition, we have produced a paper spelling out the "key elements" of such a law, designed for policy makers and legislators. These papers have the full support of all the copyright industries and should be carefully studied by all governments that are experiencing growing pirate optical disc production. IIPA and its members stand ready to assist governments in understanding, drafting and implementing these recommendations into national law.

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 disc 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 disc pirates.

### **PIRACY BY ORGANIZED CRIME**

Because of the immense profits that can be garnered by producing pirate optical disc products, this illegal business has been taken over in many countries by organized crime syndicates, making it even more difficult for local authorities to combat the problem. These criminal syndicates are highly organized, are linked across national boundaries, and have powerful friends within governments. They have access to and control of large amounts of capital, exploiting complex distribution networks to engage in criminal activity of all kinds. 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, in some cases, even terrorist activities.

These syndicates control not only the production but also the distribution of pirated and counterfeit optical disc products within the domestic market and around the world. For example, syndicates with optical disc production facilities in Southeast Asia work with partners in South America to conduct a thriving trans-Pacific trade in pirate music CDs, entertainment software,

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<sup>3</sup> As a consequence, the U.S. government has levied sanctions against Ukraine under Special 301 and removed its GSP benefits. Such sanctions remain in place today.



and other optical disc products. These criminal networks are highly sophisticated and are becoming increasingly dangerous to deal with.

In a recent article in Time Europe,<sup>4</sup> it was pointed out that a drug dealer pays about \$47,000 for a kilo of cocaine, and can sell it on the street for about \$94,000, a 100% profit. But for \$47,000 and with a lot less risk, a pirate can buy or produce 1,500 pirated copies of Microsoft's Office 2000 Professional and resell them for a profit of 900%! Examples of the involvement of organized crime on a global basis include:

- In March 2002, the largest seizure ever in **Australia** took place—35,000 pirate VCDs and DVDs. The disks were produced in **Malaysia** and a Malaysian national was arrested at the time. Further investigation led to the arrest of another Malaysian entering Australia with false documents. The authorities determined that this was a well-organized syndicate including Malaysian and Australian nationals operating in cell type structures to protect the ultimate kingpins. Unfortunately, both suspects were assessed inadequate fines, and merely deported without requiring the fine to be paid.
- In **Hong Kong** in February 1999, the Anti-Triad Squad of the Hong Kong Police raided a pirate and pornographic disc-packaging center suspected of being under the control of the triad group "Wo Sing Wo." Approximately 150,000 pirate discs worth more than HK\$3 million (US\$384,000) were seized and three men arrested. Several shopping arcades in Tsuen Wan, which had pirate discs on sale, were under the direct control and protection of this triad organization. As confirmed by the officer-in-charge of the Anti-Triad Squad, the three men arrested were all members of Wo Sing Wo.
- In **Macau** in July 2000, a raid against "Sun Fat Chin" resulted in uncovering an optical disc factory. All production equipment was seized. In October 2001, when Macau authorities returned to inspect the sealed factory, it found that all the equipment had been secretly removed. Enforcement sources later confirmed that a notorious senior triad member "Broken Tooth," at that time in prison, controlled the factory.
- In July 2001 in **Malaysia**, suspected as a center of organized piracy in Asia, a City Council President received a personal death threat along with a threat to rape his daughter if he continued his crackdown on the city's illegal VCD traders. He also received a handwritten letter containing a 10cm long razor blade. Newspaper reports cited that there had been seven death threats reported to the police in the months following aggressive action by the enforcement officers against VCD pirates. The Minister of the Domestic Trade and Consumer Affairs Ministry (MDTCA)—the main enforcement arm in Malaysia—also received a personal death threat. The Deputy Prime Minister stated publicly that it was clear that piracy is linked to criminal elements in Malaysia.

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<sup>4</sup> "Busting Software Pirates" Time/Europe, November 18, 2002.

- Also in **Malaysia**, the police reported in October 2002 that pirate production of thousands of copies of protected films was now being carried out aboard ships anchored in international waters off the Malaysian coast. The ships later offloaded their cargo at obscure points along the coast. An investigation is continuing into this new, troubling method, of piracy.
- A raid in **Taiwan** in May 2001 turned up several illegal firearms along with 70,000 suspect CD-Rs and other optical disc products containing music and pornography. This led to the discovery of an illegal arms factory alongside a sophisticated CD-R facility.
- In September 2002, in central **Taiwan**, the police arrested a 19-year-old in connection with the production of firearms to equip gang members protecting the local marketplace of a pirate optical disc production syndicate.
- In **Hungary**, criminal syndicates are assuming control of illegal CD-R burning, as well as all other aspects of duplication and distribution of entertainment software. For example, these criminal groups are using the Petöfi Stadium, which belongs to the local municipality, as a distribution point to supply the surrounding region, including into Germany.
- In **Poland**, criminal syndicates have now taken over not only distribution in the infamous Warsaw Stadium, but also the surrounding countryside. Because of their absolute control of the market, the syndicates are then able to price their pirate entertainment software, for example, at exactly PL20 (US\$5.00) with absolutely no deviations . . . whether sold in the stadium or other areas in Warsaw, Gdansk, Katowice or Poznan.
- Distribution of pirated entertainment software product (especially manufactured discs produced in Russia) in **Lithuania** is controlled by Russian organized crime syndicates that are now affixing their own logos and brand names to their illicit products. These pirated materials are then stored in Lithuania for distribution locally and throughout Eastern and Central Europe.
- CDs carrying extremist propaganda found in **Argentina, Mauritius, Pakistan and Paraguay** have been demonstrated to come from the same source as much of the illegally-produced music in these regions. Other extremist or terrorist groups, for example in **Northern Ireland**, are partly funded by music piracy.
- In **Mexico** in October 2001, police discovered a massive CD-R operation in raids on eleven houses, three linked internally. Over one million blank CD-Rs, half a million pirated CD-Rs and 235 CD burners were found. It is believed the profits were invested in narcotics and prostitution.

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 activity by the private sector. We look to additional leadership by the U.S. government, both here and in the appropriate bilateral and multilateral fora, to assist in placing the issue of effective copyright piracy enforcement on the agenda of agencies dealing with organized economic crime—generally, cybercrime, fraud, extortion, white-collar crime, drug enforcement, money laundering, and border and customs control.

## **INTERNET PIRACY, ELECTRONIC COMMERCE, 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 disc pirates in Asia and Central Europe who served global markets. The unprecedented growth of the Internet, however, coupled with 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 and on a global basis to secure the adoption of legal provisions that will prevent piracy and create a legal and regulatory environment that will facilitate the growth of legitimate on-line delivery of copyrighted materials.

IIPA recommends that USTR work with our industries to adopt a focused and comprehensive strategy to attack Internet piracy. 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. These treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are now in force and their effective implementation is critical in the fight to control this new and ominous threat.

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—was completed in 2002. More and more countries are now beginning to legislate in this area. Following is the global status of the official deposits of the treaties with WIPO:<sup>5</sup>

	WIPO COPYRIGHT TREATY (WCT)	WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)
NUMBER OF SIGNATORIES	51	50
NUMBER OF DEPOSITS WITH WIPO	40	39

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 provides 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 (DMCA), should continue to make it a priority to encourage other countries to follow this path.<sup>6</sup>

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. We also mention that efforts should be undertaken to encourage global adoption of the Cybercrime Convention, which requires countries to adopt effective remedies for on-line copyright infringement, and which facilitates law enforcement cooperation across borders—something that needs to develop if we are going to be successful in addressing this pressing problem.

#### **IMPLEMENTATION OF THE TRIPS ENFORCEMENT TEXT**

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<sup>5</sup> As of February 14, 2003.

<sup>6</sup> 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.

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.<sup>7</sup> 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.<sup>8</sup>

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 laws to bring them into compliance (or close to compliance) with TRIPS obligations. However, compliance with TRIPS enforcement obligations remains sparse but essential to returning the commercial benefits that were envisioned at the conclusion of the Uruguay Round.

**Non-Compliance with TRIPS "Performance" Requirements:** 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.<sup>9</sup> 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,<sup>10</sup> as well as directly through the initiation of a dispute settlement proceeding in the WTO.

All countries must acknowledge that the TRIPS enforcement text requires effective enforcement against all types of infringements and particularly copyright piracy on a commercial scale. This includes not only the new forms of piracy discussed throughout this submission, such as piracy of movies, records and music, entertainment and business software and books and journals on optical disc formats and on, or involving, the Internet, but piracy of works in traditional formats, such as movies on VHS tapes, as well as broadcast/cable/satellite piracy

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<sup>7</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Articles 65 and 66.

<sup>8</sup> 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 that may take advantage thereof. As of February 3, 2003, 145 countries were members of the WTO, including all countries surveyed in this submission with the exception of Azerbaijan, Bahamas, Belarus, Kazakhstan, Lebanon, the Russian Federation, Saudi Arabia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

<sup>9</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314(c), 108 Stat. 4809 (1994) (also known as the URAA).

<sup>10</sup> 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).

and unauthorized public performances, music on audiocassette, entertainment software in cartridge format and traditional textbook, tradebook and journal offset printing piracy, as well as commercial photocopying.

**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 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.<sup>11</sup>

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,<sup>12</sup> CBI,<sup>13</sup> CBTPA,<sup>14</sup> ATPA,<sup>15</sup> ATPDEA,<sup>16</sup> and AGOA,<sup>17</sup> 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) has assumed overriding importance in recent 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. At the end of 2002, the negotiations with Singapore and Chile concluded with positive results, particularly the agreement with Singapore, namely with significantly higher levels of protection and enforcement, including full and proper implementation of the WIPO Internet Treaties. These agreements will now set new global precedents – which we expect to be adopted in the four new FTA negotiations to begin in the spring of 2003, with the Central American countries, with Morocco, with Australia and with South

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<sup>11</sup> 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).

<sup>12</sup> 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.*).

<sup>13</sup> 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.*).

<sup>14</sup> 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.*).

<sup>15</sup> 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.*).

<sup>16</sup> Andean Trade Promotion and Drug Eradication Act, Pub. L. No. 107-210 (2002) (codified at 19 U.S.C. § 3201 *et seq.*).

<sup>17</sup> 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.*).



Africa and its South African Customs Union (SACU) neighbors. Other FTAs are likely to follow. We compliment the Administration for moving swiftly and aggressively to secure new high levels of protection and enforcement that will be critical to the development of e-commerce in the coming years. Finally, we next expect all this effort to come together in an unprecedented Free Trade Agreement of the Americas with standards of copyright protection enforcement that will truly set the new global framework for years to come. IIPA looks forward to working closely with U.S. negotiators to achieve these goals in the FTA and FTAA fora.

### **CORPORATE END-USER PIRACY OF SOFTWARE AND USE OF LEGAL SOFTWARE IN GOVERNMENT**

**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. software companies from business software piracy in 2002 was attributable to this corporate/government end-user software piracy. In many nations, government entities are among the largest users of software.

The biggest challenge to the business software industry is to persuade governments to take effective enforcement action against enterprises that use unlicensed software in their businesses. To effectively enforce against corporate end-user piracy, it is critical that countries provide an effective civil system of enforcement, provisional remedies to preserve evidence, extensive customs procedures to stop infringing goods at the border, and deterrent criminal penalties for piracy. More specifically, it is critical that countries provide *ex parte* search orders in an expeditious manner, deterrent civil damages and criminalization of corporate end-user piracy as required by Article 61 of TRIPS. Industry along with USTR has raised the need for strong procedural and remedial enforcement measures around the world. Although some countries have made attempts to improve enforcement through special enforcement periods and action plans, most of these proposals for action have not been sustained over time or resulted in deterrent criminal fines and jail terms. Additionally, most countries still do not criminalize corporate end-user piracy or provide civil *ex parte* measures—both in violation of their TRIPS obligations.

Moreover, the failure of many governments to require and to oversee legal software use within national, provincial, and local agencies results in huge revenue, job, and tax losses and tends to perpetuate a lax attitude toward intellectual property protection in the economy as a whole. This, in turn, discourages investment and innovation in the software and technology fields and stunts a nation’s economic potential in these critical areas. On the other hand, governments that make legal software use a priority not only comply with their international obligations to protect software copyrights but also set an example for private industry. In addition, they take an important step forward in intellectual property leadership and appropriate management of software technology, both of which are critical to active participation in the information age. The U.S. recognized the importance of government leadership in combating end-user piracy when President Clinton issued Executive Order 13103 on September 30, 1998, which required all federal government agencies (as well as third parties who do business with government) to use only legal, authorized software. This very significant Presidential Order is currently being implemented within the U.S. government and serves as a model for other governments around the world. In recognition that governments must lead the way in promoting legal software use, USTR and other agencies have been working with the industry and with their counterparts around the world, urging the adoption of similar Executive Order-style directives. Over 27 nations, including China, Korea, the 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 2003 SPECIAL 301 LISTS**

This year IIPA has considered deficiencies in copyright protection in 56 countries and has recommended them for placement in the categories of Priority Foreign Country, Section 306 Monitoring, Priority Watch List, and Watch List. We also highlighted specific issues in 7 countries.

IIPA recommends that USTR should keep Ukraine as a Priority Foreign Country (PFC) and that trade sanctions continue accordingly in 2003. This includes the continued suspension of Ukraine's duty-free trade benefits under the Generalized System of Preferences ("GSP"); those benefits were suspended in August 2001 for Ukraine's copyright shortcomings. We make these recommendations because Ukraine's copyright piracy problem remains very serious almost three years after it agreed to a Joint Action Plan signed by then-President Clinton and President Kuchma that Ukraine has neither effectively nor completely implemented. By its failure to fully implement an optical disc regulatory scheme and by its overall criminal enforcement failures, Ukraine is not in compliance with the June 2000 bilateral agreement nor with the 1992 Bilateral NTR Trade Agreement with the United States (which Ukraine agreed to implement by December 31, 1993). Also, Ukraine's overall copyright law and enforcement regime falls far short of compliance with WTO TRIPS obligations. Ukraine should be prevented from accession to the WTO until it is in complete compliance.

IIPA urges USTR to continue to monitor developments closely in the People's Republic of China 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 21 countries be placed on the Priority Watch List: Argentina, The Bahamas, Bolivia, Brazil, Dominican Republic, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, Lithuania, Pakistan, Paraguay, the Philippines, Poland, the Russian Federation, South Africa, South Korea, Taiwan, and Thailand. IIPA also recommends that 33 countries be designated on the Watch List. We also recommend that out-of-cycle reviews be taken in five countries that already appear on the various 301 lists: Lebanon, Malaysia, the Philippines, the Russian Federation, and South Korea.

Appendix C contains a survey of 56 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)	People's Republic of China	Argentina Bahamas Bolivia Brazil (GSP) Dominican Republic (GSP) Egypt India Indonesia Israel Kuwait Lebanon +OCR (GSP petition pending) Lithuania Pakistan (GSP petition pending) Paraguay Philippines + OCR Poland Russian Federation + OCR (GSP) South Africa South Korea + OCR Taiwan Thailand (GSP petition pending)	Bangladesh Bulgaria Chile CIS (10) <sup>18</sup> Armenia (GSP) Azerbaijan Belarus Georgia Kazakhstan (GSP) Kyrgyz Republic Moldova Tajikistan Turkmenistan Uzbekistan (GSP) Colombia Costa Rica Czech Republic Ecuador Estonia Guatemala Hungary Italy Kenya Latvia Malaysia +OCR Peru Qatar Romania Saudi Arabia Serbia & Montenegro Sri Lanka Turkey (GSP) Uruguay (GSP petition pending) Venezuela	Cambodia Croatia Laos Macedonia Myanmar (Burma) Spain Vietnam
1	1	21	33	7

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 are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of "priority foreign countries," provides that the U.S. Trade Representative must 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."<sup>19</sup> Under this criterion, these fifteen countries named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 15 years that Special 301 has been in existence.

<sup>18</sup> "CIS" in this filing denotes ten former Soviet republics. Russia and Ukraine are treated separately from the CIS in this filing.

<sup>19</sup> 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. After Congress renewed the GSP program through September 30, 2001, 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 accepted IIPA's GSP petitions 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 on these six countries 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 active and pending before USTR. On August 6, 2002, the GSP program was renewed for four years through December 31, 2006. At the time of this Special 301 submission USTR is considering action on the 2000 petitions already accepted and considering whether to accept IIPA's 2001 GSP petitions.

IIPA urges acceptance of our outstanding petitions based on these countries' failure to meet the conditions established under GSP, and we call for a quick resumption of the investigations of Brazil and Russia. In Brazil, we believe that the new Administration should be given an opportunity to resolve a problem that it inherited but was not of its own making, but we encourage the U.S. government to quickly reach out to the Lula Administration so that it is immediately aware of the political and economic stakes associated with its success or failure. In Russia, while there have been some encouraging signals, the government has taken little meaningful action to address the growing problem of optical disc production, and we call upon USTR and the GSP Committee to recommence the investigation with vigor.

#### **E. COUNTRIES DESERVING SPECIAL MENTION IN 2003**

In addition to the 56 countries for which IIPA has provided comprehensive country reports, IIPA also highlights issues in seven countries which deserve special attention this year but which are not recommended for placement on the Special 301 Lists. These countries and the problems encountered in them can be found at the end of Appendix C in a new Section entitled "Countries Deserving of Special Mention in 2003." These countries are: Cambodia, Croatia, Laos, Macedonia, Myanmar, Spain and Vietnam.

#### **F. ESTIMATED LOSSES DUE TO PIRACY**

As a result of the deficiencies in the copyright regimes of the 56 countries for which losses have been estimated, the U.S. copyright-based industries suffered estimated trade losses due to piracy of nearly \$9.2 billion in 2002. On a global basis, IIPA estimates that total losses due to piracy were between \$20-22 billion in 2002 not counting losses due to Internet piracy, for which data is not yet available.

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 2001 and 2002. In each survey, IIPA has described the piracy levels in each of these countries (where available). 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 56 SELECTED COUNTRIES IN 2002  
(in millions of U.S. dollars)**

Industry	Estimated Losses
Motion Pictures	1322.3
Records & Music	2142.3
Business Software Applications	3539.0
Entertainment Software	1690.0
Books	514.5
Total	9208.1

Appendix B summarizes the methodology used by each IIPA member association 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 (2001-2002) FOR IIPA's 2003 SPECIAL 301 RECOMMENDATIONS**



# IIPA 2003 "SPECIAL 301" RECOMMENDATIONS

IIPA 2001-2002 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY

(in millions of U.S. dollars)

and 2001-2002 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Motion Pictures				Records & Music				Business Software Applications <sup>1</sup>				Entertainment Software				Books		TOTAL LOSSES	
	Loss		Piracy		Loss		Piracy		Loss		Piracy		Loss		Piracy		Loss			
			Level				Level				Level				Level					
	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001
<b>PRIORITY FOREIGN COUNTRY</b>																				
Ukraine	40.0	40.0	90%	80%	150.0	170.0	80%	85%	75.4	46.7	86%	87%	NA	NA	NA	NA	NA	NA	265.4	256.7
<b>306 MONITORING</b>																				
People's Republic of China	168.0	160.0	91%	88%	48.0	47.3	90%	90%	1593.3	1140.2	93%	92%	NA	455.0	96%	92%	40.0	130.0	1849.3	1932.5
<b>PRIORITY WATCH LIST</b>																				
Argentina	30.0	30.0	45%	45%	26.0	78.2	60%	47%	70.7	72.5	62%	62%	NA	NA	NA	95%	NA	8.5	126.7	189.2
Bahamas	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	0.0
Bolivia	NA	2.0	NA	100%	15.0	15.0	85%	85%	6.0	4.9	74%	77%	NA	NA	NA	NA	5.5	5.5	26.5	27.4
Brazil (GSP)	120.0	120.0	35%	33%	320.4	302.0	53%	55%	317.0	272.3	55%	56%	NA	NA	NA	99%	14.0	14.0	771.4	708.3
Dominican Republic (GSP)	2.0	2.0	60%	60%	6.9	7.7	65%	65%	2.9	4.0	61%	64%	NA	NA	NA	NA	1.0	1.0	12.8	14.7
Egypt	NA	15.0	NA	35%	8.2	9.2	41%	41%	NA	14.5	50%	58%	NA	NA	NA	90%	28.0	32.0	36.2	70.7
India	75.0	70.0	60%	60%	6.6	NA	40%	40%	350.0	256.0	75%	70%	NA	NA	NA	90%	36.5	37.0	468.1	363.0
Indonesia	28.0	27.5	90%	90%	92.3	67.9	89%	87%	102.9	63.1	90%	88%	NA	NA	NA	NA	30.0	30.0	253.2	188.5
Israel	30.0	15.0	50%	50%	34.0	40.0	50%	25%	NA	36.9	39%	40%	17.2	66.5	68%	89%	1.0	1.0	82.2	159.4
Kuwait	10.0	9.0	95%	85%	3.4	NA	64%	70%	NA	NA	NA	76%	NA	NA	NA	85%	2.5	2.5	15.9	11.5
Lebanon (OCR) (GSP petition pending)	8.0	8.0	80%	80%	2.0	2.0	65%	40%	NA	1.1	74%	79%	NA	NA	NA	NA	2.0	2.0	12.0	13.1
Lithuania	NA	1.5	90%	NA	12.0	7.0	85%	85%	4.9	3.9	53%	56%	NA	NA	80%	NA	NA	NA	16.9	12.4
Pakistan (GSP petition pending)	12.0	11.0	95%	NA	60.0	60.0	83%	90%	NA	9.2	83%	83%	NA	NA	NA	NA	44.0	44.0	116.0	124.2
Paraguay <sup>2</sup>	2.0	2.0	80%	80%	204.4	253.6	99%	99%	4.3	3.5	69%	72%	NA	NA	NA	NA	2.0	3.0	212.7	262.1
Philippines (OCR)	30.0	28.0	80%	80%	20.9	23.9	40%	36%	20.1	19.9	61%	63%	NA	NA	NA	99%	45.0	44.0	116.0	115.8
Poland	25.0	25.0	30%	27%	45.0	37.0	45%	30%	78.4	77.1	50%	53%	337.7	115.8	91%	90%	5.0	6.5	491.1	261.4
Russian Federation (GSP)	250.0	250.0	80%	80%	371.9	285.0	66%	64%	93.9	90.6	87%	87%	NA	173.6	90%	90%	40.0	48.0	755.8	847.2
South Africa	30.0	12.0	30%	15%	NA	NA	25%	NA	NA	32.7	35%	38%	NA	26.1	NA	57%	14.0	19.0	44.0	89.8
South Korea (OCR)	27.0	25.0	25%	25%	6.9	4.0	20%	14%	121.4	100.4	50%	48%	381.0	487.7	36%	63%	36.0	35.0	572.3	652.1
Taiwan	42.0	35.0	44%	30%	98.6	51.7	47%	48%	NA	106.8	48%	53%	596.1	119.4	56%	70%	20.0	20.0	756.7	332.9
Thailand (GSP petition pending)	26.0	24.0	70%	65%	30.0	16.6	42%	45%	28.7	32.6	75%	77%	47.3	29.1	86%	93%	28.0	28.0	160.0	130.3
<b>WATCH LIST</b>																				
Bangladesh	NA	NA	NA	NA	NA	NA	98%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Bulgaria	3.0	3.0	20%	20%	7.2	3.0	83%	65%	7.0	8.3	72%	75%	21.9	NA	91%	84%	0.3	0.3	39.4	14.6
Chile	2.0	2.0	40%	40%	14.0	12.2	35%	35%	59.4	46.3	51%	51%	NA	NA	NA	NA	1.1	1.1	76.5	61.6
CIS (listed below)																				
Armenia (GSP)	NA	NA	NA	NA	4.0	4.5	85%	85%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.0	4.5
Azerbaijan	NA	NA	NA	NA	14.8	13.0	99%	85%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	14.8	13.0
Belarus	NA	NA	NA	NA	22.0	20.0	73%	75%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	22.0	20.0
Georgia	NA	NA	NA	NA	8.0	6.0	86%	86%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	8.0	6.0
Kazakhstan (GSP)	NA	NA	NA	NA	23.0	25.0	78%	78%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	23.0	25.0

# IIPA 2003 "SPECIAL 301" RECOMMENDATIONS

IIPA 2001-2002 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY

(in millions of U.S. dollars)

and 2001-2002 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Motion Pictures				Records & Music				Business Software Applications <sup>1</sup>				Entertainment Software				Books		TOTAL LOSSES	
	Loss		Piracy		Loss		Piracy		Loss		Piracy		Loss		Piracy		Loss			
			Level				Level				Level				Level					
	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001
<i>Kyrgyz Republic</i>	NA	NA	NA	NA	5.0	8.0	85%	85%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	5.0	8.0
<i>Moldova</i>	NA	NA	NA	NA	6.0	5.0	77%	86%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.0	5.0
<i>Tajikistan</i>	NA	NA	NA	NA	5.0	3.0	87%	83%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	5.0	3.0
<i>Turkmenistan</i>	NA	NA	NA	NA	6.5	NA	<90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.5	NA
<i>Uzbekistan (GSP)</i>	NA	NA	NA	NA	32.0	NA	<90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	32.0	NA
Colombia	40.0	40.0	90%	90%	56.3	73.0	65%	65%	16.2	19.5	50%	52%	NA	NA	NA	NA	5.3	5.3	117.8	137.8
Costa Rica	2.0	2.0	40%	40%	7.0	4.8	50%	40%	8.6	6.9	61%	64%	NA	NA	NA	NA	NA	NA	17.6	13.7
Czech Republic	9.0	8.0	12%	10%	7.3	8.4	50%	48%	NA	27.7	NA	43%	38.3	54.8	89%	90%	3.0	3.0	57.6	101.9
Ecuador	NA	NA	NA	95%	18.0	18.0	90%	90%	5.5	6.9	59%	62%	NA	NA	NA	NA	2.3	2.3	25.8	27.2
Estonia	2.0	1.5	30%	40%	9.0	9.0	60%	60%	5.7	3.3	52%	53%	NA	NA	NA	90%	NA	2.5	16.7	16.3
Guatemala	2.0	2.0	60%	60%	4.8	NA	NA	NA	14.5	14.1	67%	73%	NA	NA	NA	NA	2.5	2.5	23.8	18.6
Hungary	18.0	18.0	30%	40%	6.0	4.5	30%	30%	22.2	21.3	47%	48%	NA	43.3	NA	90%	4.0	4.0	50.2	91.1
Italy	140.0	140.0	20%	20%	42.0	40.0	23%	23%	380.4	338.8	45%	45%	215.4	NA	55%	74%	23.0	23.5	800.8	542.3
Kenya	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	78%	77%	NA	NA	NA	NA	1.0	NA	1.0	NA
Latvia	NA	1.5	85%	NA	8.0	NA	67%	NA	7.9	NA	57%	59%	NA	NA	NA	NA	NA	NA	15.9	1.5
Malaysia (OCR)	42.0	40.0	75%	80%	110.2	148.9	70%	75%	82.7	75.0	70%	70%	NA	56.4	NA	93%	8.3	8.2	243.2	328.5
Peru	4.0	4.0	50%	50%	70.2	57.8	98%	97%	10.3	11.2	58%	60%	NA	NA	NA	NA	8.5	9.0	93.0	82.0
Qatar	0.3	0.5	15%	30%	0.1	NA	29%	NA	NA	2.2	NA	78%	NA	NA	NA	NA	0.2	0.2	0.6	2.9
Romania	6.0	6.0	55%	65%	15.0	14.0	75%	70%	16.4	15.7	72%	75%	35.2	NA	97%	95%	2.0	2.0	74.6	37.7
Saudi Arabia	20.0	30.0	35%	45%	16.0	12.0	42%	42%	NA	16.4	47%	52%	NA	115.7	NA	83%	14.0	14.0	50.0	188.1
Serbia & Montenegro	NA	NA	NA	NA	14.0	NA	95%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	14.0	NA
Sri Lanka	NA	NA	NA	NA	NA	NA	99%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Turkey (GSP)	50.0	50.0	45%	40%	18.0	3.5	75%	35%	NA	22.4	50%	58%	NA	23.7	NA	90%	25.0	27.0	93.0	126.6
Uruguay (GSP petition pending)	2.0	2.0	40%	40%	1.4	4.0	60%	50%	5.2	6.4	60%	63%	NA	NA	NA	NA	1.5	2.0	10.1	14.4
Venezuela	25.0	25.0	65%	65%	29.0	54.0	75%	62%	27.1	25.7	52%	55%	NA	NA	NA	NA	18.0	20.0	99.1	124.7
	1322.3	1287.5			2142.3	2029.7			3539.0	3057.0			1690.1	1767.1			514.5	637.9	9208.2	8779.2

Endnotes:

<sup>1</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates were also identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

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

# **APPENDIX B**

## **METHODOLOGY USED TO CALCULATE ESTIMATED PIRACY LOSSES AND PIRACY LEVELS**

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 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 2003 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

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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**

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IDSA bases its estimates on local surveys of market conditions in each country and other factors bearing on the presence of pirate products in the marketplace, including public and proprietary data on sales and market share. The reported dollar values reflect the value (at pirate prices) of the pirated product present in the marketplace as opposed to definitive industry losses.

Based on the data collected, calculations are performed to arrive at an estimate of the overall quantity of pirate games present in a marketplace. Estimates of the overall number of games in use are based on what is known about the presence of game-playing hardware in each market and the number of games in use on each of those platforms. Separate estimates are

generated for PC, handheld and console product insofar as they may differ in at least three key respects— price per game, ratio of games per platform, and data sources. These estimates of overall game usage are compared to what is known about the relative percentages of pirate sales to legitimate sales to arrive at an estimate of the amount of pirate product in circulation.

Conservative assumptions such as the following are employed throughout, producing results likely to underestimate the overall quantity of pirate product present in the marketplace and its value:

- The methodology accounts only for pirated PC games estimated to be present on home PCs, and thus discounts pirated games that may be in use on business computers.
- The methodology accounts only for console games estimated to be used either in connection with consoles that do not require hardware modification, or those believed to have been modified to facilitate play of pirated games.
- The methodology values pirated games in circulation according to localized pirate prices as opposed to optimal or actual prices at which legitimate sales might occur.

Because the reported figures reflect only the value of pirate product present in the market, it does not measure, and thus vastly understates, the overall harm done to rightsholders and the industry in countries engaged in mass factory overproduction for export. However, the dollar figures may nonetheless be taken to reflect a sense of the relative harm done to software developers, publishers, distributors and retailers through the loss of potential sales opportunities. This approach approximates the overall dollar investments made by purchasers of pirate product at pirate process, and thus represents, at a minimum, the potential taxable revenue that could be made part of a country's legitimate economy if piracy were to be brought under control.

Because a number of the estimates needed in these calculations were of necessity approximate, considerable effort was expended to cross-reference multiple sources of information where possible.

## MOTION PICTURES

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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 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.
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**

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RIAA collects market data from the local industry, or from executives with responsibility for the particular territory. The estimates are based on local surveys of the market conditions in each territory. Each submission is reviewed against a range of sources:

- Optical disc industry data provided by third-party consultants;
- Legitimate sales;
- Enforcement data and anti-piracy developments;
- Historical piracy estimates; and where possible,
- Economic indicators and academic studies of piracy or counterfeit goods.

The basis for estimating the value of U.S. repertoire is to take an estimate of the local pirate market that is classified international repertoire and to take on average, 60% of this as U.S. repertoire. This is based on legitimate market repertoire data.

The numbers produced by the music industry reflect the value of sales of pirate product

rather than industry losses, and therefore under-estimate the real harm to the interests of record companies, music publishers, performers, musicians, songwriters and composers. This is done because it is not generally possible to assess a meaningful “substitution rate,” which in any case, would not take into account downstream (or value chain) losses from high piracy levels acting as a drag on the economic development of legitimate markets. For Latin America and some Asian territories, rather than merely reporting pirate sales, projected unit displacement is multiplied by the wholesale price of legitimate articles in that market rather than the retail price of the pirate goods. This is where piracy levels are very high and where consumer surveys have revealed clearer evidence of sales substitution from pirate product. Once again, downstream losses are not taken into account.

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, since international trade in pirate music is extremely difficult to quantify.

## **BOOKS**

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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 and scholarly journals, primarily either in or around universities.

# **APPENDIX C**

## **COUNTRY SURVEYS**

## **PRIORITY FOREIGN COUNTRY**

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# UKRAINE

### EXECUTIVE SUMMARY<sup>1</sup>

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**Special 301 Recommendation:** IIPA recommends that Ukraine remain a Priority Foreign Country (PFC) and that trade sanctions continue accordingly in 2003. IIPA also recommends that the United States government should continue the suspension of Ukraine's duty-free trade benefits under the Generalized System of Preferences ("GSP"); those benefits were suspended in August 2001 for Ukraine's IPR shortcomings. We make these recommendations because Ukraine's copyright piracy problem remains very serious almost three years after agreeing to a Joint Action Plan signed by then-President Clinton and President Kuchma that Ukraine has neither effectively nor completely implemented. By its failure to fully implement an optical media regulatory scheme and by its overall criminal enforcement failures, Ukraine is not in compliance with the June 2000 bilateral agreement or the 1992 Bilateral NTR Trade Agreement with the United States (which Ukraine agreed to implement by December 31, 1993). Also, Ukraine's overall copyright law and enforcement regime falls far short of compliance with the TRIPS obligations of the World Trade Organization; Ukraine should be prevented from accession to the WTO until it is in complete compliance.

**Overview of key problems:** The three problems of the highest priority in Ukraine are: (1) inadequate regulation and enforcement of optical media production and distribution facilities; (2) the complete absence of criminal prosecutions and border enforcement, especially against large-scale pirate operations (involving music, film, and/or entertainment software); and (3) a legal regime in need of critical reforms in other areas.

**Actions to be taken by the government of Ukraine:** The most urgent problem that the Ukrainian government must address is to complete its promised enforcement of optical media production and distribution. The steps that need to be taken by the government of Ukraine are:

- Amending the existing optical media law in several key areas, including licensing matrices, and fixing the CD source identification (SID) code importation problem;
- Fully implementing a comprehensive optical media enforcement scheme by commencing effective plant inspections by properly empowered inspectors, verifying SID codes that have been issued and including SID codes/inspections on all equipment used to make optical media, and imposing criminal sanctions against violators;
- Enacting and enforcing effective border measures to stop the export and import of illegal material;
- Commencing raids and following up with criminal prosecutions against pirates engaged in commercial distribution (for example, against organized crime syndicates involved in entertainment software distribution), as well as using administrative procedures against store and other smaller-scale pirates;

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

- Refraining from returning previously seized pirated goods to the market; and
- Making the necessary legal reforms in the administrative code and the civil procedure code to facilitate better enforcement.

## **COPYRIGHT PIRACY AND ENFORCEMENT IN UKRAINE**

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### **Optical Media Production and Distribution Must be Fully and Completely Regulated**

Five years ago Ukraine became a major worldwide 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). Organized criminal syndicates were able to start up their operations in the absence of any optical media regulations and criminal enforcement. After significant worldwide pressure to act, Ukraine took some important steps to correct this problem including the adoption of new laws and regulations. However, the complete and comprehensive steps have yet to be undertaken.

The biggest reason for the failure is that the Verkhovna Rada did not follow the government of Ukraine's proposal for an optical disc regulation and instead adopted a flawed law. Even so, in 2002, optical disc production slowed in Ukraine; more precisely, it "stalled" while the pirates tried to decide whether the government was serious about regulating their practices or not. That is why adoption of the necessary amendments (detailed below) in 2003 is critical. Although optical disc production slowed in 2002, Ukraine remained a major transshipment point (by trucks, railroads and boats), and a storage facility, for illegal discs produced in Russia and Belarus because of very poor border enforcement. Pirate material from these countries continues to flood the Ukraine market.

The stall in production by the pirates is understandable. It took almost two years of debate for the Ukraine Parliament to adopt the Optical Disc Licensing Bill #8278-1 on January 17, 2002 in response to the Joint Action Plan. The law was signed by President Kuchma on February 7, 2002 and entered into force on April 7, 2002. In addition to the law, an Implementing Decree was signed on January 30, 2002 and it set in motion a series of (13) regulatory laws that were necessary to put the law into force. Many but not all of these implementing regulations were put into place in 2002.

Unfortunately, as the IIPA and its members noted all throughout this two-year saga, the January 2002 optical disc law, the decree, and the implementing regulations contained a number of key deficiencies that, taken together, failed to properly address the production and distribution (including import/export) of optical media. Ukraine must now adopt amendments to the 2002 law, and implement more effective regulations to properly and comprehensively address this problem. In the meantime, three plants remain in operation, albeit at limited capacity (and with even a government acknowledgement of some illegal production still).

IIPA is encouraged that the State Department for Intellectual Property ("SDIP") and the Ministry of Economy have been willing to work with industry representatives to draft the necessary amendments, but further progress stalled in 2002. The government of Ukraine must now work to see that these amendments are adopted and then that the entire optical media scheme is implemented effectively.

The Joint Action Plan signed by President Clinton and President Kuchma in June 2000, with an agreed implementation date of November 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, with the authority to undertake this enforcement effort and responsibility for putting these regulations in place.

A properly implemented plan to regulate the production, distribution and export of optical media would 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 at a deterrent level; 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 to adopt source identification (SID) codes on all molds and mastering equipment to deter plants from infringing production of optical discs.

As noted, current plant production has slowed from its peak of two years ago. There are now three known licensed functioning (or able to function) optical disc plants in Ukraine, down from five plants at the height of the problem. A fourth plant recently returned under a new commercial identity to its former location in Kiev (from exile in Bulgaria). Ukrainian authorities have told industry representatives that this plant has not yet indicated its intention to resume activity. The three licensed CD plants (capable of producing music, video and software) that are SID coded are: (1) "Noiprox" (in L'viv), which obtained its code directly from Philips International B.V.; (2) "Amirtron" (in Kherson); and (3) "Rostok" (in Kiev). The last two plants agreed to use identification coding on the mastering materials and molds used to make CDs (in agreements with the Ukraine State Department for Intellectual Property, SDIP).

There are four significant shortcomings pertaining to these plants under the current licensing scheme: First, Ukrainian authorities—despite the provisions that require the issuance of SID codes only after a CD plant has provided the necessary information on its equipment—issued codes to two of the plants without having a comprehensive submission concerning the equipment held. One of the plants involved has since persistently refused to provide the authorities with (or any industry visits to review) the required description of its equipment. Second, the Ukrainian authorities have not confirmed the application of codes on the relevant equipment. In contrast, the Noiprox plant (in L'viv) invited IFPI representatives to the plant to inspect the application of the code on their equipment. Third, Rostok (in Kiev) produces blank CD-Rs without using a SID code. These CD-Rs subsequently enter the pirate market because copyrighted music and other works are recorded on these discs for sale in the Ukraine market. Fourth, it will be hard to authoritatively prove illegal activity without a comprehensive set of samples from each of the Ukrainian plants' lines and molds (because the plants prohibit visits).

One of the plants operating in Kiev has at least one line that is producing (audiovisual) DVDs, although there is no clear evidence it is replicating pirate product.

Even with the reduction in plants in operation, key optical disc plant enforcement problems remain under the current law and regulations (that is, even in the absence of the needed legislative amendments detailed later in this report):



- The licensing authorities are not properly inspecting the remaining (three) plants with effective inspections, let alone surprise inspections—the only means of effective plant enforcement;
- The three plants in operation were issued SID codes without proper verification at the time. No follow-up inspections have taken place since in order to verify the maintenance of these codes;
- The equipment used at the plants in operation has not been monitored to make certain that source identification (SID) codes are in fact properly engraved on all molds, matrices and all relevant equipment used in the production of optical discs in Ukraine;
- A database needs to be established by the Ukraine enforcement authorities (likely SDIP) to establish a complete and detailed inventory of the equipment used in the production of optical discs at the licensed plants.

It is now estimated by the recording industry (International Federation of the Phonographic Industry, IFPI) that the current production capacity of optical media material is around 30 million units per year. The demand for legitimate CDs in Ukraine is still less than 10 million units. Most seriously, the current inability to properly regulate the existing three plants means that production of even more unauthorized material is a looming threat that can be further exacerbated at any time. That is, if not properly regulated, the existing plants alone could ramp up their illegal operations to former levels.

Due to ineffective border enforcement (and no authority to hinder import or export of equipment), at least two of the Ukraine plants suspended their operations and moved their production lines to Belarus, Russia and Bulgaria in 2001. And as noted, one line apparently returned from Bulgaria in December 2002 to Ukraine.

The government of Ukraine has failed to use its existing criminal enforcement tools against illegal producers and distributors of optical media material. One of the most egregious examples took place in January 2002, when after an eight-month investigation, the General Prosecutor's Office announced that it was terminating that investigation because of a lack of sufficient evidence of any violations of the law against the illegal plant operators. This, even after the government of Ukraine openly acknowledged to several foreign governments the nature and scope of its illegal plant activity (culminating in the Joint Action Plan with the United States).

## **History of Poor Optical Disc Enforcement in Ukraine**

The history of copyright enforcement in Ukraine the past few years has 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.

Then 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 implemented in January 2001. As predicted, the Hologram Sticker law has proved itself to be open to abuse and delay (keeping legal material from entering the market) and fraud (issuing stickers to illegal distributors by failing to properly verify the legitimacy of requests). 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.

Adding to the confusing patchwork of laws, the Hologram Sticker law was not repealed by the Optical Disc Law. The Optical Disc Law was enacted in January 2002, and implemented (in part) by regulations in 2002. But the Optical Disc Licensing Bill has numerous flaws that prevent it from effectively stopping piracy in the production and distribution of optical media discs.

In addition, on January 8, 2003, the Ukrainian Ministry of Education and Science passed an "order" requiring the State Department of Intellectual Property (SDIP) to organize a voluntary registry for software manufacturers and distributors in Ukraine. The registry is supposed to contain the names of software manufacturers/distributors, data about their registration, location, and contact details as well as information about management, type of business activity and a short description of all software products manufactured/distributed. Under this order, all software manufacturers/distributors may obtain a certificate to verify their registration. For a fee, SDIP will provide users with information from this registry about a particular software manufacturer/distributor. The registry is expected to be available beginning on March 1, 2003. However, it remains unclear whether this new order will aid or harm the protection of copyrights in software.

## **Optical Disc Law of 2002 Must Be Amended**

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, the government of Ukraine announced that 13 sets of regulations would have to be adopted to implement this patchwork of laws and decrees, adding to the confusion.

The deficiencies of the 2002 Optical Disc (OD) Law are:

- It does not properly regulate all of the equipment used in the production of (illegal) discs. In particular it essentially does not cover the molds (and their components), or matrices used in the manufacturing process;
- It keeps some of the important records and licensing information out of reach of 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, leaving room for manipulation of the use of the international unique identifiers;
- It does not require plant operators to keep sample copies of the discs (all of this evidentiary and coding information is essential to identify the source of the illegal material);
- It 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;
- It 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 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;
- It contains loopholes for import and export of some of the tools (matrices and manufacturing equipment) essential to produce discs;
- It sets the liability for violators at a level that is too limited—with low minimum penalties;
- There are no provisions for confiscation or destruction of discs, material or equipment;
- It has weak administrative and criminal penalties (a high threshold will bar use of the criminal penalties in many cases).

So, the OD Law needs significant improvement—by adoption of the provisions set forth above—before it can be enforced in a way to bring meaningful protection and enforcement in Ukraine. IIPA and, in particular, IFPI have been working with SDIP and the government of Ukraine to fix these deficiencies. These changes need to be adopted quickly in 2003 to prevent the resurgence of pirate activity at the existing plants, and the creation of a territory ripe for exploitation by other pirate operations.

One other problem related to the OD Law is the interplay of the Ukrainian Licensing Law (“On Peculiarities of the State Regulation of Subjects of Business Activity Connected with the Production, Export and Import of Discs for Laser Scanning Systems”) (the “Law”) and the related Decree 411 on the importation of legal discs. These laws and regulations when first adopted required that imported discs carry only a Ukrainian issued SID code and required customs officials to verify SID codes appearing on imported product (that meant that the seal on legal discs had to be broken, thus making discs unsaleable). This requirement, an intrusive and unnecessary regulatory burden, resulted in a total blockade of legal imports by U.S. and other foreign sound recording producers into Ukraine.

In fact, the regulations had no positive impact on the real problem of illegal CD production and distribution in Ukraine and instead encouraged black market purchases in lieu of legal product, worsening the piracy problem in Ukraine. After its initial introduction, the provisions were revised so that discs (during import or export) are now required to carry any SID code, but not one issued by Ukrainian authorities. However, the damage was done by the initial round of regulations and it continues to stifle the import of legal product. Even the new regulations prohibit the importation of legitimate discs produced outside of Ukraine if they do not use any SID code. The government of Ukraine must initiate the necessary amendments to fix the current provisions and licensing regime for CD imports, while retaining the very valuable provisions relating to the production and export of CDs.

## **Lack of Criminal Enforcement, Border Enforcement and Other Enforcement Deficiencies**

Effective enforcement in Ukraine will require improving and enforcing the optical media law, as well as other key enforcement tools such as: (1) criminal enforcement using police and courts to target the criminal syndicates (and administrative remedies directed against smaller-scale activities); and (2) strong border enforcement measures to stop illegal optical media production and distribution and to slow the export or transshipment of that material.

Criminal enforcement in Ukraine has been, to date, very weak. There have been few cases of effective police action undertaken against large-scale commercial piracy, few deterrent prosecutions or sentences by the courts, and few administrative actions against stores, kiosks and other street piracy to report. The most critical of these steps is for Ukraine to use its criminal code to crack down on the organized crime syndicates distributing material in and out of Ukraine. While some successful raids and seizures are detailed below, few if any, resulted in successful deterrent criminal prosecutions (of a total of 278 criminal investigations). As a result of the too-high threshold for criminal prosecution, most cases resulted in administrative actions (in fact, over 3,000 cases under the Administrative Code pertaining to music and video piracy, mostly pertaining to hologram stickers).

In addition, Ukraine has failed to properly police its borders that permit this wide-scale shipment from and transshipment of these materials through Ukraine, to other countries in Eastern and Central Europe. There have been some minor seizures by customs authorities of CDs and other materials, but not nearly enough activity to stem the flow. Plus, customs authorities have not commenced or undertaken criminal investigations of pirating operations, especially against organized crime syndicates. For example, the entertainment software industry needs effective border enforcement to combat the Russian crime syndicates operating freely across the borders of Russia and Ukraine. Even with the legislative changes in December 2002 (which contains some deficiencies, notably a “commercial purpose” threshold), customs will remain ineffective absent proper training and administration (to combat corruption). The copyright industries report that Ukraine authorities have not responded to requests for information relating to border seizures of illegal product.

There are two reasons why border enforcement remains weak: (1) a lack of willpower and coordination in the government, and (2) improper authority. The Ukrainian border officials need to better coordinate their activities and need to get direction from the highest levels of the government that this is a priority. In December 2002, the Verkhovna Rada fixed the customs code to provide customs officials with *ex officio* authority to seize illegal material at the border without a court order. (The police and other enforcement officials also reportedly have

equivalent *ex officio* authority, but in practice they still depend on rightholder complaints to commence investigations—this needs to be corrected). Without this clear authority on the part of police and border officials, and proper confiscation of pirate materials (which IIPA understands can only constitutionally be undertaken by the courts), the problems will continue to worsen. In 2001, Ukraine border enforcement took a step backwards when it adopted a cumbersome registration system; IIPA understands that the amendments to the Customs Code adopted in December 2002 did not repeal these provisions (but IIPA has not been able to review the new customs code). Further, the new Customs Code narrows sanctions only to those activities meeting a “commercial purpose” threshold, which will hamper effective enforcement.

There is an additional lingering matter that is hampering effective enforcement. 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 (SDIP) are not equipped or empowered on their own, to proactively monitor and close down plants that are engaged in piratical activity. That should be left to an enforcement-based agency within the government.

In fact, the lack of coordination for enforcement is a long-standing problem. In February 2002, after a visit from the WIPO Director General Dr. Idris, President Kuchma signed a decree pledging better enforcement. The decree ordered the Ministries of Education and Science, Interior, the Tax Administration, Customs Service and the Security Service to step up their efforts. But without coordination of these efforts they will likely not succeed. In fact, five years after the Ukraine government promised to establish an interministerial committee, and three years after it was “organized” (in February 2000), the committee has not proven effective. It rarely meets and the copyright industries report it has issued no concrete proposals, much less implemented any, to effectively deal with IPR crimes. Plus, a continuing problem is that information is 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 by the crime syndicates.

In sum, 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 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.

In 2001, estimated losses to the recording industry, hardest hit by the optical disc production and distribution was \$170 million, reflecting the plant migration and suspension from 2000 when losses, for that industry alone, were at \$200 million.

In 2002, the combined losses for the motion picture, recording, and business software industries (based, in the latter case, on preliminary figures) were \$265.4 million.

## Industry Enforcement Reports

During 2002, Ukraine law enforcement officials reported that officers had inspected more than 15,000 shops, businesses and warehouses and seized 132,000 videotapes, 178,000 audiotapes and 272,000 CDs. In total, over UAH 7 million (US\$1.3 million) worth of material was confiscated.

The International Federation of the Phonographic Industry (IFPI) and the Recording Industry Association of America (RIAA) reported that in 2002 there were several police raids run in open markets and others places where illegal CDs, CD-Rs and DVDs were sold. For example, the police carried out a “major raid” against the Petrivka CD market in late January 2002, seizing about 13,000 CDs, videotapes, and software CD-ROM discs. At the end of 2002, another large-scale police operation was conducted against the same market and other retail points in Kiev, netting some 100,000 discs of various content. In total during 2002, 278 criminal investigations were commenced under the Criminal Code (Art. 176) with about 56% of what was seized being music or video material, and 26% software material. Of the 278 investigations, 35 cases reached the court. In 16 of these cases the offenders were found guilty but the results were: suspended prison sentences in eight cases, “correctional labor” (effectively community service) in two cases, and varying fines.

The Business Software Alliance (BSA) reported 241 police raids in 2002. Of this total, 98 cases made it to the Ukrainian courts: four defendants were convicted; 16 were acquitted or dismissed; and 79 cases are still pending. There was one case that resulted in a suspended prison term and one resulted in the confiscation of the PC used to commit the crime. In sum, only two cases involving business software led to criminal convictions in the court of first instance and both of these cases have been appealed by the defendants.

The recording industry (IFPI) further reported 4,000 cases that were officially treated as administrative code violations. Most of these involved the sale of copyrighted product without hologram stickers (about 3,000 of these concerned CDs and audiovisual materials). The total amount of fines levied was more than UAH 600,000 (approximately US\$100,000).

Two examples of successful seizures in 2002: on May 17, 2002, Ukrainian Tax Police (with support from IFPI) raided a private company in Kiev and seized 50,000 CD-Rs (as well as music MP3 and software and video MP4 discs, six computers and a color printer used to make labels). The location included three underground workshops where CD-Rs were duplicated on a 24-hour basis and were below two music shops. It was estimated that each workshop could produce 2,000 discs a day, that 20 persons were involved, and that the operation had links to other pirate operations in Ukraine. That case is still under investigation. In a second example, 30,000 previously seized CDs were destroyed on February 1, 2002 at a construction plant near Kiev—the discs had been seized during a raid on a warehouse by Kiev police in June 2001 and were believed to be the old stock of one of the displaced plants.

Unfortunately these positive actions are the exception, not the rule. Two examples illustrate this point. In the first case, despite repeated raids on two major retail outlets in Kiev, where illegal discs were found on each occasion, these cases have stalled due to procedural errors and/or inaccuracies in the case materials. The result is been that the outlets continue to operate without any sanction being imposed on their owners to date. In the second instance, a successful raid on a music shop in Odessa, which features as a prominent pirate supplier in the region, netting some 11,000 pirate CDs, the case was hampered by repeated transfers between

authorities and was eventually reclassified by a local prosecutor. The end result: the imposition of a small fine, and, to make matters worse, the discs were returned to the owner.

The MPA and IFPI reported that within the past year they started to engage in (combined) investigations and raids. But they face several obstacles. First, there is little government support for these activities; second, police lack the necessary enforcement tools (no confiscation authority); and third, because of the involvement of organized crime syndicates, corruption hampers success. Also, the certification procedure enacted by the government to protect legal copies (the hologram system described above) is cumbersome and ineffective and in effect helps the pirates by tying up legal product.

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 approximately 80%. The total value of pirate sales, including exported CDs, is estimated at \$150 million.

Ukraine continued to be a transshipment territory for pirate CDs in 2002. According to the State Customs Committee, border control measures in 2002 resulted in the seizure of some 50,000 CDs. No details about these seizures, including the disposition of the seized items, have been disclosed to the copyright industries. This contrasts sharply with the more effective (if still deficient) customs actions in neighboring countries such as Poland, where significantly higher numbers of pirate CDs were seized upon entry into Poland from Ukraine.

To add to the severity of the problem, certain Ukrainian CD plants and/or their related distribution companies continue to 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 preliminary figures of estimated trade losses in 2002 due to software piracy in Ukraine were \$75.4 million. In 2001, the BSA estimated that in the Commonwealth of Independent States (C.I.S.) other than Russia the total loss figures were \$58.4 million (up from \$29.7 million in 2000). The preliminary figures for 2002 on the level of piracy in Ukraine were estimated to be 86%.

In 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 sold to consumers (known as "HDL reseller piracy"). By the end of 2002, the software industry recorded a total of 241 police raids involving illegal business software; 34 HDL reseller raids; 171 raids of computer clubs or Internet cafes; and, 36 raids against small CD-ROM resellers. In 2001, the business software industry received favorable judgments in three cases in the court of first instance. In 2002 two of those case decisions were revised in favor of the defendants.

On July 23, 2001, the Moskovskiy District Court sentenced the director of an HDL reseller firm to a suspended 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. The sentence was appealed, and has now been remitted for further investigation; the case is still pending.

In the second HDL reseller case decided by the Goloseevskiy District Court on November 29, 2001, two individuals were fined \$640 and sentenced to pay \$11,000 in damages

to the rightholder. Both defendants appealed the decision to the Kiev Court of Appeals. On May 23, 2002 the court ruled that the case was initially investigated incorrectly, and subsequently the lower court's decision was overruled. The case now will be considered by the Supreme Court of Ukraine and obviously, the final decision is eagerly anticipated by the software industry. In a third case involving an HDL reseller in Odessa, the court proceedings were treated under the administrative code and as a result, the only punishment meted out was the confiscation of the defendant's computers.

Although the business software industry has had some enforcement successes with the Ukrainian police and prosecutors, it is discouraging that in most cases strong leads on infringing activity provided to the police by right holders resulted in no action. To date, all raids conducted by the police were initiated without consulting the right holders. Further, civil litigation is not a practical option because of the absence of *ex parte* provisions in practice, which makes it impossible for right holders to collect evidence without police assistance.

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 material produced in the past few years created a regional problem, first because the production was unregulated, and now by the distribution and export of this previously produced material throughout Ukraine, Romania, Poland, the Czech Republic, Hungary, Russia, Belarus and the rest of the countries of the C.I.S. The movement of pirate entertainment software into Ukraine and neighboring countries (of material produced in Russia) is believed to be run by a major Russian pirate syndicate; this syndicate has even apparently begun to affix its own "brand" or logo onto the pirate video game products it is distributing. Internet café piracy is also a problem for the entertainment software industry.

The Motion Picture Association (MPA) reports that the video piracy rate is 85%; optical disk piracy is at 90%; and broadcast piracy remains at 95%.

It is estimated that for all types of audiovisual piracy the levels are over 90%. Ukraine is not the main producer of pirate optical discs in Eastern Europe that it was just two years ago—Russia now claims that title. But pirate replication continues in Ukraine and one of the plants, as noted, has a DVD line though it is unclear if it produces illegal material. Ukraine is a major transshipment point for audiovisual material from Russia (especially DVDs) that is then shipped and sold in the neighboring countries of Slovakia, Hungary, the Czech Republic, Poland, Bulgaria and Romania. In the local market, pirate films continue to appear in Ukrainian kiosks within weeks of their U.S. theatrical release. Street kiosks sell pirate optical discs off the spindle and package them on the spot. Video retail stores stock pirate product including pre-release material that is available within days of the U.S. theatrical release. This type of piracy is found not just in Kiev but also throughout the country and as a result, legitimate distributors are struggling to survive.

Broadcast television piracy is also widespread. There are three national television stations, two of which Ukrainian State Television runs 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.



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 2002 due to audiovisual piracy in Ukraine remained at \$40 million.

The book industry continues to experience piracy as well, with most of the problem being books illegally printed in Ukraine (and Belarus) 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.

## **History of Trade Sanctions and the Withdrawal of GSP Benefits Imposed Against Ukraine by the U.S. Government**

On June 1, 2000, then-President Clinton and President Kuchma agreed on a Joint Action Plan in Kiev to be implemented by November 1, 2000. The Action Plan consisted of three parts: (1) to close the plants, seize illegal material, and only to reopen the plants when there is a legal licensing scheme in place; (2) to adopt proper optical media production and distribution regulations, including identification (SID) coding and the monitoring of raw material and manufacturing equipment, as well as of exports of product; and (3) to significantly improve the copyright law and to introduce other legal reforms, including criminal and administrative penalties, necessary to implement a modern copyright regime.

On March 12, 2001, Ambassador Zoellick designated Ukraine as a Priority Foreign Country (PFC) for its failure to implement the Joint Action Plan. The designation 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 was in addition to the complete withdrawal of trade benefits to Ukraine under the Generalized System of Preferences program (effective in August 2001). The suspension of the GSP benefits was also considered in light of the Joint Action Plan shortcomings.

The GSP benefits are part of a U.S. trade program that 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 did not fulfill the statutory obligations of GSP and in fact caused millions of dollars of losses to the U.S. due to piracy at the same time it was enjoying trade benefits worth close to \$40 million a year without duty.

IIPA filed a petition with the U.S. government on June 16, 1999 to request the suspension or withdrawal of Ukraine's GSP benefits. That petition was accepted on February 14, 2000 and public hearings were held on May 12, 2000. The PFC investigation moved on a parallel track with the GSP case and 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) were \$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.

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.

In January 2002 the Verkhovna Rada adopted Optical Disc Licensing Bill 8278-1. President Kuchma signed it into law on February 7, 2002. Because of serious deficiencies in that law that are incompatible with the Joint Action Plan requirements, the U.S. government announced it would maintain the trade sanctions and the suspension of GSP benefits until that law was corrected (as it was deemed unlikely that the flaws could be corrected by implementing regulations). Attempts to adopt amendments in the Verkhovna Rada in 2002 stalled.

## LEGAL REFORMS

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In 2000 and 2001 Ukraine made several key legal reforms (other than the optical media law reforms already detailed). These include:

- Geneva Phonograms Convention accession effective February 18, 2000 providing for the first time, a point of attachment for U.S. and other foreign sound recordings;
- Copyright Law of 2001 (effective September 5, 2001) an entire revision of the Copyright Law of 1993;
- Criminal Code Reform (effective September 1, 2001) adding important criminal penalties;
- WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) accession (depositing papers November 29, 2001) and including implementation at least in part in the Copyright Law of 2001. The WCT and WPPT entered into force in 2002.

Even with these improvements Ukraine is not in compliance with WTO TRIPS obligations and the draft package of legislative proposals under discussion in Ukraine in 2002 would not have corrected this shortcoming. The key missing pieces needed for effective enforcement (and TRIPS compliance) are: (1) amendments to the criminal procedure code; (2) amendments to the customs code; (3) the addition of key administrative remedies; and (4) new procedures for civil *ex parte* searches necessary for effective end-user (software) piracy actions.

### Copyright Law

The Copyright Law of 2001 fixed a major deficiency of the old law, namely, the protection for pre-existing works and sound recordings.

Before that “fix,” foreign sound recordings released prior to February 18, 2000 (the date of adherence to the Geneva Phonograms Convention), and works published prior to May 27, 1973 (the date of adherence to the Universal Copyright Convention) were unprotected in Ukraine. The most important next step in order to create legitimate markets for music and motion picture materials is for the Ukrainian police 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 by using these provisions.

The Copyright Law of 2001 grants pre-existing foreign works and sound recordings protection if they are less than 50 years old. This provides a shorter term of protection than is reciprocated by the United States for Ukrainian works and sound recordings but is a vast improvement on 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 non-renewed U.S. works (covered under the pre-1978 U.S. copyright laws). Since the passage of the law, numerous Ukrainian copyright experts and government officials have assured U.S. government officials (and the IIPA) that there is a full 50-year “retroactive” term of protection for works and sound recordings and that that position will be supported by Ukrainian enforcement officials and courts.

There are several provisions in particular in the Copyright Law of 2001 (especially Article 43.3) that are troubling because they permit the over-regulation and consolidation of power into government collecting rights societies. The Ukrainian Council of Ministers has, under this provision, recently adopted fixed tariffs for the broadcasting of sound recordings. This totally undermines the right of phonogram producers to freely negotiate their fees with users. Article 43.3 of the Copyright Act should be deleted and the current tariff decision by the Council of Ministers should be withdrawn. Collective management should be a private, not a government, enterprise; plus, legal entities and foreign rightholders should be permitted to be members on their own in Ukrainian collecting rights societies.

## **Criminal Code and Criminal Procedure Code Reforms**

Criminal code amendments were enacted in April 2001 and went into force on September 1, 2001.

These amendments fixed a major problem (in a new Article 176) by applying the criminal penalties, for the first time, to neighboring rights violations. The adoption of this provision applicable to 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 (tax-free) minimum income (roughly US\$320 to \$1300) for copyright and neighboring rights violations. These fines can multiply up to 200 to 800 times the tax-free minimum income for repeat offenders, and up to 500 to 1000 times the tax-free minimum income in certain instances (for officials abusing their “official positions”).

However, a major shortcoming remains. The Criminal Code amendments in 2001 retained the provision 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 criminal code 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.

Even more troubling now over a year after enactment of the (new) criminal code amendments, is that deterrent criminal sanctions (under the old or new code) have yet to be imposed in a copyright or neighboring rights case. As indicated, the few cases proceeding (such as the software case in November 2001) have resulted in light sentences and have been reversed before sentences were served. The criminal code provisions must be used against the criminal syndicates involved in wide-scale piracy as a first step towards effective enforcement.

The criminal procedure in law and practice must also be fixed so that police act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require right holders to file complaints to initiate actions. This acts as a bottleneck to successful enforcement. This should be changed to improve police actions so that police initiate intellectual property criminal cases and investigations for submission to the court; it must also be clear that the police (as they sometimes do in software cases) have the authority to hold confiscated products and equipment for use at trial.

## **Administrative Remedies**

As part of the Joint Action Plan, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy as well to enact a criminal penalties. Ukraine authorities need to more effectively use administrative remedies to remove the business licenses of infringing retail stores, kiosks, and other smaller-scale pirates. Administrative remedies must be properly implemented alongside available and properly implemented criminal penalties at levels sufficient to deter piracy for effective copyright protection and to comply with WTO TRIPS obligations.

## **Customs Code Reforms**

On December 24, 2002 Law of Ukraine No. 348-IV ("On Amending the Customs Code of Ukraine") was enacted; it goes into force on January 1, 2004. IIPA has not reviewed a copy of the new law. IIPA understands that the customs code revision will now provide clear *ex officio* authority to customs officials to seize suspected illegal material at the border for effective border enforcement and to commence criminal investigations. If true, this would close a legal loophole in the current border enforcement scheme. Unfortunately, IIPA understands that the new Customs Code narrowed the sanctions (permissible under the old code) to those meeting a "commercial purpose" threshold. This will limit the effectiveness of the new code. As a result of current border enforcement legal (and operational) failures, material is flowing freely into and out of Ukraine. The customs code must be used to properly seize material and to commence investigations for effective enforcement (which is a WTO TRIPS requirement). In addition, the

registration requirements and fees (which we understand were not repealed by the new law) must be abolished; these act as a bar to border enforcement action.

## **Civil Code Should Not Weaken Copyright Law**

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. IIPA understands that the latest draft of Chapter IV of the Civil Code was reduced to 14 articles. This is an improvement over earlier drafts that contained over 140 articles (and then 50 in a subsequent draft), many of which would have undercut the copyright law. However, even the shorted version with 14 articles is confusing and could overlap the copyright provisions. Plus, because the 14 articles make reference to over 90 other laws, this could make the provisions confusing (and obsolete) if and when any of the other laws referred to are amended. IIPA continues to urge that the Civil Code Chapter IV not be adopted, certainly not in a manner that would in any way weaken the copyright law or its effective enforcement.

## **Government Software Asset Management**

On May 15, 2002, the Ukrainian government adopted a tentative proposal calling for government software asset management—meaning that the government has agreed to use legal software programs within all of its agencies. The IIPA urges the government to continue down the path towards implementation of effective software asset management practices, and to work closely with the private sector in doing so.

## **WIPO Digital Treaties**

Ukraine was not a signatory to either of the two new WIPO Internet treaties when these were completed in 1996. 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 with the WIPO and both treaties entered into force (in Ukraine and the other member states) in 2002. The Copyright Law of 2001 included amendments to implement these treaties. Unfortunately the amendments fall short of complete and effective implementation, especially with regard to technological protection measures (requiring proof of “intentional” circumvention, which could prove a major impediment to protection).

If Ukraine properly implements and enforces these treaties they will act as important tools against Internet and other forms of digital piracy, and should help with the development of electronic commerce in Ukraine.

## Brief History of Legal Reforms

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 23 1993, Ukraine enacted a new law on copyright and neighboring rights (in force on February 23, 1994). That law was closely modeled on the Russian Federation's 1993 copyright law and separate legislation and regulations on broadcasting were later adopted. The 1993 copyright law was significantly revised and replaced by the Copyright Law of 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 its 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.

The 1992 agreement 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 unilaterally provided full retroactive protection for all Ukrainian works and sound recordings (and extended the term of 75 years to 95 years in 1998).

In October 25, 1995, when Ukraine adhered to the Berne Convention its instrument of accession included a declaration stating that it would *not* apply Berne's Article 18 obligations to protect pre-existing foreign works in Ukraine. Ukraine's decision not to grant protection to pre-existing U.S. copyrighted works (prior to May 1973) 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 (leaving pre-1995 recordings unprotected until September 2001). That created an intolerable situation, especially for the music industry, allowing older unprotected material to flood the market. During the seven years that Ukraine, slowly and only in piecemeal fashion, implemented the bilateral IPR obligations with its legal reforms it allowed itself to become a "safe haven" for an increasing number of pirate manufacturers of copyright material. That is why enforcement of new and pre-existing material is essential. The combination of illegal optical media material produced in Ukraine by organized criminal syndicates and the lack of any criminal or administrative enforcement has prevented the development of any legal markets. So it is imperative that Ukraine authorities enforce the new laws that have been enacted, and that the government of Ukraine further amend the deficiencies in the enforcement scheme including adopting effective optical media regulations as well as better criminal, customs and administrative remedies.

## **306 MONITORING**

**INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**  
**2003 SPECIAL 301 REPORT**  
**PEOPLE'S REPUBLIC OF CHINA**

## **EXECUTIVE SUMMARY**

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**Special 301 recommendation:** With piracy losses at a staggering \$1.85 billion in 2002, piracy rates continuing at over 90% across all copyright industries, and with no significant movement to enforce the criminal law against piracy as required by TRIPS, IIPA recommends that China remain subject to Section 306 Monitoring.

**Overview of key problems in China:** More than one year following China's WTO accession, piracy rates in China remain among the highest in the world. While enforcement actions throughout China continue, the apparent unwillingness of the Chinese government at the highest levels to take the actions necessary to reduce these rates, continues to be the cause of the greatest concern, particularly the failure to date to provide a truly deterrent enforcement system by imposing criminal penalties against pirates and by significantly increasing administrative fines for acts of piracy. Piracy by both unlicensed and licensed optical disc factories continues to flood the domestic market with pirate music, movies, videogames, books, and business software, making it very difficult for local Chinese creators and U.S. right holders to build viable businesses in China. Exports have diminished to a trickle, but pirate Chinese optical disc (OD) product has been found in Hong Kong, Russia and Vietnam. Piracy at the wholesale and retail level, and over the Internet, remains rampant, even though provincial and central government authorities, as well as Customs with respect to pirate imports, have undertaken numerous raids and massive seizures. The lack of deterrence in the system, the uncoordinated enforcement activities throughout China, the lack of transparency, and continued local protectionism are the primary causes of China's inability to reduce piracy rates. The absence of an effective criminal remedy has necessitated that right holders, in desperation, resort to less effective, more expensive and less deterrent civil actions, which have resulted in injunctions and civil damages to right holders in some cases, but little deterrence and thus a reduction in piracy rates.

Severe market access limitations, some enshrined in the agreements accompanying China's WTO accession, also severely inhibit the ability of many segments of the U.S. copyright industries to open and conduct efficient business operations and to better assist in the anti-piracy fight.

**Actions to be taken by the Chinese government:** The following actions must be taken in 2003—

- Appoint, and publicly support, a Vice-Premier to be permanently in charge of coordinating nationwide enforcement and law reform activities;
- Immediately reduce or eliminate the high criminal thresholds (and accompanying procedural hurdles) that in practice prevent the effective application of the criminal law to piracy—the only way to significantly reduce piracy in China. Then, establish a national anti-piracy criminal task force to



deter OD factory, wholesale and retail, Internet, and end-user piracy of software and other works with arrests and the imposition of severe criminal penalties. Amend the Penal Code to clarify its full application to all piracy crimes;

- Announce a national campaign to unleash this Anti-Piracy Task Force to prevent and punish criminal acts of piracy both internally and at the border;
- Through amended copyright legislation or regulations, correct the deficiencies in China's implementation of the WCT and WPPT, and ratify the two treaties.

**PEOPLE'S REPUBLIC OF CHINA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	168.0	91%	160.0	88%	120.0	90%	120.0	90%	120.0	90%
Records & Music <sup>2</sup>	48.0	90%	47.0 <sup>2</sup>	90%	70.0	93%	70.0	90%	80.0	56%
Business Software Applications <sup>3</sup>	1593.3	93%	1140.2	92%	765.1	94%	437.2	91%	808.4	95%
Entertainment Software	NA	96%	455.0	92%	NA	99%	1382.5	95%	1420.1	95%
Books	40.0	NA	130.0	NA	130.0	NA	128.0	NA	125.0	NA
<b>TOTALS</b>	<b>1849.3</b>		<b>1932.5</b>		<b>1085.1</b>		<b>2137.7</b>		<b>2553.5</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>2</sup> The estimated losses to the sound recording/music industry due to domestic piracy are US\$48 million for 2002, and exclude 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 up to US\$600 million.

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$765.2 million at 93% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

# **COPYRIGHT PIRACY IN CHINA**

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## **Optical disc Piracy**

The levels of optical disc piracy in China across all lines of copyright business continue to remain over 90% despite the seizure of a record number of pirate discs in both 2001 and 2002. IIPA members report that the Chinese authorities conducted over 20,000 raids against optical disc pirates (production, wholesale and retail) in 2002 and seized over 75.8 million VCDs, CDs, CD-ROMs and DVDs (7.96 million DVDs) compared to a then-record 51 million VCDs, etc., and 4.9 million DVDs in 2001. While this indicates that the National Anti-Pornography and Piracy Working Group (NAPPWG) and its affiliated agencies, central and provincial, continue to take action, once again, as in 2001, we must report that this activity is having little effect in reducing the piracy rate. The authorities also have raided both licensed and unlicensed factories and seized 25 production lines (12 DVD lines and 13 VCD and CD lines), again more than were seized in 2001—a record year. By the end of 2002, Chinese enforcement authorities had seized a cumulative total of 160 replication lines since the 1995 U.S.-China bilateral IPR agreement. Industry estimates are that as of January 2003, there are 70 factories operating 196 replication and mastering lines in China compared to 72 plants and 162 lines at the end of 2001. Overall capacity, not including underground plants that continue to spring up around China, is estimated at close to 690 million units annually, up 100 million since 2001.

As reported in last year's submission, pirate production is not limited to underground, unlicensed plants that are to be found throughout China, many in locations more inaccessible than in the past. Last year, industry estimated that approximately 80% of the plants operating in China produce some pirate product to satisfy a huge domestic demand. This has apparently not changed, though some dent may have been made by the NAPPWG raiding and the successful civil cases brought by the recording industry against licensed plants. Much of this production is still accomplished through fraudulent licensing documents from Hong Kong, Taiwan and other Asian territories. Industry reports seizures of pirate product with SID codes present allowing authorities to easily identify the producing plant. But as has become true throughout Asia, there are many OD products being sold with their SID codes removed, whether by scratching them out manually or with new machines built by the pirate syndicates for this purpose. It is suspected that many of these "burned" products are also produced in licensed Chinese factories. 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.

In addition to what appears to be growing production levels in underground, unlicensed plants, it is estimated that a high percentage of the pirate 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 (in our 2002 submission, industry had estimated about 50%). For example, in March 2002, Guangdong border police seized close to 5 million pirate discs being smuggled through Hong Kong territorial waters, and three weeks later, Zhuhai Customs seized an additional almost 2 million pirate units coming in through Macau territorial waters. This mere sampling is indicative of massive smuggling operations<sup>4</sup> which, when added

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<sup>4</sup> MPA reports that China Customs seized over 30 million units of pirate smuggled product in seven major cross-border operations through September 2002. These seizures were part of the 75.8 million discs referred to in the text above.

to domestic pirate production, adds up to a market more than 90% pirate and still out of control, despite valiant efforts by Chinese authorities, the Ministry of Culture, NAPPWG and China Customs. The problem, of course, is that the profits are so high, and the deterrence is so low in China, that the authorities are, in reality, fighting a losing battle unless a new strategy is found.

Despite the severe problems affecting the domestic market, industry reports that there continue to be negligible *exports* from China. Nevertheless, some exports can still be traced to China with Chinese product still found in Russia, Hong Kong,<sup>5</sup> Vietnam and Thailand. 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 continues for a fourth year in a row with revenues only very slightly up in 2002 due to intensive anti-piracy operations by the Ministry of Culture. The recording industry views this as a hopeful sign after three years of revenue decline. It also is encouraged by the cooperation of the courts in imposing civil damages against pirate plants as described below. Noteworthy in 2002 was the persistence problem of cassette piracy. RIAA/IFPI in a recent survey found that 39% of the sound carriers in circulation in China were cassettes, with the number around 50% in rural areas. Virtually all this product is piratical.

The music industry estimates that, overall, including local Chinese repertoire and all international (including U.S.) repertoire, lost sales due to piracy amount to up to \$600 million, with U.S. repertoire amounting to about \$48 million.

Piracy of audiovisual product in digital format remains a serious problem, with continuing huge seizures, as noted above, throughout China. DVD lines have remained constant from 2001 at a total of 18. 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 967 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.

But motion picture piracy has been particularly devastating to the Chinese industry. A recent article in the Shanghai Daily<sup>6</sup> documents the fruitless efforts of famed Chinese director Zhang Yimou, and the distributor of his latest acclaimed film *Hero*, the New Picture Film Company, to secure a decent return on their investment. When the film was released in October 2002 in Shenzhen and in Shanghai on December 20, moviegoers were prevented from taking handbags or anything made of metal into the movie theater during the preview to prevent illegal camcording of the film. The distributor spent over RMB1 million (US\$120,800) in financing a local anti-piracy unit, knowing that without major precautions, the film would be on the street in VCD and DVD format in days. But on January 8, a cinema in Xi'an reported losing a print. The police cooperated and interviewed the theater's employees, one of whom killed

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<sup>5</sup> For example, in May 2002 Hong Kong Customs, Shenzhen NAPP, and Shenzhen PSB in a joint effort broke a notorious DVD-smuggling operation. Hong Kong arrested one HK citizen and seized 2200 DVDs, and the Shenzhen authorities raided three locations, arrested four Chinese citizens (including the syndicate head) and seized 54,000 pirate DVDs.

<sup>6</sup> January 18, 2003. On November 1, 2002 a story about the sad saga of this film also appeared in the *New York Times*, <http://nytimes.com/2002/11/01/business/01PIRA.html>. As was stated then by the head of New Pictures, Jiang Wei, "After the release, we often have only three days before the pirate copies hit the market ... The industry can't survive that." Another Chinese film, *The Touch*, starring famed Michelle Yeoh, was available on pirate DVDs four days after the film's release, "and ticket sales slid fast."

herself by jumping off a building. Then low-quality copies started showing up on the street. The legitimate DVD distributor then violated his contract with the film's distributor and began selling pirate DVDs before it was authorized to begin legitimate distribution on February 20, and in low-quality, cheap format to compete with the pirates. The film distributor is now considering taking legal action against the distributor. Zhang's effort was a first for China—he was able to keep pirate copies off the street for a number of weeks and actually broke records at the box office. This is unusual, however, and most first run movies—U.S. and Chinese—are available in pirate form within days in China, and for U.S. films this is well before even their theatrical release in China.

Pirate DVDs are selling for US\$0.76 to US\$2.50 and the penetration of DVD players in China have grown from an estimated 5.3 million in 2001 to an estimated 18 million today. 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 60 million VCD players in China.

In 2001 MPA reported a small decrease in the piracy rate in China. However, despite considerable efforts of the authorities and MPA to fight piracy, the rate actually increased for 2002 to 91%, this despite record seizures in 2002. The lesson is simple, and must be grasped by the Chinese authorities, that without significantly heavier deterrence afforded by real criminal prosecutions for piracy and a national campaign to accompany it, piracy rates will not go down.

Unfortunately, we must report again that, with the exception of many raids and administrative cases brought against pirates of Nintendo's Game Boy products, 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 94% of that market in China, while console-based games are at 97%. Imports appeared to have diminished and most production (particularly of entertainment software for PCs) occurs locally in Chinese factories or increasingly through CD-R burning, which is reportedly on the increase. High quality counterfeits of such popular videogames as *Harry Potter* and *The Lord of the Rings* can be found throughout China, complete with the copied video game packaging as well as instruction manuals. Domestic factory production allows for the localization of pirate product before legitimate fare is available on the market (in some instances, pirate product carries the "logo" or "brand" of the pirate operation controlling the production and distribution of the videogame).

## Wholesale and Retail Piracy

Enterprise end-user piracy is the most pressing problem for the business software industry in China but counterfeiting of enterprise software and hard disk loading are also major problems. Indeed, China is the source of some of the most sophisticated counterfeits of software anywhere in the world. In order to deal with the counterfeit and hard disk loading problem, the Chinese government should initiate a crackdown on the open sale of pirate software.

In order to regularize the audiovisual marketplace, the Ministry of Culture, in early 2001, set about to close what were predominately pirate markets throughout China. To date 277 audiovisual markets in major cities have been closed, including the notorious Chendu Chenghuangmiao Market, Liaoning Haicheng Market, Shenzhen Luohu Market and Wuhan Jiangnanlu Market.

Supplied by both licensed and unlicensed factories and by smugglers, the wholesale and retail trade in pirate OD product in particular continues to thrive despite the improvements described above. The recording industry reports that small retail shops have become the major outlets of pirate music product with up to half of these outlets selling pirate music. In Beijing alone there are 1,500 of these small pirate outlets. As in other countries in the region, mobile vendors and individuals, supplied by larger well-organized distributors ply their trade actively. Audio, video and entertainment software products are the mainstays of all these businesses.

MPA has also targeted major distribution centers and major retailers. One major distribution center in Beijing was raided and 312,000 pirate OD products, including 35,000 pirate DVDs and 65,000 VCDs were seized. Another such distribution center was hit in October 2002 and 77,000 DVDs were seized. And retail piracy is not limited to small shops. In April 2002, a major retail operation in the Yongsheng Century AV Center in Beijing was raided, with both large quantities of DVDs and music cassettes seized. This outlet is part of a larger group of companies that have faced repeated complaints from industry. This time the owners were charged with operating an illegal business and, in October 2002, sentenced to six and five and one-half years, respectively. This kind of action will result in deterring further infringements.

## **Enterprise 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 important, it provides that the Ministry of Finance will itemize a budget for software, to ensure that government agencies have money to 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 continued 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.

These actions signal that the government recognizes the problem, but 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. As described further in the sections on enforcement, it is here that aggressive steps must be taken to establish an effective administrative and judicial enforcement regime against this type of piracy.

## Internet Piracy

Internet piracy is a growing phenomenon and IIPA hopes that the Chinese government will do more to recognize the problem. With over 58 million Internet users (up from 33.7 million or 72% from 2001) and over 293,313<sup>7</sup> websites as of June 30, 2002, China's response will be all important.

For the entertainment software industry, piracy in Internet cafes remains a problem. This is due in part to the fact that a majority of Chinese are dependent on these cafes for their Internet access. Last year, IIPA urged the Chinese government to look into the use of entertainment software at these cafes, citing the fact that while the government had been vigilant in requiring cafes to install blocking software for pornographic and subversive sites, the issue of piracy of entertainment software products was not addressed. In January 2003, it was reported that the Chinese Ministry of Culture announced that it will launch a crackdown on Internet game piracy at Internet cafes beginning in February 2003. An official announcement, however, has not been issued, nor has the IDSA or IIPA yet been able to obtain a translation of the Culture Ministry's announcement that supposedly addresses normalizing software use at Internet cafes. This is, however, a promising step in combating Internet piracy and it is hoped that the regulation, once in place, is effectively enforced.

Internet piracy has reached crisis level for the recording industry in 2002, and the industry expects the situation to worsen if the Chinese government does not take immediate action. Not counting music files (mainly MP3, but increasingly in Microsoft's Windows Media format) being exchanged through FTP servers set up by university students, and other peer-to-peer servers (such as the Taiwan-based Kuro), RIAA/IFPI estimate that there are over 7 million music files being offered for download and listening (through audio streaming) from over a thousand active pirate music websites in China.

In a recent warning campaign conducted by the industry, up to 60 warning letters were sent to ISPs that were hosting websites with alleged telecommunication companies' background. Although it is encouraging that most of those websites have ceased to operate after receiving the letters, there is still a large portion of sites offering infringing music files. Moreover, while many of those sites are mainly targeting local Chinese users (i.e., the web pages are mainly written in Chinese and a larger portion of music files are Chinese titles), RIAA/IFPI has also found that many China-based ISPs are now being used by international

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<sup>7</sup> Source: CNNIC Internet Report 2002/01, <http://www.cnnic.net.cn/develst/2002-7e/6.shtml>.

Internet music pirate syndicates to store their infringing files. In a number of cases, RIAA/IFPI have located sites that were offering new releases of Western artists for downloading with their MP3 files mainly stored in servers located in China.

Meanwhile, mainly because of the lack of awareness of copyright laws and the lack of government initiative to crack down on online piracy, even large and popular Chinese portals were found to have offered services that allowed users of mobile phones to select recorded music from a list of over a thousand titles. There are now over 200 million mobile phone users in China. Fortunately, these services were immediately stopped after RIAA/IFPI took action against the infringing websites.

It is critical that the government intervene with clear rules in the Internet area, accompanied by more effective enforcement. The recording industry fears that the local market, which is already seriously affected by massive CD and cassette piracy, will be further devastated. More importantly, if the problem continues to grow, there is a real possibility that ISPs in China will soon become the most important “warehouses” for many international online pirates to store their music files as they can take advantage of the inadequate legal protection and feeble enforcement.

MPA also experiences growing Internet piracy in China and has embarked on a program of issuing cease and desist letters to ISPs and monitoring Chinese websites to find pirate MPA titles. As of December 4, 2002, it had taken down a total of 225 pirate websites. There is an urgent need to update the Supreme Court “interpretations” in light of the new copyright law, particularly with respect to spelling out more clearly the liability of ISPs, and to deal with the temporary copy issue. See further discussion below.

## **Piracy of Journals and Books**

After years of suffering from lack of action regarding journal piracy in China, the Association of American Publishers (AAP) reports unparalleled improvement for 2002. This comes as a result of several months of research into the issue of massive journal piracy, undertaken by foreign publishing groups and culminating in a letter of August 14, 2001 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 International Publishers Association (IPA) and the Publishers Association of the United Kingdom (PA). 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, Guanhua, informed its customers that it would thereafter be unable to supply pirate journals. 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. Guanhua was closed down in December 2001.

By mid-January 2002, local representatives of U.S. publishers were reporting considerable increases in interest by Chinese libraries in licensing journals, with many halting their prior subscriptions to pirate journals with the expectation of paying legitimate licensing fees. Whereas 2001 had seen virtually all journals pirated, stifling the legitimate market, journal piracy has now slowed to a trickle. This is quite a positive development, and one that the

Chinese government must work to sustain through proper funding for purchase of legitimate journals and proper enforcement measures. The outlook is hopeful, as many journal subscriptions for 2003 are now complete. IIPA and AAP commend the Chinese government for taking these firm actions and encourage continued reinforcement of the importance of honoring journal copyrights; this will encourage foreign investment and greatly benefit Chinese scientists, academics and students.

Unfortunately, the successes against journal piracy have not carried over into efforts to combat piracy of other materials. Traditional reprint piracy continues to remain a major problem in China. Piracy of higher education textbooks continues unabated. The Chinese government needs to take action against textbook piracy with the same vigor with which it tackled journal piracy. Reprint piracy affects the market for trade books as well. J.K. Rowling's Harry Potter books were a rousing success in China, with the local publisher selling over 5.5 million copies. However, it has been reported that an equal number of pirate copies have also been sold.<sup>8</sup> Counterfeiting problems also abound. We have previously reported the publication of totally bogus books purportedly written by a famous author. This happened most recently with the Harry Potter series, with Chinese publishers producing at least three additional books about Harry under Rowling's name. One of the publishers was caught and subjected to a \$2,500 fine.<sup>9</sup> Furthermore, well-known business and academic trademarks, such as those of the Harvard Business School, are used illicitly to promote sales of books by implying a nonexistent affiliation or endorsement. Finally, translation piracy remains a problem for foreign publishers. While official State publishing houses have largely ceased their illegal translation activities, second-channel distributors continue production of illegal translations at an alarming rate. The government must take vigorous action against these problems in order to continue the positive example it set with regard to journal piracy.

A new problem has developed with publishers stealing PIN numbers and downloading online journals off the Internet and other electronic databases. In fact, publishers now report more illegal downloads of online journals and digital license violations in China than anywhere else in the world. Publishers have been working with librarians to try to minimize file transfers and to prevent pirate "document delivery services" from developing, but the Chinese government must work to promote digital copyright compliance as well.

Also new in 2002 is the discovery of a Chinese printer, Duoli International in Guangzhou, that has been shipping large quantities of pirate books to Africa, particularly Nigeria. The case is still being researched. It is suspected that the company is exporting pirate books to other countries, including the United States, and reports of pirate exports to Iran have appeared recently as well.

## **Other Types of Piracy**

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

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<sup>8</sup> "Chinese Pirates Rob 'Harry' of Magic, and Fees," Washington Post, November 1, 2002.

<sup>9</sup> *Id.*



audiovisual regulations issued last year 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 1,500 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) were 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. An action was taken in May 2002 against Hanzhong Cable TV.

Cartridge-based games suffer high rates of piracy as well. 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. In August 2002, Chinese police raided an electronics factory in Guangzhou, where a sizable amount of counterfeit Game Boy Color printed circuit boards and cartridges were seized. The owner of the factory is a Taiwanese citizen who reportedly purchased the component parts from Taiwan, and shipped them back to China for assembly of the finished product at his factory. It appears that there is still production of component chips in Taiwan, but their assembly into finished counterfeit cartridges appears to be taking place in factories on the Chinese mainland. Nintendo reports that it seized 1 million counterfeit products in China in 2002 and supported 135 raids on Chinese manufacturers. A January 2003 January raid in Guangdong province netted 300,000 counterfeit games, according to a recent Reuters report.<sup>10</sup>

## **COPYRIGHT ENFORCEMENT**

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To meet its WTO/TRIPS commitments on enforcement and particularly TRIPS Articles 41, 50 and 61 (provide enforcement which “on the ground” deters further infringements, provide effective *ex parte* civil search orders, and provide specific deterrent “criminal” remedies), China must implement a system in which the State Council ensures that the authorities (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) appoint a Vice-Premier to lead and coordinate the nationwide enforcement effort; (e) significantly increase administrative penalties and actually impose them at deterrent levels; and (f) increase criminal penalties, lower the criminal thresholds and actually criminally prosecute,

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<sup>10</sup> Reuters News, February 11, 2003.

convict and impose deterrent fines and prison sentences on pirates. None of these objectives has as yet been either fully articulated or accomplished.

## Administrative Enforcement

China continued to take many enforcement actions at the distribution and retail level and also undertook a number of factory raids. These actions included many arrests (NAPPWC reported more than 4,500 arrests in the first 8 months of 2002) but they usually cover arrests for pornography as well as piracy without differentiation. Moreover, IIPA and its members have never been able to ascertain what has happened to those arrested. Finally, we do know that administrative actions almost always result in small fines, usually between RMB 50 and 200 (\$6 to \$25) for retail piracy.

In short, the copyright industries 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. The Chinese government regularly claim large numbers of administrative actions (NAPPWC reports over 6,000 in 2002—again for pornography and piracy) dealing with copyright infringements but industry is not able to evaluate the deterrent impact of these actions.

Virtually all enforcement in China is done through a complex and overlapping local, provincial and national administrative system. Given the overwhelmingly high piracy rates, it is crystal clear to all that this system fails to deter piracy as required by TRIPS Article 41. There are myriad deficiencies in the administrative enforcement system in China:

- 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\$6,000) threshold for sustaining a criminal prosecution. IIPA continues to hear rumors of movement on this issue, but to date we have seen no action yet to redeem this commitment. In the new Regulations to the Copyright Law, issued in August 2002 and effective on September 15, 2002, administrative fines have been changed from a simple maximum of RMB 100,000 (\$12,000) (which, to the best of our knowledge, has seldom been imposed by NCAC) to a "fine not exceeding three times the amount of the illegal business gains, or a maximum of RMB 100,000 when it is difficult to calculate the amount of the business gains" (Article 36). Depending on how this provision is administered, it could result in a reduction in fines in practice since in most retail situations, vendors are not carrying large inventories (and growing "burn-to-order" CD-R techniques will exacerbate this problem). It is highly unfortunate that the State Council did not use the opportunity offered by the need to adopt new copyright regulations as a means to increase administrative fines to real deterrent levels. As noted below, China has, however, 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 audiovisual regulations also contain a closure remedy for licensing and related violations. However, IIPA members are not hearing reports that markets and retail

shops selling pirate CDs, VCDs, DVDs, CD-ROMs and other pirate products are being closed even after subsequent administrative “convictions” for copyright piracy or trademark violations.<sup>11</sup> The WTO 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. This extends to the Chinese public as well as to foreign right holders. 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. The new copyright law amendment requiring the courts in civil cases to execute an *ex parte* search within 48 hours of the request by the right holder has not proven as yet to work in practice. (See further discussion below.)
- 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.

There are two bright lights, however: MPA and AFMA continue to report positively on the title verification program run by NCAC. At the end of August 2001, a total of 7,858 title verification requests (an additional 736 from a year earlier) have been submitted to NCAC by MPA, and a total 2,866 titles have been challenged as unauthorized (an additional 103 from a year earlier).

After years of requests by BSA, NCAC exercised its administrative authority in two enterprise end-user cases. In August 2002, the Shanghai branch of NCAC conducted two raids, with one of these uncovering unauthorized software valued at over US\$1 million. Settlements in these cases amounted to tens of thousands of dollars. These cases were a major advance, and BSA hopes they are a harbinger of the large-scale use of administrative authority. Unfortunately however, NCAC does not have sufficient resources for wide-scale and sustained enforcement actions of this kind without utilizing the resources of other agencies such as the AICs.

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<sup>11</sup> In year 2002, however, MOC did revoke over 7,000 audio/video retail licenses because the space of the shop was less than 50 square meters.

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS			
ACTIONS	2002		2001
	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	MOTION PICTURES
Number of raids/searches conducted	852	3*	983
Number of administrative cases brought by agency	812	3*	769
Number of defendants found liable (including admissions/pleas of guilt)	808	0	769
Ratio of convictions to the number of raids conducted	99.5%	0	78%
Ratio of convictions to the number of cases brought	99.8%	0	78%
Number of cases resulting in administrative fines	808	0	501
Total amount of fines levied		0	
US\$0-\$1,000	764	0	493
\$1,001-\$5,000	42	0	4
\$5,001-\$10,000	2	0	4
\$10,000 and above	0	0	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)		0	

## Criminal Enforcement

IIPA and its members (and the USG) have pressed China for years to use its criminal law to prosecute pirates, as the only viable means effectively to reduce piracy levels in China. 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 there is a publicly stated commitment and an ample record of convictions with deterrent penalties. As discussed in detail below, the piracy provisions in Article 217 and 218 of China's criminal law have rarely 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.

IIPA members have inquired on many occasions about the existence of criminal convictions purely for piracy offenses and we have received no confirmations. 2002 may mark the year of the first pure piracy case ever, involving a factory in Guangdong Province, where two defendants was sentenced in March 2002 to 2 years imprisonment for copyright piracy only. This case involved the Foshan Jinzhu Laser Digital Chip Co. Ltd., which had accepted a phony order for 920,000 DVDs from a Taiwan defendant (who was fined RMB 400,000 (\$48,000)). In addition to the prison terms, three lines were removed, and the GPPA revoked the plant's license.<sup>12</sup> There were earlier rumors of criminal piracy convictions in Anhui Province but no confirmation was obtained. Another case in Shanghai involved the *Dictionary of Cihai*, but again it appears that this was not a pure copyright case either. IIPA has received informal reports of two book-piracy cases which were decided purely under Article 217 and 218, but these may be the Anhui cases for which we have no confirmation.

Again, we urge the USG 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

<sup>12</sup> This is precisely the kind of result, if repeated and widely publicized, that will eventually result in China reducing its staggering piracy rates.

to make criminal prosecutions more available. Indeed, as discussed below, the State Council has ultimate authority merely to order those amendments.

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002</b>		
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>
Number of Raids conducted	80 (Shanghai & Beijing)	0
Number of cases commenced	N/A	0
Number of defendants convicted (including guilty pleas)	3 (Guangzhou case)	0
Acquittals and Dismissals	N/A	0
Number of Cases Pending	N/A	0
Total number of cases resulting in jail time	1 (Guangzhou case)	0
Suspended Prison Terms	N/A	0
Maximum 6 months		0
Over 6 months		0
Over 1 year		0
Total Suspended Prison Terms		0
Prison Terms Served (not suspended)	3	0
Maximum 6 months		0
Over 6 months	2	0
Over 1 year	1	0
Total Prison Terms Served (not suspended)		0
Number of cases resulting in criminal fines	N/A	0
Up to \$1,000		0
\$1,000 to \$5,000		0
Over \$5,000		0
Total amount of fines levied		0

## CIVIL ENFORCEMENT

One positive development is the increasing sophistication and effectiveness of the IPR courts throughout China. This has resulted in an increase in the number of civil cases for damages being brought by Chinese right holders and, increasingly, by U.S. right holders, particularly given the failures of the criminal and administrative enforcement systems. The recording industry began to use civil litigation in 2001 when it 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 were settled). Twenty-six 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. In 2002, RIAA/IFPI report about 80 cases in progress or completed/settled (against 30 licensed plants) and so far close to 100% (approximately 11 judgments) have been successfully concluded. Some of these cases resulted in significant damages, and it is reported that these cases have had a deterrent effect on the licensed plants that were engaging in pirate activities.

The motion picture industry has also embarked on a civil litigation program with a total of five cases commenced in the second half of 2002, two in Beijing against factories as well as a retail outlet in each case, and three solely against retail outlets in Shanghai. None of these cases has yet reached its conclusion. In the Shanghai cases, the court is seeking to separate the actions for each separate plaintiff. This increases the difficulty of efficiently prosecuting these cases and creates a greater backlog of cases for any court system to deal with.

As discussed below, the new copyright law amendments have made certain positive changes that 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, particularly the business software industry.

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. However, the courts in those cases never did issue the search orders, despite acknowledging the existence of the remedy and that the orders needed to be executed in 48 hours as required under the new amendments.

As reported in our 2002 submission, the same result fell to two BSA members that 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.

Fortunately, in March 2002, a BSA member was finally granted such an order; it was then executed and illegal software found. In November 2002, after three hearings, the Shanghai No. 1 Intermediate Court found the party guilty and awarded damages of RMB 500,000 (US\$60,000) as statutory damages under the new amendments, the maximum amount allowed. BSA initiated two other civil actions in December—one in Nanjing and one in Shanghai. The targets are both advertising companies. BSA applied for an evidence preservation order and a preservation of property order. The case is now in process.

In the area of book and other literary works piracy, 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. 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). This case is still pending in the Beijing People's Court, after a trial in May 2002 and submission of post-trial briefs in fall, 2002.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2002		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	5	2*
Post Search Action		NA
Cases Pending	5	2
Cases Dropped		0
Cases Settled or Adjudicated		0
Value of loss as determined by Rightholder (\$USD)		Not Known
Settlement/Judgment Amount (\$USD)		0

## Enforcement Against Internet Piracy

Due to the rapid growth of Internet piracy in China, some of the copyright industries have begun concerted enforcement campaigns. MPA began such a program in earnest in May 2002 employing webcrawlers that can find pirate movies both in English and simplified Chinese characters. Since that time, 548 cease and desist letters were sent to mainland Chinese ISPs, with an average compliance rate of 41%. This rate was significantly improved after MPA officials met with China Telecom. Significant improvements in these compliance rates are not likely to occur until the Chinese government clarifies the liability of ISPs and thereafter civil cases are brought which hold ISPs liable for failing to take down pirate sites. MPA keeps NCAC fully informed of these activities but to date NCAC has done little on their own initiative.

The recording industry, facing massive Internet piracy in China, issued 60 cease and desist letters to offending ISPs and websites, FTP sites etc. in 2002. Compliance has generally been good by the ISPs but litigation and *ex officio* action by Chinese enforcement authorities will be necessary to make a significant difference. RIAA/IFPI have brought a number of civil suits against ISPs and websites which have been reported in earlier submission. Some success has been achieved.

## STATUTORY LAW AND REGULATIONS

### The New Copyright Law Amendments

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.<sup>13</sup> These new amendments ("2001 Copyright Law") make a number of very significant and welcome changes to the 1990 law and attempt to bring that law into compliance with TRIPS, which became effective on December 11, 2001 when China joined the WTO.

<sup>13</sup> 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).

Importantly, the amendments also purport to implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

In its 2002 submission, IIPA set out many of the positive changes wrought by these amendments, and we won't repeat these here. Listed below are those changes which IIPA believes are deficiencies that remain to be fixed, and were not fixed either by the December 2001 regulations governing computer software, or the regulations to the Copyright Law which became effective on September 15, 2002 and were issued in December 2001.

1. The most glaring deficiency is that criminal liability is not affected and there are apparently no plans to amend the criminal code.
2. While the Law [Article 47(6)] provides anti-circumvention protection, it does 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; and 6) does not provide for criminal penalties for circumvention violations (since the copyright law only deals with civil and administrative remedies). Unfortunately, none of these deficiencies was dealt with in the implementing regulations.
3. 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.
4. 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.<sup>14</sup> As it stands, the current Article 10(5) description of the 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 (Articles 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.

5. 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. It would also violate 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 to limit their scope in a manner consistent with the Berne Appendix.
6. 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’s 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.
7. 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

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<sup>14</sup> The agreed statement to Article 1 of the WIPO Copyright Treaty provides,

[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. Mihály 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.” Mihály Ficsor, Copyright for the Digital Era: The WIPO “Internet” Treaties, Colum.-VLA J.L. & Arts (1998), at 8. See also, Mihály Ficsor, The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation (2002).

obtain permission to broadcast “unpublished” works (e.g., an exclusive right), Article 47 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 not only enjoy full exclusive rights for both performances and broadcasts in line with modern trends, and this treatment appears to conflict with the “Regulations Relating to the Implementation of International Treaties” promulgated in 1992. Article 12 extends these rights to foreign cinematographic works and Article 18 applies that Article 12 applies to sound recordings. The authorities, though asked, did not clarify this contradiction in the Implementing Regulations to the Copyright Law discussed below. 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.

8. 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.
9. 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. The deficiencies noted above in the copyright amendments were not eliminated in these regulations.

Furthermore, the regulations created other, new, problems which are listed below:

1. 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.

2. 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.
3. The regulations should have made 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.
4. 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 New Copyright Regulations**

Another opportunity was available to the Chinese authorities to clarify many of these deficiencies but that opportunity was not taken. What was done was a shortening of the 1991 Regulations with few changes. Selected problems include:

1. Still left unclear was the fate of the public performance and broadcast right for sound recordings. The 1992 “International” regulations, referred to above, should clearly take precedence over these regulations and the copyright law with respect to foreign works and sound recordings such that foreign sound recordings have an exclusive broadcast right and must be compensated by Chinese broadcasters.
2. Article 32 of the 2002 Implementing Regulations seems to imply that the Article 23 compulsory license covers all subject matter, not just printed material. As such the law and the regulation violate the Berne Convention and TRIPS. No attempt was made to limit the application of Article 23 to domestic works or to so-called el-hi uses.

3. Again, as discussed above, the administrative fines should have been increased, but they still remain at a maximum of only RMB100,000 (US\$12,000).

## **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 (and IIPA strongly recommends that this be done), 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 to 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 USG 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. Finally, IIPA has a report that China Customs is not referring significant seizure cases at the border for criminal prosecution on the apparent ground that under the “interpretations” the act of importation is not a “sale.” These interpretations should be immediately amended.

## **Application of the Copyright Law to Internet Disputes: Supreme People’s Court “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.<sup>15</sup> 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 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. IIPA members have requested, however, that these regulations be further clarified to ensure that the liability of ISPs in connection with transmitting pirate product is made especially clear.
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 it violates 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

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<sup>15</sup> 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.

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 catch-all "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.

## Market Access Issues

Most of the copyright-industries suffer from non-tariff and tariff trade barriers which severely limit their ability to enter into, or operate profitably, business in China. These are only selected barriers which affect the named industries:

Entertainment software: Entertainment software titles must go through an approval process at the Chinese Ministry of Culture before distribution is allowed. In many instances, the approval process takes several weeks to complete. In the interim, pirate copies of popular games are already readily available in the market, localized into Chinese, before the legitimate product has been approved for distribution.

Book and Journal Publishing: The government-run China Educational and Research Network, which is the Internet service provider used by universities, levies a charge on access to internet sites outside China. This has the effect of making foreign publishers' on-line journals prohibitively expensive to would-be subscribers. In order to combat this, publishers must spend hundreds of thousands of dollars per year funding lease lines on China-based servers. Furthermore, the ban on publishing and printing by foreign publishing companies remains in place and opens AAP members up to rampant offset piracy. A compromise suggestion, short of the strongly preferred option of removing restrictions on foreign publishing, is to soften restrictions on printing, allowing foreign entities to print in special "export processing zones," similar to those used in India.

### Motion Picture Industry:

*Import quotas:* Limits on the number of films imported into China continue. Under the terms of China's WTO commitment, China has agreed to allow 20 revenue-sharing films into the country each year, up from a previous limit of 10. The Chinese are insisting that the 20 is a "maximum," not a "minimum." This interpretation is not in accordance with WTO policy and should be corrected. Moreover, the needs of the market far exceed the legal films now available as demonstrated by the huge market in pirated optical discs. Censorship and the monopoly import structure are the tools by which these quotas are imposed and enforced.

*Monopoly on film imports and film distribution:* China Film continues to be the monopoly importer and distributor of imported films. China Film is capable of handling effectively only 7-8 films a year. This restriction of legal film supply leaves the market to the pirates and they are taking full advantage of that. Import and distribution of films should be broadened to meet the demands of the market.

*Cinema ownership and operation:* Current law restricts foreign ownership of cinemas to no more than 49%. Foreigners are not permitted to operate cinemas. For the growth and health of the industry, foreigners should be allowed to own and operate cinemas.

*Broadcast quota:* Foreign television programming is restricted to no more than 25% of total air time and no more than 40 minutes of prime time between 6:00 PM and 10:00 PM on terrestrial stations and pay television systems. Since June 2000, foreign animation must follow the same censorship procedure as general programming and is restricted to no more than 25% of total air time and cannot exceed 40% of total animation programming delivered by each station. The quota on air time should be raised to at least 50%, and the prime-time quotas should be eliminated altogether.

*Retransmission of foreign satellite signals:* Foreign satellite channels may only be shown in four or five-star hotels, government buildings and foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government owned satellite for a fee of \$100,000, placing a significant and unnecessary financial burden on satellite channel providers. The up-linking fee should be eliminated.

*Television regulations:* Under the 1997 Foreign Investment Guidelines, companies that are wholly or jointly owned by foreign entities are strictly prohibited from investing in the broadcast industry. MPA member companies are not allowed to invest in broadcast stations or pay television systems. China TV Program Agency, the government acquisition arm, must approve all importation of foreign programming.

# **PRIORITY WATCH LIST**



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# ARGENTINA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Argentina remain on the Priority Watch List due to high piracy levels and ineffective copyright enforcement.

**Overview of key problems:** The growing problems with pirate optical media and the illegal use of CD-R burners seriously undermine the ability of all the copyright industries to compete with legitimate product in Argentina. The entertainment software industry reports three major forms of piracy: (1) substantial importation of videogame CD-ROMs (especially from Malaysia, Hong Kong, the People's Republic of China, Thailand, Taiwan, Paraguay and Chile), entering via Iquique, Chile or Colonia, Uruguay; (2) reproduction on demand, whereby games software is burned onto blank CD-Rs, and; (3) Internet piracy, whereby websites offer pirate videogame software for sale. The recording industry reports that the shift from analog to optical media-based piracy represents a long-term, alarming trend in Argentina which already has caused much harm to the recording industry. The preferred piracy format is burned CD-Rs which mostly come from Taiwan, go through Uruguay and land in Argentina, as goods in transit, on their way to Paraguay; the same CD-Rs come back into Argentine territory for piracy purposes. Thousands of street vendors take advantage of these CD-Rs throughout the country and are rapidly putting out of business tax-paying legitimate retailers. The book publishing industry reports widespread photocopying of English language materials and computer books and texts in Argentina. Copyshops located near the universities, but mostly by the student unions and organizations in the universities, are the main sources of illegal photocopying. The filmed entertainment industry reports that new forms of optical disc and television piracy are rapidly appearing, and video piracy in Argentina is becoming an integral and perhaps inextricable part of the audiovisual market. With respect to business software, piracy among end-users remains quite high, especially in small and medium-sized organizations. Larger organizations may have some licenses to use software, but commonly these licenses only cover a small percentage of the software in use. Estimated 2002 U.S. trade losses due to piracy in Argentina were \$126.7 million.

The copyright industries face ongoing enforcement obstacles in Argentina, despite concerted efforts by industry anti-piracy actions. While the results on criminal enforcement remain far from ideal, the willingness of the Argentine authorities to take initial actions was somewhat encouraging in 2002. However, raids and seizures did not translate into prosecutions and deterrent sentences. 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. Procedural delays before obtaining and conducting a civil search in business software piracy cases increased significantly in 2002.

Argentina's 1933 Copyright Act (as amended) has been under review for years. A package of copyright amendments, circulated in mid-2001 to selected industry representatives,

remains under review within the Ministry of Justice. A bill (Bill No. 3205-D-01) to provide statutory damages and the seizures of infringing equipment (among other measures), has been introduced but has been pending for over a year. Argentina was one of the original 30 countries which put the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty into force in 2002.

**Actions which the Argentine government should take in 2003:**

- Commit to an anti-piracy campaign, as a matter of national priority;
- Enforce the current copyright and criminal laws in-practice, by conducting more raids, and importantly, pressing for more criminal prosecutions;
- Continue to support the various enforcement agencies in working with the copyright industries in anti-piracy actions and increase their resources and training;
- Instruct Argentine prosecutors and courts to make copyright piracy cases a priority so that Argentina begins to meet its existing multilateral and bilateral obligations;
- Improve border enforcement significantly. Local industries (at least the music industry) are ready to work with customs authorities to provide information and training on pirate products;
- Establish a program to inspect goods in transit for potential pirate product;
- Encourage the Secretaria de Seguridad Interior Nacional to take an active role in a national anti-piracy campaign;
- Adopt the bill to amend the copyright for provide for statutory damages and the seizures of infringing equipment;
- Revive efforts to improve the draft amendments to the 1933 Copyright Act, which are still being reviewed within the Ministry of Justice. The 2001 draft failed to address many of the enforcement deficiencies and required further clarification with respect to other key issues for the copyright industries. In sum, the Argentine legislation needs to effectively implement the WIPO treaties, both of which Argentina has already ratified;
- Argentina bases its customs duties on audiovisual works and sound recordings on assessments of potential royalties; customs duties should be based on specific fees or be *ad valorem* based on the value of the physical carrier medium only. 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. MPAA and RIAA seek a modification of the Argentine Customs Valuation Code and/or an exemption from the *ad valorem* duty. Computer programs also face high value-added taxes (VAT) which raise the cost of importing software into Argentina;
- Promote high standards of copyright protection and enforcement in the negotiations in the Free Trade Area of Americas (FTAA);
- Support efforts to issue an executive decree in 2003 that would require government legalization of current business software programs on computers and improve procurement practices.

**ARGENTINA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music <sup>2</sup>	26.0	60%	78.2	47%	76.0	46%	50.0	33%	50.7	35%
Entertainment Software	NA	NA	NA	95%	141.4	94%	90.3	92%	87.1	94%
Business Software Applications <sup>3</sup>	70.7	62%	72.5	62%	92.9	58%	156.7	58%	100.8	62%
Motion Pictures	30.0	45%	30.0	45%	32.0	45%	32.0	45%	30.0	45%
Books	NA	NA	8.5	NA	8.5	NA	8.0	NA	7.5	NA
<b>TOTALS</b>	<b>126.7</b>		<b>189.2</b>		<b>350.8</b>		<b>337.0</b>		<b>276.1</b>	

## COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

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. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> Estimated trade losses for the recording industry reflect the impact of significant devaluation during 2002.

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$139.9 million at 60% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets. Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include – and clarify – on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

Argentina is a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program which requires beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners.<sup>4</sup> Argentina also is a WTO member and is obligated to have already implemented both the letter and the spirit (performance) of the TRIPS Agreement.

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<sup>4</sup> For the first 11 months of 2002, \$250.5 million worth of Argentine goods (or 8.7% of Argentina's total imports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 4.4% increase over the same period in 2001. For more information on the history of Argentina under Special 301 review, see Appendices D and E of this submission.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# BAHAMAS

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** The Bahamas should be named to the Priority Watch List. The United States Government also should immediately initiate a process to withdraw trade benefits the Bahamas receives under the Caribbean Basin Economic Recovery Act (CBERA) and to remove its country eligibility under the U.S.-Caribbean Trade Partnership Act (CBTPA).<sup>1</sup> The Bahamas, which was placed on the Special 301 Watch List last year, made no progress in 2002 towards meeting commitments it undertook in a trade agreement with the United States concluded in November 2000.

**Overview of key problems:** Bilateral negotiations between the governments resulted in an exchange of letters between the Government of The Bahamas and the Government of the United States of America dated October 26 and November 9, 2000. Over two years have elapsed and the Government of The Bahamas has yet to enact that amendment.

One of the key problems is the 1998 Copyright Act itself. The act included an overbroad compulsory license that violated numerous international copyright standards and established an unacceptable precedent. Furthermore, the regulations fail to provide adequate and effective remuneration to rightsholders. The Government of The Bahamas also failed to consult with affected U.S. rightsholders regarding the issue of equitable remuneration for the compulsory licensing for free over-the-air broadcasts. Therefore, The Bahamas is in breach of a trade agreement with the United States

**Required actions for 2003:**

- USTR should name The Bahamas to the Special 301 Priority Watch List;
- An investigation should be initiated to withdraw trade benefits under the CBERA and remove its eligibility under the CBTPA;
- The Bahamas must immediately implement the bilateral agreements it made with the U.S. in 2000;
- The Bahamas should ratify the two WIPO treaties and amend its copyright legislation to reflect the modern obligations in both treaties.

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<sup>1</sup> The Bahamas has been designated as a "CBTPA beneficiary country" under Presidential Proclamation 7351 but has not yet been determined eligible to receive CBTPA preferential tariff treatment.

## COPYRIGHT LEGAL ISSUES

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### **The Problem: Overbroad Compulsory License and Inequitable Remuneration Rates in the January 2000 Regulations to the Copyright Act**

On January 5, 2000, the Government of The Bahamas implemented its 1998 Copyright Act ("the Act") through publication of regulations that, *inter alia*, authorized a new compulsory license for retransmission of television programming by persons who are licensed cable operators. This new compulsory license expands the scope of a compulsory license far beyond the internationally accepted limits of such a license (e.g., authorizing retransmission of free-over-the-air broadcasts) to the unprecedented step of permitting retransmission of *any* copyrighted work transmitted over its territory, including the encrypted signals of U.S. basic cable and pay TV services. The regulations also would have permitted Internet retransmission of all signals via Internet.

The introduction of such a broad compulsory license is inconsistent with the obligations of the Berne Convention for the Protection of Literary and Artistic Works, to which The Bahamas is a signatory. By adopting a Berne-inconsistent compulsory license, The Bahamas denies U.S. copyright owners of audiovisual and other works adequate and effective protection of their intellectual property rights. The Bahamas' compulsory license sets an extremely harmful precedent. It threatens to disrupt commercial markets for programming and to cause serious harm to U.S. producers of filmed entertainment, providers of programming packages, and other U.S. rightsholders in The Bahamas and around the world.

The equitable remuneration rates for the compulsory license fixed in the Regulations also have to be addressed. These rates are unreasonably low and inconsistent with the Berne Convention.

- Under the Act, cable operators are required to pay fixed rates as equitable remuneration to the copyright owners in accordance with the Berne Convention. The rates established in the regulations are far lower on a per-signal basis than rates paid for television broadcast signals under compulsory licenses permitted by international norms, and fail to meet the "equitable" standard under Berne.
- The regulations made a bad situation worse by permitting cable operators to pay only 25% of the already low rates of equitable remuneration otherwise payable when the subscribers are hotels. The Berne Convention's compulsory license provisions for retransmission of broadcasts do not provide any exemptions for retransmission to hotel rooms. The normal careful balancing of the interests of the users and rightsholders is, in this situation, inordinately out of balance. A hotel is a commercial enterprise. There is no legitimate need for a reduction in the equitable remuneration payable and no public interest that justifies the exception. Thus, there is no basis under international law or a legitimate need that would support such an abridgement of the copyright owners.
- Under the regulations, cable operators are exempt from paying to the rightsholders these already low rates of equitable remuneration when the premises are rooms in

hospitals, nursing homes, schools and any other health or educational facility. There are no “for profit” restrictions on this very broad exemption. For example, a school could show a copyrighted work on the school premises and charge an entrance fee to that premise to view or listen to the work.

New technological advances in the means of reproduction and distribution require careful consideration of the scope of allowable exemptions under the Act. Even if the Bahamian compulsory license were limited to television broadcast signals, by eliminating entirely the requirement to pay equitable remuneration in some cases such as hospitals and educational facilities, and by requiring a meager payment of 25% of the fees when the served premises are hotels, the Act renders meaningless the Berne Convention’s requirement of equitable remuneration and is therefore inconsistent with Article 11*bis*(2).

## WIPO Treaties

IIPA recommends that The Bahamas should make all efforts to ratify the two WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In addition, The Bahamas should amend its 1998 Copyright Act to respond to the challenges of the rapidly evolving marketplace for copyrighted materials by implementing the substantive obligations found in these treaties.

## COMMITMENTS UNDER THE 2000 BILATERAL AGREEMENT

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The governments of The Bahamas and the United States engaged in bilateral negotiations regarding the compulsory license provisions in the Copyright Act and its regulations and reached an agreement to resolve these matters, as reflected in an exchange of letters dated October 26 and November 9, 2000. The Bahamas made a number of commitments that have not been redeemed.

1. The Bahamas promised to make necessary amendments to its legislation to clarify that it was not its intent to allow persons licensed to operate cable systems in The Bahamas to retransmit copyrighted works over the Internet or to transmit such works outside the territory of The Bahamas.

**Status:** This commitment has not been met.

2. The Government of The Bahamas further committed to suspend the operating license of any cable operator who retransmits any transmissions containing copyrighted works over the Internet without prior authorization and to refrain from issuing any licenses to any cable operator to permit such Internet retransmissions.

**Status:** This commitment has not been tested. To the best of our knowledge, no cable system in The Bahamas has sought to retransmit signals over the Internet pursuant to the compulsory license.

3. The Government of The Bahamas undertook “to make amendments to the Copyright Act and Regulations so as to narrow the scope of its compulsory licensing regime for the reception and transmission of copyrighted works to permit only the compulsory licensing of copyrighted works broadcast free over-the air.”

**Status:** This commitment has not been met.

4. The Government of the Bahamas further undertook to introduce such amendments into Parliament for consideration not later than December 31, 2000.

**Status:** Although “An Act to Amend the Copyright Act, 1998” was introduced into the Parliament of The Bahamas on 13 December 2000, Parliament failed to act on the bill. To the best of our knowledge, the bill has not been reintroduced after the elections in the spring of this year.

5. The Government of The Bahamas, through its Copyright Royalty Tribunal, undertook to begin consultations with affected U.S. rightsholders regarding the issue of equitable remuneration for the compulsory licensing for free over-the-air broadcasts and to amend the royalty rate structure.

**Status:** In April and May of this year, MPAA received calls from the Ambassador of The Bahamas to the United States and from the Office of the Attorney General proposing a meeting with the Copyright Royalty Tribunal. MPAA agreed to a meeting and proposed an agenda for that meeting. However, the change in government that resulted from the elections in The Bahamas interrupted this dialogue and the proposed meeting never occurred.

## Bilateral IPR Obligations under the CBERA, as Amended

The Bahamas is a beneficiary country under the Caribbean Basin Economic Recovery Act (CBERA, also known as the Caribbean Basin Initiative or CBI), a U.S. trade program which includes criteria requiring beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners. The Bahamas also is a beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), which amended the CBERA.<sup>2</sup> To maintain these CBTPA benefits, The Bahamas must meet all the CBERA criteria, as well as the CBTPA’s explicit TRIPS-or-greater IPR criteria. Interestingly, in July 2000, IIPA recommended that The Bahamas should not be designated as an eligible CBTPA country, given that its copyright regime failed to meet the CBTPA statutory criteria.<sup>3</sup>

## COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

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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

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<sup>2</sup> For the first 11 months of 2002, \$63.9 million worth of Bahamian goods (or 15.6% of The Bahamas’ total imports to the U.S. from January to November) entered the U.S. under the CBERA program, representing a decrease of 7.2% from the same period last year.

<sup>3</sup> See IIPA’s July 17, 2000 Comments to USTR Regarding Eligibility Criteria for Beneficiaries of the U.S.-Caribbean Trade Partnership Act, available at [http://www.iipa.com/pdf/2000\\_Jul26\\_CBTPA.pdf](http://www.iipa.com/pdf/2000_Jul26_CBTPA.pdf).



enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# BOLIVIA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Bolivia be elevated to the Special 301 Priority Watch List. Bolivia has been on the Watch List for the past six years and no progress on copyright reform has been made. Bolivia currently does not meet its current bilateral and multilateral obligations in that it fails to provide a TRIPS-compliant copyright law and adequate and effective copyright enforcement. If the requisite improvements are not forthcoming swiftly, we will request that the U.S. government to initiate a review of Bolivia's eligibility to obtain trade benefits under the Generalized System of Preferences (GSP) program, the Andean Trade Preferences Act (ATPA), and the Andean Trade Promotion and Drug Eradication Act (ATPDEA).

**Overview of key problems:** Estimated trade losses due to piracy amounted to \$26.5 million in 2002. Some of the problems that the copyright industries face in Bolivia include—

- Bolivia fails to meet basic TRIPS standards. The lack of civil *ex parte* measures remains the biggest problem in enforcing copyright in Bolivia.
- Significant improvements are needed to strengthen civil enforcement mechanisms, criminal enforcement and border measures.
- Copyright legal reform has been considered for years. A comprehensive intellectual property rights bill was introduced to the Bolivian Congress in early February 2001 but the Bolivian Congress has yet to commence its review, despite several requests from the copyright industry.

**Actions which the government of Bolivia should take:** To improve the copyright law and enforcement in Bolivia, we recommend the following actions for 2003—

- TRIPS- and WCT/WPPT-compliant law reform must be considered and approved. Passage of the pending bill will not suffice because it is not even TRIPS-compliant in its current form.
- Ratification of the WCT and WPPT and their implementation in the copyright law reform referenced above.

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**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications <sup>2</sup>	6.0	74%	4.9	77%	2.8	81%	4.1	85%	4.0	88%
Records & Music	15.0	85%	15.0	85%	15.0	85%	15.0	85%	20.0	85%
Motion Pictures	NA	NA	2.0	100%	2.0	100%	2.0	100%	2.0	100%
Entertainment Software	NA	NA	NA	NA	1.5	NA	NA	NA	3.9	93%
Books	5.5	NA	5.5	NA	5.5	NA	5.0	NA	5.0	NA
<b>TOTALS</b>	<b>26.5</b>		<b>27.4</b>		<b>26.8</b>		<b>26.1</b>		<b>34.9</b>	

Bolivia currently participates in the Generalized System of Preferences (GSP) program, the Andean Trade Preferences Act (ATPA), and the Andean Trade Promotion and Drug Eradication Act (ATPDEA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries; all these programs have standards of intellectual property rights which must be afforded to U.S. copyright owners.<sup>3</sup> Responding to the U.S. government's request for comments regarding countries' eligibility for ATPDEA benefits, IIPA reported in September 2002 that Bolivia had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.<sup>4</sup> Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Bolivia. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Bolivia's actions to meet the IPR standards of the ATPDEA before

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$3.0 million at 79% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> For the first 11 months of 2002, \$30.6 million worth of Bolivian goods (or 21% 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 391% increase over the same time period last year. Another \$32.6 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2002, representing a decrease of 37.9% from the same period last year. For a full history of Bolivia's Special 301 placements, see Appendices D and E of IIPA's 2003 Special 301 submission.

<sup>4</sup> IIPA Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September, 16, 2002, available on the IIPA website at [http://www.iipa.com/rbi/2002\\_Sep16\\_ATPDEA.pdf](http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf).

designation was officially conferred. One of the key discretionary criteria of these programs is that Bolivia provide "adequate and effective protection of intellectual property rights." USTR has proposed an interim rule that September 15, 2003 be the deadline for filing a petition to review a country's eligibility under the ATPA, as amended by the ATPDEA.<sup>5</sup>

## **COPYRIGHT PIRACY IN BOLIVIA**

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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 2002 were \$6.0 million. The level of business software piracy remained at a high 74% level. The recording industry also reports high losses of \$15 million, with an 85% piracy rate. The book publishing industry estimates its annual losses at \$5.5 million.

## **COPYRIGHT ENFORCEMENT IN BOLIVIA**

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### **Lack of Commitment from the Government to Protect Copyright**

Despite promises from the new administration to combat all forms of piracy, the government has yet to show its commitment to truly reduce piracy levels across the board in Bolivia. In 2002, the Bolivian government launched a Departmental Commission for the Defense of Intellectual Property Rights (*Comisión Departamental de Defensa de los Derechos de Propiedad Intelectual* (COMDEPI). Unfortunately, the COMDEPI has announced that it will prioritize the protection of some protected works over others. The government stated, for instance, that reducing movie and sound recording piracy levels are more important than reducing software piracy levels. While IIPA applauds the government's announcement of its intention to reduce the levels of piracy of copyrighted products, it also reminds the government of its obligation to combat piracy in a non-discriminatory fashion. Otherwise, the public may perceive that the government acquiesces to the piracy of certain protected works leading to even more widespread piracy of those works not deemed "as important."

During 2001, the Bolivian government failed to adequately and effectively protect IPR within its borders on numerous occasions. In March 2001, for instance, 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. Without notice to the BSA, the Ministry of Sustainable Development called a press conference and stated that the BSA did not have the right to operate in Bolivia and that any software publisher wanting to enforce its copyrights in Bolivia needed to register them locally. Both statements were in clear contradiction with Bolivian and international law. After several meetings, document productions and

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<sup>5</sup> See Office of the United States Trade Representative, Establishment of a Petition Process to Review Eligibility of Countries for the Benefits of the Andean Trade Preference Act, as Amended by the Andean Trade Promotion and Drug Eradication Act, 68 Fed. Reg. 5542 (February 4, 2003).

negotiations with the government, the Ministry of Sustainable Development issued a press release correcting the minister's previous statements. The ministry's original statements, however, sent the 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 Ministry of Justice ordered the suspension of any piracy 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.

Despite several executive decrees mandating that government agencies use only licensed software, unlicensed software use by the government continues to be a problem.

## **Failure to Provide TRIPS-compatible Civil *Ex Parte* Search Measures**

Concerning civil actions, the BSA has encountered a legal obstacle when trying to procure judicial search measures and/or inspections in Bolivia. Article 326 of the Civil Procedure Code states that the defendant must be notified prior to the execution of any preparatory proceedings (e.g., judicial inspections). Upon receiving notice, the defendant is entitled to object to the search, thus impeding execution of the search order until a judge rules on the objection. Many potential defendants have taken advantage of this process to destroy the evidence that the search was intended to discover. Failure to comply with this notification requirement makes the proceeding null *ab initio*. This prior notification requirement clearly violates TRIPS Article 50.2.

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. In 2002, BSA conducted eight civil raids and settled three of these cases. The rest are still 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 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.

In some cases, 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 an infringement, there has to be a separate damages trial. This new trial on damages may take up to eight months. All of 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 nine cases in Bolivia during 2002. 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 fails to provide a meaningful deterrent.

## **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 a damages award significant 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.<sup>6</sup> The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).<sup>7</sup> IIPA is encouraged that the 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 work<sup>8</sup>, but as indicated above, other provisions of the copyright reform bill fail to meet TRIPS and WCT/WPPT standards.

## **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. Despite the unwarranted delay, 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.

Because under Bolivian law a party filing a criminal complaint has the right to review the case file, after the raid, local counsel for BSA visited the Prosecutor’s Office and the Court several times to have access to the file and ascertain the case’s status. In both places, local

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<sup>6</sup> Ley de Derechos de Autor, No. 9610, Article 103.

<sup>7</sup> 17 U.S.C § 504 (c).

<sup>8</sup> Anteproyecto de Código de Propiedad Intelectual, Article 175 I.

counsel was denied access to the file every single time because the file was under “review.” When he finally had the ability to examine 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 due process guarantees in this 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. In one of the cases the delay was long enough to allow the reseller to relocate his business.

In 2002, one of the BSA member companies brought 10 criminal search and seizure raids in the cities of Cochabamba, Santa Cruz and La Paz against resellers who were selling computers with pre-installed unlicensed software. In most of these cases, the BSA member company faced significant problems to enforce its copyrights. Furthermore, in some of these cases, criminal enforcement proved to be totally ineffective and inadequate. In the past eleven months, only one of the ten criminal raids has resulted in criminal prosecution and the public hearing in that case has not even been scheduled yet. In Cochabamba, for instance, the prosecutor handling the case (*fiscal*) let the statute of limitations run out in three of these cases, despite local counsel’s frequent requests for protection. In another case, also in Cochabamba, another prosecutor recommended to local counsel that the action be transformed into a private action because he did not have the time, interest, or resources to spend prosecuting a copyright infringement case. In Santa Cruz, the prosecutor in charge of two cases decided, notwithstanding local counsel’s objections, to return to the defendants the computers that were seized as evidence of the crime. According to the prosecutor, pursuant to Article 189 of the New Code of Criminal Procedure, he may return any seized materials to a defendant provided that the defendant exhibit the seized evidence whenever required by the prosecutor or a judge. With this decision, the prosecutor created a situation where the evidence might be destroyed, putting at risk the rightsholder’s ability to prove copyright infringement. In La Paz, the prosecutor in charge of two cases postponed the issuance of the raid order in one of the cases for more than six months without justification. The BSA member company had to contact the Prosecutor’s General Office (*Fiscal General de la Nación*) to get the prosecutor in charge of the case to act.

## **Border Measures in Bolivia Must Be Strengthened**

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 under which the competent authorities can act on their own initiative and suspend the release of suspect goods (TRIPS Article 58).

# COPYRIGHT LAW REFORM AND RELATED ISSUES

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## Copyright Law of 1992

Bolivia passed a copyright law on April 29, 1992, which replaced its antiquated 1909 law.<sup>9</sup> 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 including provisions that specifically permit criminal actions to be undertaken against copyright infringers was implemented by presidential decree on April 25, 1997, five years after the original law. With respect to films, the copyright law’s protection is limited to works registered through CONACINE (Cámara Nacional de Empresarios Cinematográficos), a government/industry organization responsible for title registration, or, for works shown on television, through the Ministry of Telecommunications. The CONACINE registry has proven to be highly susceptible to fraudulent registration of titles by parties other than the legitimate rightsholder.

## 2001 Bill to Amend the Copyright Law

Efforts to overhaul the 1992 copyright law have been underway for years. In 1996, the National Secretary of Culture and the National Secretary of Industry and Commerce started to develop a proposal for a special law on intellectual property protection which would complement the existing copyright law. The objective of this project was to increase the level of IP protection, streamline judicial proceedings relating to the enforcement of intellectual property rights, and otherwise improve enforcement efforts to combat piracy and counterfeiting of IPR-protected works in order to encourage the economic development of these industries in Bolivia. Due to funding problems, a final draft of this project was not originally expected until August 1997. At that time, IIPA received mixed reports on whether the project was abandoned in 1998 or whether the Ministry of Justice took over drafting, with a goal of releasing a draft in the March-April 1999 time frame.

On February 1, 2001, 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. The copyright chapter 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. Unfortunately, this bill has been stalled in Congress since its

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<sup>9</sup> 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.



submission. Furthermore, there have been reports that Congress does not intend to pass the bill.

## **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 criminal 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.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiation process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS), as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be a forward-looking, technologically neutral document that sets out modern copyright obligations. It should not be a summary recitation of already existing multilateral obligations such as TRIPS. As the forms of piracy continue to shift from hard goods and more toward

digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# BRAZIL

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Brazil remain on the Special 301 Priority Watch List in 2003. High levels of copyright piracy, compounded by inadequate criminal enforcement throughout the Brazilian system, indicate that Brazil fails to provide adequate and effective copyright protection to U.S. copyright owners. We encourage the U.S. government to quickly reach out to the Lula Administration so that it is immediately aware of the political and economic stakes associated with its success or failure in addressing the copyright piracy and enforcement problems. IIPA requests that the review of Brazil's copyright practices under the Generalized System of Preferences (GSP) trade program remain ongoing and that a public hearing be scheduled in the coming months.

**Overview of key problems:** Copyright piracy in Brazil worsened over the past year, and the declining Brazilian economy only exacerbated matters. Brazilian pirates have increasingly turned to local domestic production of pirate materials, with much of the blank CD-R materials being imported or smuggled from abroad. Pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, still enters the Brazilian market. Internet piracy is on the rise, compounding the long-time problems associated with the more traditional forms of hard goods piracy. Organized crime elements, from within and outside Brazil, exercise control over the production and distribution of infringing copyrighted products.

Although a few Brazilian police units have conducted a substantial number of raids, these raids have resulted in very few criminal prosecutions. Over the last five years, the ratio of convictions to the number of raids run each year is less than 1%. In those few cases that reach judgment, the sentences are not deterrent. The Inter-ministerial Committee, formed in early 2001, has taken very little concrete, organized anti-piracy actions to-date. 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. One area of success involves civil copyright infringement cases where the business software industry has obtained significant civil damages in litigation, in part because the Brazilian copyright law contains a deterrent level of statutory damages. This success on the civil side must be tempered by the long time it takes to resolve a civil case and the fact that the courts require costly expert fees and court bonds. Civil copyright infringement cases related to business software take many years to be adjudicated (currently more than 200 civil cases are awaiting judgment). It is important to keep in mind that the victims of piracy include Brazilian creators, performers and companies who produce and distribute legitimate copyright product. Sadly, piracy continues to grow even as the industries continue to increase their anti-piracy investigations and foster public awareness through educational campaigns. Estimated trade losses due to copyright piracy of U.S. products in Brazil amount to \$771.4 million in 2002. The Brazilian government needs to make copyright protection and enforcement a top priority.

**Measures which could be taken by the Brazilian government in 2003:** The copyright industries hope that the new administration of President Luiz Inácio Lula da Silva will usher in a reinvigorated, national approach to reducing copyright piracy, a plague which is harming Brazilian cultural and economic development as well as threatening foreign investment. The appointment of Brazilian singer/songwriter Gilberto Gil as Minister of Culture, could be viewed as a sign of the importance the government places on protecting Brazilian culture, and a key way to enhance culture is to enforce the copyright law. The Cardoso administration simply failed to address rampant piracy in Brazil. In fact, that administration made numerous commitments to U.S. government officials over the years—such as the March 2001 creation of the Interministerial Committee to Fight Piracy (IMC)—to address the core problems of extremely high piracy rates and inadequate enforcement, without tangible results.

The industries realize that a short period of time is needed for the new administration to identify its priorities. President Bush met with President-elect da Silva in December 2002, and both agreed to a bilateral “common agenda.” Copyright piracy and effective enforcement have long been near the top of the bilateral trade agenda, and we hope that the new Brazilian administration will embrace this important economic and cultural issue. IIPA and its members hope that the new Brazilian administration will take swift action to engage and address these challenges so that the scourge of copyright piracy will diminish.

Invigorating a concerted, national plan to tackle copyright piracy and improve enforcement is a necessary first step. Toward that goal, we outline a list of key objectives which require national focus. The industries stand ready to work with Brazilian officials in taking the needed actions to meet these broader objectives. For example, elements of an effective national anti-piracy plan in Brazil should address the following goals/objectives—

- **Manufacturing / distribution:** Investigate and raid illegal domestic manufacturing sources, major distribution channels, and key distributors.
- **Transshipment / distribution:** Investigate and intercept transshipments of illegal products via import channels of contraband.
- **Broad enforcement action:** Plan, dedicate the necessary resources, and implement comprehensive enforcement measures that create effective and efficient law enforcement work performed by several federal and state authorities, including the police, customs authorities, tax authorities as well as the judiciary.
- **Statutory framework:** Initiate legislation that strengthens the Brazilian enforcement framework against infringement of copyrights, and consider acting against the tax evasion that always accompanies such violations.
- **Best practices:** Establish a few priority government actions that have the potential to demonstrate how the Brazilian government acts successfully against identified targets with competent investigation, case development, timely prosecution, and deterrent sentencing.
- **Private sector engagement:** Achieve efficient coordination among the several public agencies while at the same time including the private sector affected by piracy and counterfeiting.
- **Government legalization:** The federal government (and with its encouragement, state and municipal governments) should implement measures to ensure that all use of intellectual property such as computer software within its agencies and instrumentalities is properly licensed, and should enact a decree requiring lawful use within government agencies.

In addition, there are several specific anti-piracy actions which would support effective enforcement efforts, such as:

- Customs (Receita Federal) should dedicate resources to establish tougher controls in major transshipment points including border crossings, ports, and airports. Imports from certain countries or corporations known to be the source of counterfeit or pirated products should be thoroughly screened. Products from Paraguay, and products shipped to Brazil's free ports of Santos and Paranaguá, should always be inspected and documented thoroughly.
- Officials in border areas should be trained, directed, and managed (with performance measured) to devote a substantial amount of their time to the transshipment of pirated and counterfeit IPR products. The main target areas are: Foz do Iguaçu—Ciudad del Este; Guaíra—Saltos de Guaíra; Ponta Porã—Pedro Juan Caballero (BR-PY); Corumbá—Puerto Suarez (BR-BO); Uruguaina—Paso de los Libres (BR-AR); Santana do Livramento—Rivera (BR-UR). Major airports and seaports (Santos, Paranaguá) also should be included.
- The federal police should be immediately assigned to investigate major criminal operations in a number of high priority and potentially high impact cases.
- Copyright law and enforcement-skills training and seminar programs should be implemented broadly and immediately among the various segments of public enforcement officials with the cooperation of the private and education sectors. This would include judicial training on copyright law and procedures, in both the criminal and civil cases.
- The judiciary should consistently apply Law 9.099/95 such that the defendant is required to pay damages as a condition for granting suspension of prosecution.
- On legislative matters, legislation designed to strengthen Brazil's legal environment vis-à-vis piracy should be introduced and adopted. For example, additional amendments should be made to the long-pending Bill No. 2.681/96. In addition, the committee should analyze the issues, draft, and propose legislation supporting the following goals:
  - For street vendors who are first-time offenders, evaluate the convenience of recommending the reduction of current imprisonment terms, provided that, if the judge suspends a case or converts a sentence and thereby applies an alternative sanction, such alternative sanction must be applied effectively.
  - Increase the criminal prison term and monetary fines applicable to those pirates who operate in a venue or on a scale other than as street vendors. Special emphasis should be given to adequate punitive sanctions for the manufacturers, importers, contrabandists and distributors (in a venue or on a scale other than simple street vendors) of pirate goods.
  - The payment of damages to the victims of the crimes should be effectively pursued and the laws reviewed to assure that the specific provisions can be executed accordingly.
  - Allow the immediate disposal of counterfeit product with the existence of: an expert report declaring the illegality of the product; an itemized report specifying all of the product to be destroyed (for court, evidentiary and damages purposes), and the authorization of the judge.
  - Create laws that reflect the principle that medium- and large-scale piracy falls within the definition of an organized crime scheme.
  - Include provisions in the penal code that to knowingly supply raw materials for the purpose of piracy is a punishable offense.

These recommendations are illustrative of the large-scale effort needed at the national level to begin to reduce copyright piracy in Brazil.

**BRAZIL**  
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Motion Pictures	120.0	35%	120.0	33%	120.0	33%	120.0	35%	125.0	40%
Records & Music <sup>2</sup>	320.4	53%	302.0	55% MC99% CD47%	300.0	53% MC98% CD35%	300.0	MC95% CD35%	290.0	MC95% CD30%
Business Software Applications <sup>3</sup>	317.0	55%	272.3	56%	264.1	58%	319.3	58%	298.8	61%
Entertainment Software	NA	NA	NA	99%	248.2	94%	116.2	90%	103.2	89%
Books	14.0	NA	14.0	NA	18.0	NA	18.0	NA	20.0	NA
<b>TOTALS</b>	<b>771.4</b>		<b>708.3</b>		<b>950.3</b>		<b>873.5</b>		<b>837.0</b>	

Note that the estimated losses for 2002 may likely underestimate total losses due to the severe fiscal decline of the Brazilian economy last year.

## BILATERAL ENGAGEMENT ON COPYRIGHT ISSUES

**Special 301:** Brazil received a significant degree of attention from the U.S. government under the Special 301 bilateral trade tool.<sup>4</sup> In April 1993, the U.S. Trade Representative designated Brazil as a Priority Foreign Country. As a result of the ensuing Section 301 investigation, in a February 1994 diplomatic agreement the Brazilian government committed to take certain concrete steps to improve its IPR regime, including the early implementation of TRIPS, improving protection for computer software, addressing certain tax issues affecting

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> 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.

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$303.1 million at 58% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>4</sup> For more details on Brazil's Special 301 history, see Appendices D and E of this filing.

computer software, and improving copyright enforcement in general. Over the next few years, Brazil's placement on the Special 301 lists see-sawed between the Special Mention list and the Watch List. 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 action plan to allow this Committee to take concrete, significant action to reduce and deter piracy in Brazil."<sup>5</sup>

In April 2002, USTR took the step of elevating Brazil to the Priority Watch List. Ambassador Zoellick noted: "Despite having adopted modern copyright legislation that appears largely to be consistent with TRIPS, Brazil has taken no serious enforcement actions against increasing rates of piracy....Intermittent, localized antipiracy and anticounterfeiting campaigns are an inadequate substitute for a planned, systemic, and consistent approach to domestic and border enforcement activity and the application by the Brazilian legal system of deterrent penalties."<sup>6</sup>

**Generalized System of Preferences:** Because of the lack of progress being made by Brazil to enforce its copyright law through early 2000, the IIPA filed 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.<sup>7</sup> 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.<sup>8</sup> 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. There the industry representatives described the lack of Brazilian government participation in anti-piracy actions, compared with other Latin American governments, and requested improved industry-government coordination. This GSP review is ongoing. IIPA recommends that another GSP hearing on Brazil be held in the coming months.

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<sup>5</sup> Press Release 01-25, Office of the United States Trade Representative, "USTR Releases Reports Emphasizing Enforcement Priorities," April 30, 2001, at <http://www.ustr.gov/enforcement/special.pdf>.

<sup>6</sup> Press Release 02-48, Office of the United States Trade Representative, "USTR Releases Annual Special 301 Report on Global Intellectual Property Protection," April 30, 2002, at <http://www.ustr.gov/reports/2002/special301-report.pdf>.

<sup>7</sup> 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. See 19 U.S.C. § 2462(c)(5).

<sup>8</sup> For the first 11 months of 2002, \$2.0 billion of Brazilian goods (or 13.5% of Brazil's total imports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 6.6% increase over the same time period in 2001.

## **BRAZILIAN GOVERNMENT'S ANTI-PIRACY EFFORTS in 2002**

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### **The Inter-Ministerial Committee (IMC) has failed to implement any coordinated national anti-piracy plan.**

**Created in 2001:** It appears that the most tangible step taken by Brazil toward addressing a national anti-piracy plan was the March 13, 2001, publication of the decree implementing the Inter-Ministerial Committee to Fight Piracy (IMC).<sup>9</sup> 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. There we urged that the IMC should establish itself quickly and begin its work. On April 23, 2001, the first IMC coordinator was identified. However, the only thing that the locally based copyright industry heard from the IMC in 2001 was that it needed considerably more time to develop its ideas. Simply put, USTR's April 2001 expectation that Brazil would prepare an integrated action plan was not met.

In the first quarter of 2002, the IMC coordinator was replaced and some action was promised by the IMC. Meetings between the IMC and several IIPA member associations and other copyright groups were held in the second half of 2002 and an anti-piracy plan was debated. However, the only substantive step taken by the IMC in 2002 was the request by it for some criminal police enforcement actions to be taken against copyright pirates. This was a positive step; however, it goes nowhere near far enough to make an effective impact in reducing the piracy level in Brazil. While one of the aims of the IMC should be to recommend enforcement actions, there are many others set forth in the decree implementing the IMC, including the debate of ideas to reduce piracy, and the creation and effective implementation of a plan to reduce substantially the level of piracy in Brazil. The fact that the IMC indicates that it has made some progress as it has requested a small number of police actions in 2002 actually shows that the IMC lacks any determined focus on the primary goals of its mandate or sincerity of purpose.

It is not yet known how the da Silva administration will direct the IMC. 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 (the Minister of Justice has given almost no attention to 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 noted at the GSP hearing 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

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<sup>9</sup> 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.



coordinating body, in and of itself, does not solve the existing problem of piracy. In fact, it is important to repeat in this country report that 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 virtually nonexistent. Important elements of the ongoing review include the IMC’s development and implementation of a government strategy to fight piracy and 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.<sup>10</sup> We are hopeful that the new Brazilian administration will take a renewed approach toward listening to industries’ suggestions and input.

**IMC and 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.<sup>11</sup> 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. For example, in 2001, industry representatives presented a list of suggested actions to the IMC chairman, none of which were implemented by the IMC. In fact, the industry has never met with all members of the IMC at once, nor has the industry ever received any official communication from the IMC regarding any of its decisions or actions. In sum, the IMC to-date has not shown sufficient willingness to work with the private sector.

## **Actions at certain state and local levels have been encouraging.**

**São Paulo:** 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 and did not come from the IMC, yet it is a groundbreaking move that provides a model for other states. The motion picture industry industries have reported good cooperation and good results 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 continuous anti-piracy efforts in the state. As IIPA has noted before, much 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 (it should also be noted that the

<sup>10</sup> The details of IIPA’s proposed “action plan” was contained in Appendix B to IIPA’s April 6, 2001 Post-GSP Hearing Brief, available on the IIPA website at [http://www.iipa.com/gsp/2001\\_Apr6\\_GSP\\_Brazil.pdf](http://www.iipa.com/gsp/2001_Apr6_GSP_Brazil.pdf).

<sup>11</sup> 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.

personnel responsible for this effort have transferred to other duty assignment and are no longer at the consulate).

**Rio de Janeiro:** The state announced the creation of a special anti-piracy task force mid-2002. Unfortunately, that task force has not been formed yet. However, MPA reports positive action from the Rio de Janeiro municipal authorities against street piracy. Municipal authorities have begun to take administrative action against street 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. Sadly, IFPI reports that at least 42 stands still exist in the camelodromo that sell pirate music CD-Rs. Again, it should be noted that this effort did not come from the federal government or the IMC.

**Other states:** 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. MPA notes that the municipality of Porto Alegre in Rio Grande do Sul has also established a municipal effort to fight piracy administratively that may serve as a model for other municipalities, along with the Rio effort noted above. MPA has developed a short white paper describing the legal fundamentals for such action and is currently talking with several municipalities, encouraging them to establish such an effort. 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 Defraudacoes* were given responsibilities to combat piracy. Other states are encouraged to make similar, tangible progress in anti-piracy.

## **COPYRIGHT PIRACY IN BRAZIL**

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Brazil is currently obliged to provide the standards of copyright protection found in the WTO 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, 50.3); and to provide effective border measures (TRIPS Articles 41, 51-60).

### **Optical media piracy undermines the market for legitimate products.**

Replication of pirate optical discs sold in Brazil, whether on a large or small scale, such as the many CD burner operations scattered throughout Brazil, generally cuts across all the copyright industries. 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. (See further industry-by-industry discussion in the next piracy section, below.) Some industries report indicate that there are nine CD plants, with 11 lines, in Brazil.

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. In the last five years, sales of

recorded music has declined 30%. 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 music product, duplication equipment and smuggled blank CD-Rs, but most of the reproduction facilities are within Brazilian frontiers.

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 non-established 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.

The videogame industry has seen both Asia-source counterfeits as well as locally manufactured discs find their way to Brazilian street markets. The legitimate DVD market grew rapidly in 2002 and pirate product is beginning to fill some of the new demand. 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.

## **Internet piracy is on the rise.**

All the industries report that the Internet is increasingly being used in Brazil as a means to distribute pirated product. The number of Brazilian users has risen dramatically, with some 23 million users as of 2002. For 2002 IFPI reports that 9,232 web pages with pirate music have been removed and 8,991 notifications have been sent to ISPs regarding pirate sites or pages. Since September 2002, the MPA has been able to remove or block 295 websites offering pirated audiovisual products; in total, MPA's Brazilian campaign resulted in the removal of 58,830 copies of film titles from the Internet. BSA reports positive response to date to its campaign of cease and desist letters.

The Internet is still used primarily as a tool for advertising burn-to-order operations or pirated entertainment software products already available in the market. Direct Internet downloads are not yet a predominant problem, although with increased Internet access, it will only be a matter of time before this too becomes a significant concern. In the last quarter of 2002, IDSA and ABES started monitoring online auction sites. During this period, a total of 1,626 auction "announcements" (about 237 users) were removed as a result of "take down" requests made to the auction sites. There is also a large number of infringing videogame product appearing on Portuguese language auction sites such as Arremate.com and MercadoLivre.com. But in many of the cases handled through ABES, the compliance rate for requests for take down of infringing product has been quite satisfactory.

## **Organized crime.**

During 2002, the business software industry introduced a campaign showing the relationship between piracy and other organized crime. This sought to increase public awareness of the nature and repercussions of piracy in Brazil. This campaign has had a significant effect, at least in the minds of government prosecutors. Prosecutors of organized crime-related cases now include piracy on their agenda (along with narcotics, money laundering, etc.), such as at their national meeting February 18, 2003 in Porto Alegre.

## **Piracy continues at unacceptably high levels in Brazil.**

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.

### **CD piracy continues to decimate the recording industry.**

Brazil is the world's third-largest producer of pirate music, trailing only China and Russia. Because of rampant piracy, Brazil was the 12<sup>th</sup> largest market in 2001, having been the 6<sup>th</sup> largest market three years prior. With the continued assault on the legitimate market by pirate product, it is possible that Brazil will continue to fall in market ranking. The local record industry commissioned a professional market survey that places piracy at 53% of the total music market in units. This volume represents 103 million pirate units. Estimated trade losses due to sound recording piracy, in both compact disc and audiotape format, in Brazil amounted to \$320.4 million, with a piracy level of 53%.

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.<sup>12</sup> In 2001, the overall music market decreased by 25 percent in units, and an additional 3.5% in 2002 mostly due to the increase in CD-R piracy. The level of music CD piracy rose to 53% last year, which means that more than 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 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.

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, continues to be a major problem. In addition, local illegal replication through the use of CD burners 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. 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; the market shrunk by 25% in 2001 and fell again by 3.5% in 2002.

In addition to the growing presence of locally replicated illegal CD-Rs, pirate and bootleg music cassettes and CDs still enter Brazil mainly from Paraguay via Foz de Iguazu, Corumba, Uruguaiana, Salto de Guaiá 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

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<sup>12</sup> Tom Gomez, "Brazilian Music Market Sees Sales Drop 40%," *Billboard*, Sept. 15, 2001.

deliver blank CD-Rs intended for piracy and some pirate CD product from Taiwan 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-Rs were imported in 2001 which more than likely will be used for piracy purposes. To stem the flow of this product, IFPI and Phillips have presented in 2002 a joint petition to the Customs Central Coordination (COANA) requesting a number of measures which include creation of a specific line item for blank CD-Rs, checking imports for undervaluations and monitoring entry of known pirate CD-R labels. Unfortunately, nothing has been done yet.

Brazil's audiocassette market has been completely lost to pirates for years. For 2002, 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.

### **Video piracy continues, with more and more 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, with an overall audiovisual piracy rate of 35% for 2002. Optical disc (CD-R and DVD-R) piracy is rapidly increasing in Brazil, affecting the developing DVD market and the existing VHS market. With the impressive growth of optical disc hardware, especially in the middle class population, this illegal competition will inevitably have a negative impact. (DVD player households in Brazil have grown considerably over the last three years, with the user base growing to an estimated one million in mid-2002 from only 5,000 in 1999.) There are two sources of optical disc piracy in Brazil, neither related to the other. Sales of low-quality CD-Rs are growing quickly in the street markets in urban centers. CD-R and DVD-R are also available in Ciudad del Este Paraguay, on the Brazilian border, for illegal introduction into Brazil. MPA estimates that its OD piracy rate is 10%, but unfortunately steadily increasing, in Brazil.

MPA is also concerned about the growth of sales of optical discs over the Internet. The number of users of Internet services has grown from 7% of the population in 1999 to 19% (23 million users) in early 2002 and Internet access is generally available to all social levels. MPA has tracked a steady increase in the incidence of Internet sites for hard goods sales, including CD-R recordings of its member company product, along with business software and videogames.

VHS piracy also continues in video stores, amounting to an approximately 33% piracy level. Pirate videos are primarily those titles in current home video release. Estimates of the

types of piracy in the retail market are: back-to-back copies, 60%; organized reproduction of better quality tapes, 25%; small-scale reproduction of low quality tapes, 15%. Organized pirate manufacturing of VHS and, recently, optical disc continues to threaten the market, and MPA is very concerned that without consistent efforts by enforcement authorities, it may continue to develop into highly organized systems related to other organized crime. With current enforcement cooperation, MPA has been successful in forcing the source piracy system into smaller, less coordinated, systems. However, MPA's investigation continues to uncover evidence of organized distribution to video stores and cross-border capabilities, probably the result of closer links to organized crime. Most organized reproduction takes place in the state of São Paulo. São Paulo pirate product is also distributed throughout the country. Pirate CD-R and VHS is also distributed via street vendors.

### **Business software piracy continues in a variety of formats.**

Brazil has a very large informatics/software development and distribution industry, which contributes positively to the Brazilian economy. 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 \$317.0 million in 2002. The estimated level of business software piracy dropped a little from 56% in 2001 to 55% in 2002. During 2002, the business software industry introduced a campaign showing the relationship between piracy and other organized crime. This campaign had the support of, among others, all IIPA members and sought to increase public awareness of the nature and repercussions of piracy in Brazil.

In 2002, BSA continued to engage in civil judicial actions (search and seizure) and criminal police actions promoted by the local industry association, ABES. BSA focuses its anti-piracy activities in the following states: Rio Grande do Sul, Santa Catarina, Parana, São Paulo, Rio de Janeiro, Minas Gerais, Espirito Santo, Bahia, Pernambuco, Ceara, Goias, Mato Grosso do Sul, and the Federal District of Brasilia. 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 medium-sized and small 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. An upside in the year of 2002 was the reaction of the press, particularly in São Paulo, that has for some years reacted negatively to certain actions brought by BSA against corporate end users (despite evidence of illegal software in use by these entities) and has now started to react differently, pointing to the number of jobs and taxes lost due to piracy. In civil infringement cases, where the business software industry has achieved some success, Brazilian courts continue to require extremely high expert fees and bond requirements. Further, due to unacceptable delays within the judicial system and the lack of attention of judges to copyright protection, civil infringement cases related to the business

software take many years to be adjudicated (currently more than 200 civil cases are awaiting judgment).

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

The biggest problems for the interactive entertainment software industry in Brazil continue to be poor border enforcement and the lack of police action against high levels of videogame piracy, according to the Interactive Digital Software Association (IDSA). In its efforts to address the unabated piracy problems in the country, the IDSA launched a joint anti-piracy campaign with ABES in late 2002.

The predominant form of entertainment software piracy in the country continues to be CD-burning, which accounts for about 80-90% of pirate product in the market. Although there continues to be a prevalence of factory-produced pirate products (so-called “silver disk” piracy) in the Brazilian market, there are no known underground factories producing pirated optical media in the country. Factory-produced pirate console discs are usually produced in Asia (China, Taiwan, and Malaysia) and exported to Brazil through Paraguay, or increasingly through other transshipping countries. Large quantities of these factory-produced discs appear in the “Promocenters,” which are small retail booths renting space in larger markets and galleries. Their products are almost exclusively pirated or counterfeit goods.

Pirated videogames in cartridge format are usually shipped to Paraguay, sometimes assembled in this country before being transported across the border into Brazil. In two instances, the Brazilian authorities seized hundreds of counterfeit Nintendo videogame products at two raids conducted at major Brazilian airports. In both cases, the products reportedly were shipped from Hong Kong and China.

As mentioned in last year’s Special 301 report, there are several venues through which pirated products are sold. For the CD-burning operations, advertisements of pirated products are usually placed in newspapers or on the Internet, with the customer calling in to place their “orders.” Last year, ABES made significant strides in São Paulo, where it succeeded in obtaining agreements from local newspapers to cease publishing advertisements for pirated product. The group is working towards replicating these agreements in other cities and regions, where such advertising continues unabated. However, while the Internet continues to be primarily an advertising medium for CD-burning operations in the country, there are a number of “warez” sites that are a popular source of pirate game software. IDSA members also note that with growing Internet access in the country, it is only a matter of time before Internet piracy becomes a significant problem. There is also a large amount of infringing videogame product appearing on Portuguese language auction sites such as Arremate.com and Mercadolivre.com. But in many of the cases handled through ABES, the compliance rate for requests for takedown of infringing product has been quite satisfactory

Promocenters, flea markets and street vendors continue to be sources of pirate products. But given the lack of a fixed location for these operations, enforcement against such vendors becomes rather difficult particularly in tracing them back to the bigger operations that supply them with illegal products. The police have shown reluctance in taking action against these vendors, particularly where they are minors and possibly where there are links to organized crime.

### **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. Imported educational materials are commonly photocopied. Many university texts used are *apostilas*, anthologies made up of chapters from various books copied illegally, both in English and in translation. Some professors make photocopied compilations of materials before the first date of classes, which gives the booksellers no chance to import or sell the books before classes. Some estimates place that the annual number of unauthorized photocopies range from 3 to 5 billion pages. 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 were constant at \$14 million in 2002.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

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The major criminal enforcement problem in Brazil has been failure of Brazilian 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 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. Rightsholders 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. In some cases, the federal police have refused to act on complaints presented by the recorded music industry alleging that their central command in Brasilia has not listed IPR violations as a priority.

Some 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 2002, due mainly to increased activity in São Paulo and Bahia, the total number of raids increased compared to 2001. For the year, the recording industry along with state police forces brought 870 actions (versus 577 actions in 2001 and 724 for 2000), which resulted in the seizure of 3.7 million CDs, 177 thousand cassettes and 8.6 million 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 79 million legal units versus 113 million pirate units (103 million illegal CDs and 10 million pirate cassettes). Pirate sales represented 53 percent of the total music market in 2002.

The gap between the number of units seized and the pirate market is a clear reflection of 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, Riberao Preto, Porto Alegre, as well as throughout the cities of Brasilia, Florianopolis, Curitiba, Goiania, Cuiaba, Feira de Santana, Vitoria 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.

Although MPA has been successful in obtaining police raids (over 7,000 in the last four years) and in initiating criminal cases (over 5,000 cases pending), efforts to develop deterrence has been frustrating due to the lack of prosecution and sentencing (there is no focus on 25 key cases of organized reproduction and distribution or on the 350 recidivists among the pending cases, for example). 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 36 arrests in 2002 (33 in 2001, 16 in 2000, 4 in 1999), 13 convictions for copyright violations in 2002 (13 in 2001, 4 in 2000 and none prior to that). Despite the increased number of convictions in 2001 and 2002, most are for 3-4 months and all are immediately suspended with probation.

The business software industry, BSA, in collaboration with the ABES (Associação Brasileira das Empresas de Software, the local software association), was successful in getting the police to bring 253 criminal actions against resellers in Brazil in 2002 (IDSA participated with ABES in actions taken during the fourth quarter 2002). Of these actions, 13 were against small stores where 185,406 CDs were seized, 238 actions were brought against street resellers where 162,398 CDs were seized, and two actions were brought against two individuals offering pirate software for sale in newspapers, where 7,352 CDs were seized. A total of 355,156 illegal CDs have been seized as a result of these actions. 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 2002.

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 1998 Software Law. 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. BSA was hopeful that this type of tax evasion case would have a significant impact to lower software piracy in Brazil, especially by medium-sized and large companies. However, with the exception of a limited number of actions by tax authorities in the Federal District of Brasilia and the state of Bahia in 1999, 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.

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

Prosecutions are ineffective; few cases reach the courts, and those few that do fail to impose deterrent penalties. Unfortunately, this pattern has continued for years, without improvement. For the last 5 years, the ratio of convictions to the numbers of raids run is less than 1%. Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. Case backlogs constitute a serious enforcement problem, caused by burdensome substantive and procedural formalities in the law and a general lack of resources. Enforcement efforts sometimes fail due to the lack of sufficient skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence. A major problem has been the low penalties imposed in the few criminal copyright infringement cases which have been decided by the courts. This problem may be alleviated if the penal code is reformed to index penalties for inflation and if the courts actually impose deterrent levels of penalties in copyright cases. Regulations aimed at reducing the backlog of court cases further undermine and weaken deterrence. Courts usually suspend jail terms for first offenses, thus returning defendants to the streets to return to their illicit activities.

In 2002, the recording industry promoted along with local and state police forces actions against 870 targets. Of these 870 cases, more than 70 percent were suspended and only 12 people from the 847 arrested were indicted and spent more than 30 days in jail.

Although MPA is pleased with the very modest increase in arrests and sentences (33 and 13, respectively, in 2002), the prosecution effort appears to be *ad hoc*. MPA employs two full-time attorneys to follow up on cases, acting as the victims' representative and offering assistance and recommendations to prosecutors. Nevertheless, MPA has not seen notable interest by prosecutors in seeking suspensions for small first-time cases (they generally sit unprosecuted for years) or in pursuing important cases for sentencing. The use of suspensions as a modest deterrent is still ineffective; MPA reports 144 suspensions in 2002, all for non-deterrent conditions.

As for business software actions, BSA's criminal campaign against resellers is focused on seizures and publicity, conducting actions with the state police. In 2002, BSA filed 240 criminal complaints relating to the piracy of business software (these actions were brought in collaboration with ABES). However, no criminal verdicts have been issued in any of these actions.

### **CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN BRAZIL for 1998-2002**

<b>ACTIONS</b>	<b>Recording Industry 1998 (1999) [2000] {2001} -2002-</b>	<b>Motion Picture Industry 1998 (1999) [2000] {2001} -2002-</b>	<b>Business Software Industry 1998 (1999) [2000] {2001} -2002-</b>	<b>Totals 1998 (1999) [2000] {2001} -2002-</b>
Number of complaints filed with police	530 (409) [724] {577} -412-	1,320 (832) [1,957] {1,750} -1,825 -	34 (118) [134] {273} -253-	1,884 (1,359) [2,815] {2,600} -2,490-
Number of raids conducted	680 (777) [724] {577} -870-	2,381 (1,671) [1,535] {1,354} - 1,640 -	34 (118) [134] {273} -253-	3,095 (2,566) [2,393] {2,204} -2,763-
Number of pirate copies seized	2.85 million (2.86 million) [4.63 million] {3.4 million} -4.1 million-	243,581 (212,063) [220,878] {225,785} -253,805 VHS, 56,037 OD-	NA (NA) [212,898] {351,944} -355,156-	+3.09 million (+3.07 million) [5.06 million] {3.97 million} -4.76 million-
Number of cases suspended or dismissed	NA (18) [131] {NA} -29-	148 (235) [146] {87} -144-	(0) (0) [0] {0} -0-	+148 (253) [277] {NA} -173-
Number of defendants convicted (including guilty pleas)	5 (3) [9] {NA} -8-	1 (0) [2] {13} 13	0 (1) [0] {0} -0-	6 (4) [11] {NA} -21-

<b>ACTIONS</b>	<b>Recording Industry 1998 (1999) [2000] {2001} -2002-</b>	<b>Motion Picture Industry 1998 (1999) [2000] {2001} -2002-</b>	<b>Business Software Industry 1998 (1999) [2000] {2001} -2002-</b>	<b>Totals 1998 (1999) [2000] {2001} -2002-</b>
Criminal sentence issued	Minimal fines (1-year jail term, commuted to small minimal fines) [sentences commuted to small fines - \$260] {NA} -8-	Community service (None) [Community service] {up to 2 years, all given probation} - community service, probation -	None (2 years' probation plus fine <\$600) [None] {None} -None-	Minimal (Minimal) [Minimal] {Minimal} -Minimal-
Ratio of convictions to the number of raids conducted	0.7% (0.8%) [1.2%] {NA} -9%-	0.04% (0%) [0.09%] {--} -1%-	0% (0.8%) [0%] {0%} -0%-	0.19% (0.16%) [0.46%] {NA} -0.76%-

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 in criminal cases

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. As a result, 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).

## Ineffective border measures

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. According to the Brazilian government, they do implement a "red traffic light" system in the major seaports with Paraguay. 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. To matters worse, Roberto Requião, new governor of Parana state which includes the city of Foz de Iguazu, has been reported to say that he will not promote any measures to stop the smuggling from Paraguay carried out by individuals coming across the border even though it is widely recognized that this activity is a major source of pirate product.

### **Civil actions: Significant damage awards have been issued, but lengthy delays and high bond requirements still pose problems.**

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. Due in large to these unacceptable delays and the lack of attention of judges to copyright protection, BSA currently reports that more than 200 civil cases are awaiting judgment. Civil infringement cases related to the business software take many years to be adjudicated.

The business software industry 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 2002, BSA members, acting through BSA or individually, brought 210 civil actions against software pirates (compared with 145 civil actions in 2001), and the business anti-piracy hotline received 39,514 calls in 2002 (compared with 30,626 in 2001), which produced 3,015 leads of suspected piracy (compared with 1,834 in 2001).

In one civil case in the State of São Paulo and another civil case in the State of Rio Grande do Sul, BSA received two very favorable judgments for multimillion-dollar sums, the sixth and the seventh judgments of this nature under the 1998 Copyright Law and Software Law. The judges in these cases applied Article 103 and Article 104 of the Copyright Act of 1998, ordering the defendants to pay damages of 3,000 times the retail value of the illegal software seized. The level of damages awarded in these cases is unprecedented worldwide with respect to software copyright infringement suits.

Brazilian courts continue to require extremely high expert fees and bond requirements. In some BSA cases during 2002, for instance, bond requirement of US\$ 50,000 to US\$100,000 were required and BSA had no option but to terminate the cases without seizure the defendant. On the average, BSA has paid up to US\$5,000 for experts fees and up to US\$25,000 as bonds. However, there have been other cases in which the bonds were so excessively high that the BSA could not afford to continue the case.

Also of note, a September 2002 judgment issued by a Sao Paolo civil court required two Brazilian CD manufacturers to pay record companies over US\$1 million. One company manufactured pirate stampers (the metal discs used in CD manufacturing) which where then used by the second company to reproduce tens of thousands of pirate music CDs featuring music by international artists. This judgment followed a three-year investigation by police and industry representatives.

# CRIMINAL CODE AND REGULATIONS

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## **The Brazilian Criminal Code simply fails to provide effective deterrence.**

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.

**Problems with suspension:** In 1995, a criminal procedure regulation was issued for the purpose of alleviating serious overcrowding of the court dockets. 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.

**Criminal code reform:** Legislation to reform the criminal code has been pending for years. The first package 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, drafted 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**

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## **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. Finally, both bills were enacted in 1998. The software bill (PL 200/96) entered into effect on February 20, 1998 and the amendments to the 1973 copyright law (Law No. 9.610) 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). In addition, the Brazilian government unfortunately has refused, apparently for reasons involving regional trade leverage, to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, despite the fact that its national law is quite strong.

## **Specialized IPR courts with copyright jurisdiction are needed.**

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**

We encourage the government of Brazil to continue its efforts to implement effective software asset management practices in its public ministries and agencies. This will allow it not only to ensure all of its software is licensed, but will also help it make the most out of its investments in information technology. Good software asset management practices can best be achieved through active public-private sector partnership. We urge the government of Brazil to work closely with the private sector in this regard.

# **NON-TARIFF BARRIERS**

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## **Remittances, computer software and tax barriers**

Although Brazil has eliminated most of the non-tariff barriers that afflict the computer software industry, several issues still remain. These non-tariff market access barriers, if corrected, could increase additional foreign investments in the technology sector and help further develop the technology industry in Brazil.

One of the main issues deals with a law passed by the previous administration. Law 10.332 imposes an additional 10% tax called “CIDE” (Contribuição de Intervenção no Domínio Econômico) on international payments for technology and royalties of any nature. CIDE essentially raises 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. The constitutionality of CIDE is also questionable as it is currently being challenged in court by several Brazilian and international software companies, based upon the argument that CIDE was enacted under the wrong procedure (the Brazilian Constitution, article 146, section 3, demands a complementary law to impose the “CIDE”, and Law No. 10.332 is an ordinary law).

A second market access concern involves a Central Bank’s requirement (per Circular No. 2685 of May 1996), which requires 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. The Central Bank of Brazil currently requires all documentation listed in Circular No. 2682 of May 1996 of the Central Bank. Furthermore, 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, among other documentation. Such burdensome paper requirements further impedes and discourages foreign investment and trade and we urge the new administration to correct the mistakes of the old and start Brazil on a new path to economic investment and development.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# DOMINICAN REPUBLIC

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** In order to support continued progress on effective implementation and enforcement of the 2000 copyright law, IIPA recommends that the Dominican Republic remain on the Priority Watch List, where it has been since 1998. IIPA filed a petition in June 1999 with the U.S. government to review the intellectual property rights practices of the Dominican Republic under the Generalized System of Preferences and the Caribbean Basin Initiative; USTR accepted this petition and GSP hearings were held in May 2000. IIPA recommends that the GSP Subcommittee swiftly schedule another hearing. Copyright must remain high on the bilateral trade agenda.

**Overview of key problems:** Levels of copyright piracy in the Dominican Republic remain quite high—well over 60% across almost all copyright sectors. The government of the Dominican Republic has taken commendable steps to address some of the issues and challenges it faces regarding copyright protection and enforcement, and this is commendable. However, the effective enforcement of the 2000 copyright law, which corrected numerous deficiencies in the prior legislation, remains critical. While industry cooperation with administrative (such as ONDA) and criminal agencies is good, actions resulting in practical deterrence against copyright infringement are mixed. During 2002, television piracy worsened, with no actions taken against the larger stations involved in unauthorized broadcasts; in fact, according to the MPAA, the Dominican Republic suffers the worst levels of broadcast piracy in the entire region. Meanwhile, ONDA still needs more political and economic support within the government in order to go beyond simple retail cases of copyright enforcement. Estimated 2002 trade losses due to piracy in the Dominican Republic were \$12.8 million.

#### **Actions for the government of the Dominican Republic to take in 2003:**

- Instruct the enforcement agencies (including ONDA, INDOTEL and the police) to take immediate and specific actions and prosecutions against certain broadcast television stations which continue to broadcast U.S. programming without authorization;
- Dedicate more resources and training to ONDA inspectors—for example, fund and expand ONDA to include satellite offices in the North and the South;
- Assign a squad of investigative law enforcement officers (police) to follow up on the cases after ONDA or Fiscalia has conducted a raid;
- Support ONDA's use of penalties under the *Reglamento* (regulation) to fine and close down retail outlets, including television stations, where infringing actions have been identified or infringing products seized;
- Continue to have ONDA and the Fiscalia seek the assistance of copyright-based industry organizations;
- Assure proper implementation of the new Criminal Procedure Code (i.e., training of judges, prosecutors and police officers);
- Create a dedicated position for National IPR Prosecutor, with nationwide jurisdiction.

**DOMINICAN REPUBLIC**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002 <sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	60%	2.0	60%	2.0	60%	2.0	80%	2.0	90%
Records & Music <sup>2</sup>	6.9	65%	7.7	65%	2.0	80%	2.0	80%	2.0	80%
Business Software Applications <sup>3</sup>	2.9	61%	4.0	64%	6.7	68%	7.4	69%	7.3	73%
Entertainment Software	NA	NA	NA	NA	6.0	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
<b>TOTALS</b>	<b>12.8</b>		<b>14.7</b>		<b>17.7</b>		<b>17.5</b>		<b>12.4</b>	

## SUMMARY OF BILATERAL IPR ENGAGEMENT

The IIPA and its members have long supported high-level, bilateral engagement between the U.S. and the Dominican Republic.<sup>4</sup> In June 1999, IIPA filed a June 1999 petition with the U.S. government to initiate a review of the eligibility of the Dominican Republic to participate in two trade programs, the Generalized System of Preferences (GSP) and the Caribbean Basic Economic Recovery Act (CBERA, or CBI), 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 (USTR) accepted

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> RIAA reports that \$7.65 million (rounded to \$7.7 million, above) for 2001 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.

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$12.3 million at 70% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>4</sup> 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.

this petition on February 14, 2000, and hearings were held on May 12, 2000. Currently, this review is ongoing.<sup>5</sup>

In addition, the Dominican Republic also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA) in 2000.<sup>6</sup> To maintain its CBTPA benefits, the Dominican Republic must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater criteria. In fact, in July 2000, IIPA recommended that the Dominican Republic should not be designated as an eligible CBTPA country, given that its copyright enforcement regime failed to meet the CBTPA statutory criteria.<sup>7</sup> 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.

The Dominican Republic and the U.S. continue their bilateral economic relations in the context of regular Trade and Investment Council (TIC) meetings. The next TIC meeting will be held in Santo Domingo in the Spring 2003, and IIPA strongly requests that copyright be included on the agenda for action-oriented discussions.

## **COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC**

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Copyright piracy across the industry sectors remains very high in the Dominican Republic.

The Motion Picture Association of America (MPAA) reports that audiovisual piracy in the Dominican Republic in 2002 reflected a combined piracy rate across various media of 60%, resulting in an estimated \$2 million in losses to U.S. owners of filmed entertainment. In early 2002, the most disturbing problem was that current theatrical releases and theatrical DVDs were being broadcast in the Dominican Republic without authorization. At that time, unauthorized broadcasts of other less current materials also continued. Recent reports have confirmed that the broadcast piracy problem is as bad as it has ever been. Furthermore, illegal broadcasts of non-current theatrical releases continues, almost unabated, on these three channels. Several large broadcast television stations—specifically, Telemicro-Channel 5 (VHF), Canal Digital-Channel 15 (UHF) and Canal del Sol-Channel 40 (UHF)—regularly broadcast U.S. programming, including motion pictures produced by MPAA member companies, without authorization. These channels often use DVDs or videos as the source materials for their broadcasts.

Estimated levels of both broadcast piracy and cable piracy in the Dominican Republic each amount to 20%. While broadcast piracy is the most immediate and pressing problem,

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<sup>5</sup> A significant amount of goods (over \$2.47 billion) from the Dominican Republic receive preferential duty-free treatment under the U.S. trade program. Specifically, for the first 11 months of 2002: \$14.2 million worth of Dominican goods entered the U.S. under the duty-free GSP code (representing a 57.8% decrease from the same period in 2001); \$827 million worth of Dominican goods entered under the CBERA (representing a 10.7% increase over the same period in 2001) and \$1.63 billion of Dominican goods entered under the CBTPA (representing a 15.2% increase from the same period in 2001).

<sup>6</sup> Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

<sup>7</sup> See IIPA's July 17, 2000 Comments to USTR Regarding Eligibility Criteria for Beneficiaries of the U.S.-Caribbean Trade Partnership Act, available at [http://www.iipa.com/pdf/2000\\_Jul26\\_CBTPA.pdf](http://www.iipa.com/pdf/2000_Jul26_CBTPA.pdf).

MPA reports that cable and MMDS system operators in the Dominican Republic (systems such as Cable TV Dominicana, Telecable Luperón, Happy Day TV Cable, Cable La Unión and Cables de Miches) also engage in signal theft by making unauthorized retransmissions of U.S. satellite-carried programming. Since the country 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 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.

Piracy of sound recordings and music in the Dominican Republic continues to plague the country, with piracy estimated at 65%. The estimated trade loss due to music recording piracy was \$6.9 million in 2002. The piracy rate estimate for audiocassettes is 98%, compact disc (CDs) is 30% in retail stores, with a noticeable increase in the tourist areas and major shopping areas around the country. The move from audiocassettes to music CDs has brought about an explosive growth of pirate music recorded on the CD-R format. In 2002, street vendors and retailers set up in kiosks at the major malls and plazas around the Dominican Republic were the main source of illicit retail distribution of pirated recording. The street level inventories continue to be 100 % pirate. Pirate audiocassettes cost between US\$1.00-2.00 per unit and counterfeit CD-Rs can range from US\$3.00-5.00. Counterfeit music CDs traced back to the Ukraine continue to make it into the Dominican Republic, although this is not a big concern at this time. These molded CD counterfeits make it to the larger retail stores and sell at or near suggested retail. With few exceptions, the majority of the counterfeit and pirate CD-Rs are recorded in the Dominican Republic. ONDA reduced operations in music related activities by 227% in 2002. Total seizures dropped 87% from 2001 to 2002.

The Business Software Alliance (BSA) reports that computer software piracy in the Dominican Republic comprises primarily end-user piracy and hard-disk loading. 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. Preliminary estimated losses due to business software piracy in 2002 are \$2.9 million, with a 61% piracy level.

The book publishing industry reports that 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 2002.

The Interactive Digital Software Association (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.

# **COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC**

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## **Coordination among enforcement agencies is improving but actions do not always result in deterrence.**

As in prior years, 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. ONDA must be given the necessary support and resources to continue its campaign of investigations and raids against pirates. Coordination between the *Fiscalia* and ONDA, which had been strained up until early 2001, improved during 2002; there remains room for improvement in 2003 in the collective effort to prosecute copyright infringers. The Office of the President can facilitate coordination between ONDA, INDOTEL, the *Fiscalia*, and the police, and can make the fight against piracy a top public priority. Dominican judges at the trial and appellate levels should continue their training to give the copyright law full implementation. Since 2002, the judges have started to grant petitions for civil copyright claims, as provided under the new copyright law.

In March 2001, an interagency commission was formed 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. 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 *Fiscalia*, INDOTEL and other agencies. During 2002, the commission pressed for the approval of the WIPO treaties in the the Senate.

The good news continues to be that the 2000 copyright law provides more tools for Dominican Republic agencies and rightholders to take more concrete action against piracy. 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 and by failing to adequately support ONDA. In addition, there has been little encouragement to pursue prosecutions under the law. No action has been taken to effectively address television piracy by operators containing close political ties to the administration.

## **ONDA's Inspections and Actions in 2002**

**The Structure of ONDA:** ONDA is the Mejia government's successful response to piracy in the Dominican Republic. When the government took office in August 2000, President Mejia appointed Mariel Leon as director of ONDA, who was director until July of 2002. During that period ONDA carried out an aggressive campaign of inspections, raids and seizures against pirates. This effort has continued under the new ONDA Director, Dr. Edwin Espinal, who has been very proactive not only in Santo Domingo but also in other cities. ONDA presently has a contingency of nine inspectors in the Santo Domingo main office. 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.

One concrete step toward improvement of enforcement actions in the Dominican Republic would be to continue to actively 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. Since the January 2002 publication of the copyright regulations (*reglamento*), ONDA has started to apply its administrative fines against copyright infringers with some success.

**The industries' experience with ONDA:** The industries continue to have varying experiences regarding the deterrent effect of ONDA enforcement actions.

MPAA indicates that, because of apparent political concerns, the Dominican enforcement agencies have totally failed in enforcing the law against the illegal television broadcasts transmitted by three television stations in Santo Domingo. The increased incidence of television piracy -- a problem in the Dominican Republic for well over a decade -- 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. In early 2002, MPA and several of its member-company executives met with Dominican authorities, including the Attorney General and the Assistant Secretary of Commerce and Industry, to detail complaints regarding specific broadcasters. The Dominican authorities admitted that the problem was political and promised to take action. However, no action was taken and the problem continued. In mid-December 2002, MPAA counsel worked with both ONDA and INDOTEL to conduct inspections at Telemicro and Canal Digital. The notarized complaints alleged unauthorized broadcasts of MPAA-member company films, "Pearl Harbor," "Black Hawk Down," "Training Day," "Bandits," "Rollerblade," "Lake Placid," "Spy Game," and "Swordfish." Broadcast station personnel denied the charges, saying they did not broadcast pirated movies. These cases remain under investigation. With respect to TV and cable piracy, ONDA has jurisdiction to take enforcement; it can also work with INDOTEL, especially if ONDA requires technical assistance. These two agencies have done a good job applying the 2000 Copyright Law to small businesses, such as video stores and small television stations. For example, in March 2002 actions were taken against Channel 12 in Santiago, Jaravisión in Jarabacoa and Telediaducto in Moca. It is important to acknowledge that ONDA has done a good job with video piracy enforcement. The frustration comes from the lack of governmental enforcement actions against these three larger broadcast stations.

The recording industry reported that music piracy operations suffered a setback due to reduced involvement by ONDA. ONDA went from conducting 180 music-related operations in 2001, where they seized 65,589 pirate audiocassettes and music CDs, to 55 operations in 2002, seizing 30,582 pirate audiocassettes and music CDs. This is a dramatic reduction during 2002. RIAA looks for a dramatic improvement in this area. ONDA needs to work more closely with other government and non-government entities to make the best use of its limited resources. The assignment of a law enforcement specialist/detective to ONDA would facilitate the need for follow-up investigations beyond the present first tier seizure of product and/or arrest of a vendor/retailer. The need to identify deeply into the criminal networks that manufacture and distribute the illicit product is crucial to an effective anti-piracy campaign and an important element needed to deter others. In addition, the *reglamento*, although considered, was not used by ONDA against any music piracy retail targets during 2002.

BSA reports it continues to be able to work very effectively with ONDA and the *Fiscalia* in this new enforcement regime. During 2002, the *Fiscalia* was very proactive and conducted 15 more *ex officio* actions in 2002 than in prior years. In the case of actions against software pirates, ONDA conducts inspections and routinely seizes computers that are found to contain illegal software. ONDA then refers this evidence to the *Fiscalia* for criminal prosecution. BSA expects to keep working closely with ONDA and *Fiscalia* and would like to see continuing increase in the amount of raids taken by these two agencies. Working with Dominican prosecutors in the *Fiscalia* offices, BSA has achieved twelve (12) convictions of software piracy in recent years. Other prosecutions for piracy and counterfeiting are working their way through the Dominican courts.

## **Criminal enforcement in 2002 continues to have mixed results.**

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 had mixed experiences in 2002.

**No progress on broadcast television piracy cases, only video cases:** The audiovisual industry has not seen a serious attempt to coordinate criminal copyright enforcement, including prosecutions, against broadcast television piracy. In contrast to the dismal situation with broadcast piracy, MPAA reports that cooperation and results with ONDA on video piracy cases have been positive.

**Recording industry continues to report minimal progress:** The RIAA reports that there were 55 raids/seizure operations by ONDA in 2002, resulting in the confiscation of 3,078 audiocassettes and 27,504 pirate CDs/CD-Rs, an 87% decrease of 2001. These actions included raids of three illegal manufacturing and distributing facilities of pirate CD-R operations. Because of the drastic decreases in operations and seizures by ONDA, the RIAA has been working with ADOPROFONO, a local group of music labels brought together as a coalition, to address the increasing piracy problems in the Dominican Republic. Through this group, which was formed in July of 2002, and the assistance of the *Fiscalia* (Prosecutor's Office, IPR prosecutor), ADOPROFONO conducted 11 operations and seized 284,000-pirate/counterfeit music CDs and 11,000 audiocassettes through December 2002. The RIAA is encouraging the formation of a task force that would include members of the *Fiscalia*, ONDA, ADOPROFONO, and the National Police, to address music piracy issues and work together in the identification, arrest, seizure and prosecution of illicit manufacturers, distributors and vendors of music pirates.

**Positive results with business software actions:** During the first half of 2002, ONDA, the District Attorney's Office, State Attorney's office, and INDOTEL and other private industries launched the Zero Tolerance Campaign. Some government officials actively participated in this campaign, which was held from March to June 2002. The District Attorney's office conducted eight raids and ONDA conducted between 20 and 30 inspections. 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 any computers loaded with the illegal software. ONDA then prepares a report and refers the evidence of piracy to the *Fiscalia* for prosecution. These referrals resulted in the *Fiscalia* filing between 50 and 60 cases against software pirates during 2002. The *Fiscalia* 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 *Fiscalia* is up to date on filing criminal actions resulting from the ONDA inspections. Likewise, it is important to point out that after the new Criminal Procedure Code was approved, the *Fiscalia* initiated more

*ex officio* actions in software cases. BSA expects, since the approval of the new criminal procedure code, to keep working closely with ONDA and *Fiscalia* and would like to see more raids during this year.

Last year 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 from October 2001 to April 2002. The curriculum was available to judges all over the Dominican Republic via a state-of-the-art distance learning program, and was a great success. In addition, BSA, in coordination with the District of Attorney's Office, U.S. Embassy, and with the sponsor of the U.S. Office of Patent and Trademark (USPTO), organized a two-day seminar on Intellectual Property issues, in which international speakers from the U.S., Colombia, Venezuela, Panama and Costa Rica participated. About 400 participants among judges and prosecutors participated in this event, which was a complete success. During 2003, BSA is expecting to keep working with the National School of the Judiciary in its continuing legal education program.

## **Judicial action is improving in civil cases, but criminal actions lag.**

An effective judicial system is a necessary ingredient in providing adequate and effective copyright protection.

**Criminal cases:** As recently as mid-2002, some industry representatives have felt 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. However, this situation should improve in the future with the implementation of the new Criminal Procedure Code. Under the new code, criminal cases will be heard much more quickly. 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 also allows for the negotiation of restitution amounts, something that is not presently available. So far, few copyright infringement cases have made it through the Dominican judicial system.

RIAA reports that the court system continues to be the weakest link in its anti-piracy efforts in the Dominican Republic. For 2002, the RIAA had 55 cases pending, 23 of which were added during the year. As of December 2002, the RIAA has been successful in obtaining eight prosecutions, including prison sentences, court fines and restitution in the amount of US\$102,500. However, all of the above cases are on appeal and have not been scheduled for review by the Court of Appeals. In contrast, BSA continues to be successful in the appeals process with the confirmation of previous judgments in their favor by the Court of Appeals. A recent realignment of territory in Santo Domingo will limit the reach that Carmen Chevalier, IPR Prosecutor in the *Fiscalia's* office, previously had to pursue these cases. Moreover, we would strongly recommend that the government move forward with creating a national post for an IPR prosecutor in the country. This would streamline cooperation between the many prosecutors' offices and provide consistency throughout the country.

**Civil cases:** During 2002, BSA has received five favorable judgments. In January 2002, based on an action filed in December 1998, BSA obtained a judgment on appeal which was confirmed by the Superior Court against Robotics, a reseller that imported and sold a



counterfeited office suite of programs. In the longest jail time to date in a software case, the judge condemned Robotics to one year of prison and imposed \$17,500 as damages and \$650 in fines. Likewise in January 2002, BSA obtained a judgment on appeal against *Centro Copiados León*, a copy center in which the judge condemned *Centro Copiados León* to \$14,114 in fines; \$13,636 damages. And in May 2002, BSA obtained a judgment on appeal against Almatrac. The judge order \$7,057 in fines, \$11,000 damages plus three months of jail time. In July 2002, based on a action filed in March 1999, BSA obtained a judgment on appeal against Atlántica, a car dealership. The judge in this case ordered three months of jail time, \$350 in fines and \$11,500 damages. Finally, in December 2002, on an action filed in 1999, BSA obtained a judgment on appeal against Cocimar, an engineering firm. The judge condemned Cocimar to pay \$350 in fines and \$11,500 in damages.

## 2002 CRIMINAL ENFORCEMENT STATISTICS IN THE DOMINICAN REPUBLIC

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	NA	98	55 by ONDA and 11 by ADOPROFONO
By Police (D.A.)		15	
By Customs			
Number of cases commenced		25	13
Number of defendants convicted (including guilty pleas)			8
Acquittals and Dismissals			
Number of Cases Pending		12	45
Total number of cases resulting in jail time		3	All RIAA sentences are on appeal
Suspended Prison Terms			
Maximum 6 months		3	
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		5	8
Up to \$1,000		1	3
\$1,000 to \$5,000			5
Over \$5,000		4	
Total amount of fines levied			\$25,700

## Civil Enforcement Improves: *Ex Parte* Searches, Damages and Bonds

The court of appeals of Santo Domingo, in two BSA civil cases (*MC Todo Casa* and *Vimenca*), expressly banned the imposition of bonds even in cases filed under the scope of the previous IP Law No. 32-86 in which a payment of a bond was necessary. BSA considers this opinion a very positive one. The 2000 law provides expressly for civil *ex parte* inspections, as

required by the TRIPS Agreement (Article 50), an element which was missing in the prior copyright legislation. The omission of this remedy had severely harmed the ability of business software owners to protect their rights from unauthorized uses. 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.

The 2000 Copyright Law corrected another problem in Dominican law and practice in that it 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.<sup>8</sup> However, the new copyright law has relieved foreign rights holders of this burden when protecting their rights in Dominican courts. In fact, 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**

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### **Copyright Law 2000 and Its Regulations 2001**

The Dominican government succeeded in its years-long effort to pass new copyright legislation which contained high levels of copyright protection. Although the official date of publication of this law was August 24, 2000, it was published in the Official Gazette on October 24, 2000, entering into effect that same day. 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* search authority was also remedied. The level of criminal fines was increased significantly, and is based on the statutory minimum wage, which is RD\$3,690 (US\$168) per month; the law creates fines of 50 to 1,000 times the minimum wage (or US\$8,400 to US\$165,000). 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 was expanded, and comes close to meeting the obligations found in both of the WIPO treaties. However, 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.

In March 2001 a regulation (*reglamento*) was passed which empowered the Director of ONDA to, among other things, continue pursuing violators in IPR cases. It provides the following: (1) 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; (2) the Director can also close down any establishment for

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<sup>8</sup> 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.”

30 days, indefinitely in repeat cases; (3) 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. 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. Since the publishing of the *Reglamento*, ONDA has started to apply these administrative penalties with success.

## **Criminal Procedures Code 2002**

The Dominican Congress on July 2, 2002 passed a new Criminal Procedure Code. This code includes some of the changes that the copyright industries had been lobbying for. Significantly, the new Criminal Procedure Code continues to allow ONDA and the *Fiscalia* to conduct *ex officio actions*.

## **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. The current ONDA administration supports ratification of these treaties. In October 2002, the Senate opined in favor of the ratification of these two treaties. Currently the document is in the Chamber of Deputies for its opinion. Ratification is the natural next step for the Dominican Republic, especially because its 2000 copyright law already includes many of the treaties' obligations. A vote could happen at any time.

## **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. Currently, BSA is waiting for the next hearing, which is scheduled for March 24, 2003.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# EGYPT

### EXECUTIVE SUMMARY<sup>1</sup>

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Egypt should remain on the Priority Watch List. Egypt passed its new IPR Code in 2002. Progress has been made in the fight against government licensing of pirate distributors of copyrighted works, resulting in less government-sanctioned piracy in Egypt. The government has taken positive steps to legalize software usage in its agencies and in educational institutions. Courts remain backlogged, and the few case results there are remain non-transparent. The Police and the Ministry of Culture remained largely ineffective in deterring piracy.

Egypt was elevated to the Priority Watch List in 1997 and has remained there ever since.

Egypt has long been noted as a market essentially closed to U.S. right holders, due to enormous trade barriers – piracy being the chief one. While many barriers remained in place in 2002, several improvements in Egypt were noted. First, the new IPR Code provides a firm basis for the protection of works and producers of sound recordings, and allows for immediate enforcement against pirates. Second, it appears the government of Egypt is moving away from the damaging practice of granting licenses (from the Ministry of Culture's censorship department) to pirate distributors, which resulted in huge damage, as pirates ruled the market, and enforcement officers refused to act on behalf of the true right holders. Third, purview over business and entertainment software will move to the Ministry of Communications and Information Technology (MCIT), a very positive change for copyright owners in those sectors. Still, more work needs to be done with multiple agencies to increase the number of raids (although IIPA notes the establishment of a new computer crimes division at the Ministry of Interior as another very positive development). The court system, while meting out some strong criminal sentences, reversed one conviction in 2002 in a non-transparent manner.

Required actions for 2003:

- Derecognize further licenses granted to those without authorization to reproduce/distribute right holders' product in Egypt. Continue working with right holders to verify titles.
- Take enforcement actions against illegal distributors of pirate product or false licensees, and against all corporate end-users of business software. Increase raiding by all government agencies, with particular emphasis on improving Ministry of Culture and Police activities.
- Improve court functionality and transparency. The Egyptian judiciary should be encouraged to use its existing authority to issue *ex parte* orders and injunctions. Transparency remains a problem with the judiciary. Consider establishment of a specialized IPR court.
- Implement the new copyright law swiftly, through amendments and implementing regulations:
  - Fix Section 148, which on its face violates TRIPS (places in the public domain any work not translated into Arabic within three years of publication).
  - Increase minimum and maximum fines in the new law to provide deterrence.
  - Fix remaining TRIPS deficiencies and complete implementation of WIPO "Internet" treaties.

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

**EGYPT**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	NA	NA	15.0	35%	15.0	35%	15.0	50%	11.0	50%
Records & Music <sup>3</sup>	8.2	35%	9.2	41%	12.0	48%	12.0	50%	12.0	50%
Business Software Applications <sup>4</sup>	NA	50%	14.5	58%	10.0	56%	26.4	75%	8.7	85%
Entertainment Software	NA	NA	NA	90%	14.9	94%	6.2	65%	5.5	60%
Books <sup>5</sup>	28.0	NA	32.0	NA	30.0	NA	30.0	80%	26.0	80%
<b>TOTALS<sup>6</sup></b>	<b>36.2</b>		<b>70.7</b>		<b>81.9</b>		<b>89.6</b>		<b>63.2</b>	

## COPYRIGHT PIRACY IN EGYPT

Piracy harms both U.S. as well as Egyptian copyright owners.<sup>7</sup> The following snapshot describes the types of piracy causing the most egregious harm to U.S. companies trying to do business in Egypt:

- **Pirate Distribution by False Licensees.** One of the most damaging forms of piracy in Egypt in recent years has been the production and distribution of pirate product by those claiming to have (but not having) licenses to engage in those activities from the copyright owner. Often

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> The piracy rate for international products is roughly 70%. The local industry also suffers from high piracy rates – roughly 50%.

<sup>4</sup> BSA's estimated piracy losses 2002 are not available, and levels are preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$8.5 million at 53% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> Losses to the Association of American Publishers due to piracy in Egypt were \$28 million, compared with \$32 million in 2001. The change reflects 40% currency devaluation.

<sup>6</sup> In IIPA's 2002 Special 301 report, IIPA reported overall 2001 losses to the copyright industries at \$64.7 million in Egypt. Since BSA reported its numbers in mid-2002 (see footnote 4), the revised total loss number increased to \$70.7 million.

<sup>7</sup> 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). Further, a study completed by AC Nielsen in 2002 shows that the Egyptian Government loses some \$83 million every year in customs and local taxes losses due to software piracy.

presenting false licenses, sometimes from piracy havens in Asia, these wily pirates obtained approvals from the Ministry of Culture's censorship department, then pirated with impunity in the market. During these times, right holders could not even get the police or other enforcement organs to go after blatant piracy, reasoning that they had permits from the government of Egypt; in this way, the government of Egypt was sponsoring piracy. After several years of sustaining devastating losses due these pirates' activities in Egypt, in 2002, the authorities in Egypt undertook some welcome efforts to solve/reduce the problem. Specifically, IIPA understands that some of the licenses (production or distribution) granted to pirates have been revoked, and the government of Egypt has pledged that no more will be issued. IIPA further understands that the Ministry of Culture is now accepting documentation regarding exclusive licensees of right holders, and is proceeding to deny licenses to other third parties on the basis of that documentation. These are all positive steps. Now, implementing regulations must be issued to set in stone how applications for permits will be handled, to ensure that fraud never leads to issuance of licenses again. Further, the government, especially Customs, must be vigilant to ensure that known pirate distributors (particularly those that previously held licenses fraudulently) do not take steps to circumvent the revocations, by illegally importing pirate product into Egypt. Also, some of those entities and individuals who had licenses revoked continue to pirate; the Egypt authorities should take swift action against them.

- **Pirate Photocopying and “Reprint” Piracy.** Egypt is one of the worst pirate countries in the Middle East for book publishers. Estimates of losses range from 30% for higher education textbooks to 90% for medical texts.<sup>8</sup> A vast portion of the Egyptian market for professional reference books (medical, engineering, etc.) is supplied with illegitimate product.<sup>9</sup> 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 is rampant, as evidenced by the fact that U.S. publishers routinely receive requests for free supplementary teaching materials from lecturers in areas (such as Upper Egypt and the Delta) where there is no legitimate distribution of texts. 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, making the pirate product in some cases virtually indistinguishable from the legitimate product. Bound photocopies, pirates selling “illegal” subscriptions to new reference books for professionals and students, and pirated “ESL” (English as a Second Language) materials can also readily be found. Illegal copies of books are routinely sold at stalls set up near university campuses. Recent complaints against such establishments in Cairo, October City and Minya City, have yielded action by the police in closing down the stalls, as well as two cases against the dealers. These types of enforcement efforts must be continued and augmented. Enforcement of the laws remains especially weak on university campuses.<sup>10</sup> Massive imports from India and East Asia continue to harm the market as well, and exports from Egypt to other Arab countries, including Libya, are increasingly problematic.

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<sup>8</sup> There are a few exceptions, most notably the Arabic Academy of Science and Technology in Alexandria, which has achieved an outstanding record of supplying legitimate texts.

<sup>9</sup> An anecdote from 2001 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).

<sup>10</sup> Officials have refused to enter university campuses for anti-piracy activities due to political sensitivities. The Egyptian government needs to work more closely with university officials in order to ensure that students and lecturers are complying with copyright obligations.

- **Retail Piracy.** Retail piracy of entertainment software, business software, music, and motion pictures (including, more recently, on digital carriers like VCD, DVD, and CD-ROM) 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 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 “burned” 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. One problem unique to the software industry involves the unauthorized loading of software onto a computer prior to sale (so-called “hard-disk loading”).
- **Internet Piracy.** While not rampant, there is some piracy in Egypt occurring over digital networks, although most of it involves the advertising on the Internet of “hard goods” pirated product (e.g., CDs and VCDs). Internet piracy makes up about 2% of all game piracy in Egypt, including both CD “burning” and downloading of pirate “WAREZ” (a term used to indicate illegal software) software from the Internet.
- **Corporate End-User Piracy of Software.** The largest losses to the business software industry accrue due to the unlicensed use of software in businesses (corporate “end-user” piracy, e.g., when a corporation buys one copy of computer software and loads it onto multiple computers in a company). Corporate end-user piracy occurs largely in small and medium-sized companies, which also happens to be the core customers of the business software industry in Egypt. By failing to pay for software they use, businesses unduly injure the software industry, while getting a free-ride as to the skills, efficiencies, and know-how provided by the software. Swift and serious focus to this particular problem is needed in 2003.

## COPYRIGHT ENFORCEMENT IN EGYPT

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Once again in 2002, enforcement in Egypt proved to be very much of a mixed bag. The change in responsibilities over protection of business and entertainment software to the Ministry of Communications and Information Technology bodes well for those industries, but still leaves other industries saddled by the largely ineffective Ministry of Culture. The Ministry of Interior’s new Computer Crimes Unit has also proven a successful addition for enforcement against business software piracy. Overall raiding remains largely stagnant compared with 2001, and case decisions remain few and far between (although IIPA notes that a managing director of a leading pirate reseller was sentenced to two months imprisonment with labor in September 2002).<sup>11</sup> A significant development continues to be efforts on the part of the government of Egypt (through the MCIT) to legalize software usage by the government, educational institutions, and home users. Further work is needed on the critical issue of enforcement against corporate end-user piracy of business software.

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<sup>11</sup> This case arose from a criminal complaint in March 2001, leading to a raid and prosecution brought to the Criminal Court of the Nasr City suburb. Of the three cases filed by the Business Software Alliance in 2001, one resulted in an acquittal, the district attorney shelved another, and in a third, a six month jail term meted out to the general manager of a company engaged in corporate end-user piracy, was dropped and the conviction is being appealed. BSA filed five more cases in 2002, two with the new Ministry of Interior Computer Crimes Unit and three with the Anti-Piracy Police. These were positive steps forward.



## **Raiding and Follow-Up More Effective Under MCIT and MOI Watch ...**

With authority over business and entertainment software copyright in the process of moving to the Ministry of Communications and Information Technology (MCIT),<sup>12</sup> it is hoped that enforcement against all forms of business software piracy (retail, hard-disk loading, and end-user) and piracy of entertainment software will improve in 2003. MCIT clearly understands the benefits of rigorous protection of intellectual property rights to the growth of information technology in the Egyptian market. Further, since the formation of the Computer Crimes Unit (CCU) at the Ministry of Interior, raiding activity has commenced (two reseller raids were conducted in 2002) after two successful test purchases.<sup>13</sup> The CCU has demonstrated its knowledge of difficult copyright and technical computer issues. We are hopeful that the CCU will be actively involved in future anti-piracy work in Egypt.

## **...But Not Under the MOC or the Police**

The Ministry of Culture and the Anti-Piracy Unit of the police department remained largely uninterested in enforcement against piracy in 2002. MOC took very few actions against pirates in 2002, despite its large-scale presence in Egypt. None of the actions taken by the business software industry through the MOC in 2002 resulted in deterrent fines or sentences. On another unfortunate note, MOC shut down the intellectual property educational campaign. In 2001, that campaign had helped raise awareness among consumers throughout the country about the value of IP and the importance of purchasing legal software. IIPA encourages the MOC to reenergize this initiative and to focus resources to targeting business use of software. Police engagement in 2002 was almost non-existent. No actions were taken by the police against corporate end-user piracy of business software. The Anti-Piracy Unit refused to conduct test purchases in reseller cases filed by right holders, insisting on traditional “visits” to the sites, which traditionally yield no evidence of piracy.<sup>14</sup>

## **Government and Educational Software Management Successes Continued in 2002 . . .**

In IIPA’s 2002 Special 301 report on Egypt, it was noted that the Egyptian government took some very positive steps, including the legalization of usage of over 100,000 computers in the government, and brokering an agreement by college campuses to legalize the usage of 100,000 student computers. In 2002, MCIT developed and executed a new initiative to get computers to the public – the “Economic PC Initiative.” Under the initiative, the MCIT aimed to sell 1 million computers to individual users. The PCs were offered for the price of less than \$15 per-month installments on the purchaser’s phone bill. MCIT worked closely with computer software companies to ensure that these computers would only include licensed software. MCIT is to be commended for

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<sup>12</sup> While the change in authority has occurred, an Executive Order/Regulation is still under development, and until these are issued, the shift will not be entirely complete.

<sup>13</sup> This was the first time the MOI had done a test purchase and indicates a very positive step forward in MOI’s efforts. Test purchases are critical to anti-piracy efforts against retail vendors. The Computer Crimes Unit’s willingness to engage in such activity is paramount to success of the program. One of the MOI raids resulted in a successful monetary settlement.

<sup>14</sup> No action has been taken by the Anti-Piracy Unit in two cases filed with the Unit on October 26, 2002. A third case filed in May 2002 resulted in no action taken, as the Police claimed there was insufficient information that a copyright violation took place. In these cases, requests to make test purchases were denied, the Police preferring to make visits to the sites, where stocks are not kept.

its efforts to date, which have resulted in sales of many personal computers. The Ministry of Education (MOHE) is engaged in a similar program to get PCs to students, providing 100,000 PCs loaded with licensed software to university students in Egypt. Reportedly, MCIT and MOHE have renewed agreements with software companies and will continue to work with software companies to license software for student PCs at home in 2003. This high level of cooperation with the Ministries is unprecedented in the region and deserves strong praise.

### **. . . But Enforcement Against Small and Medium-Sized Corporate End-Users Not Forthcoming**

Unfortunately, IIPA continues to note that successes were not achieved in fighting corporate end-user piracy by small and medium-sized businesses. For example, while the Anti-Piracy Police have made commendable efforts to address the issue of retail piracy, end-user piracy has not been given proper prioritization. The MOC's record against corporate end-user piracy is particularly disturbing, as it usually settles for "legalization" by a company, or, worse yet, a mere warning to the company, rather than taking raids and seeing end-user piracy cases forward to prosecution. The MOI has not run any raids against corporate end-user piracy, although IIPA hopes that MOI will begin to pay more attention to this severe problem in 2003.

### **Courts Remain Backlogged, Results Are Mixed**

Copyright owners obtained some positive court decisions in 2002, including some prison sentences and fines imposed on reseller pirates. However, in at least one case, the Court of Appeals acquitted a reseller pirate that had been convicted in the lower court, and since a written judgment has been unavailable, the reasoning behind the acquittal remains unclear.

The court system is marred by structural defects from initial raid to judgment. At the initial stages of a copyright case, judges have proved unwilling to issue *ex parte* orders in relation to actions involving corporate end-user piracy of business software. TRIPS requires the availability of such orders, both in the law (there is no express provision for such orders) and in practice. Absent execution of *ex parte* searches against end-user piracy, and given the government's less-than-stellar performance against end-user piracy in 2002, Egypt remains an impossible enforcement environment to combat corporate end-user piracy of business software. Copyright cases brought in Egypt continue to move at a snail's pace, leading to frustration for copyright owners who are unable effectively to enforce their rights. Lack of transparency in the court system is a major concern. Court decisions are not published expeditiously, meaning parties are kept in the dark as to the reasoning behind a decision. The situation is worse in cases initiated by the government, as there is simply no means to follow such cases. Lack of transparency hinders right holders as they cannot track sentencing results or the reasoning behind court decisions. For cases that have resulted in positive judgments being awarded to right holders, collections take an unreasonably long time in Egypt.

IIPA members and the U.S. government conducted judicial training in 2002, including one session held in December 2002 for 75 Egyptian judges, and one session in January 2003 in which judges were present (as well as other copyright officials). Such training, it is hoped, reinforces the notion that copyright piracy is a serious offence, with real victims (namely, the copyright owners, the authors and artists, both foreign and Egyptian, who lose their livelihoods and/or opportunities due to piracy, the government, which loses tax revenues, and the like), and emphasizes the judicial mechanisms that are required by international obligations, such as *ex parte* searches, adequate compensatory damages, injunctive relief, and imposition of criminal penalties including jail time (actually served) and deterrent fines.

## MARKET ACCESS ISSUES

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### ***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). 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 2002.

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 (aside from those described above, including, most importantly, piracy) effectively keep the U.S. recording industry (and other industries, as applicable) out of the market in 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 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, the requirement that a commercial entity be 100% Egyptian-owned in order to import products into Egypt 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 in the world.

## COPYRIGHT LAW AND RELATED ISSUES

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Egypt's new IPR Code, including what essentially is a discarding and an overhaul of the 1954 Copyright Act, was signed into law on June 2, 2002 (effective date June 3). The law provides

the basis for protection of U.S. works and sound recordings, and allows for immediate enforcement against copyright infringement and copyright piracy. The Code also clearly extends the protection of copyright to the digital environment, including protection of temporary copies, broad exclusive rights of exploitation that appear to encompass digital communications and transmissions over digital networks, and attempted implementation of other key provisions of the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), including provisions prohibiting the circumvention of technological protections employed by copyright owners to protect their rights. The final version of the Code also ended up with exceptions with respect to software that come closer to compliance with international norms. Another positive aspect of the new law includes the reshuffling of responsibilities for enforcement of business and entertainment software to the Minister of Communication and Information Technology (MCIT), which will hopefully allow for stronger enforcement against software piracy in Egypt. IIPA is pleased that the Egyptian government has taken this step of passing the new IPR Code. It is sincerely hoped that the passage of the 2002 IPR Code will usher in a new era of strict enforcement of copyright, leading to deterrent results against piracy in Egypt, lowering of piracy levels, and the resultant commercial gains that will accrue to U.S. as well as all other (including Egyptian) right holders.

## Comments on IPR Code Chapter Pertaining to Copyright

At the same time, IIPA must express its disappointment that most of the improvements noted in the draft that passed a first reading of the People’s Assembly in June 2001 were not included in the Code as finally passed.<sup>15</sup> In addition, IIPA notes that the government of Egypt has never acknowledged the need to increase criminal penalties, which, in the IPR Code, remain at 1954 levels (without any adjustment for inflation), that is, totally non-deterrent. The law also fails to comply with TRIPS in several other concrete ways, and fails to fully implement the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA encourages the government of Egypt to make the necessary changes to become the first country in the Middle East to fully implement the WIPO treaties.

### Necessary Changes to Comply with TRIPS

- **Increase Criminal Remedies.** The Code contains non-deterrent criminal penalties. Article 181 provides a sentence of “not less than one month” imprisonment and a fine of EL5,000 to 10,000 (US\$905 to \$1,810). While a minimum sentence of “one month” imprisonment constitutes a positive development, there is no set maximum jail term (as there was in the old law), potentially making this provision much weaker as carried out in practice (for example, if only the statutory minimum, and no higher sentence, is regularly imposed). Fines on-their-face are totally insufficient and non-deterrent (TRIPS Article 61 requires remedies “sufficient to provide a deterrent”). IIPA understands that the fine is to be imposed “per work” or “per title.” For pirates dealing in high-end commercial software, for example, the fine would not even amount to a cost

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<sup>15</sup> For example, one key improvement in the June 2001 draft, namely, the protection of works for life of the author plus seventy (70) years, protection of sound recordings for 70 years from the year in which the recording was “made or made public,” and protection for 70 years from first publication or first making available to the public as to works in which the copyright holder is a legal entity, was replaced by “fifty (50) years” at the last minute by a legislator. This is highly disappointing since the government of Egypt itself touted the protection of “life plus 70” and “70 years” in its answers to TRIPS Council questions in June 2001. Also deleted from the final Code was an article providing for 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. That this provision was removed is highly disappointing.

of doing business, and would be well worth the risk. Fines must be increased and doubled for recidivists (as of now a recidivist receives mandatory minimum jail term and maximum fine), and, as opposed to “per work” should be meted out “per copy.” Imprisonment should be set at from three months to three years (with mandatory imprisonment for recidivists). Such penalties would be closer to TRIPS standards. The GOE must implement tougher penalties through implementing regulations to satisfy TRIPS.

- **Provide TRIPS-Compatible Remedy as to “Materials and Implements.”** Article 179(3) in the Code is TRIPS deficient, in that it only permits the seizure of “materials” that are “serviceable” 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. Implementing regulations should confirm that Article 179(3) will be read as compliant with TRIPS, namely, that the language “serviceable” “only” does not conflict with the “predominant use” standard of TRIPS, and should also confirm the availability of forfeiture and destruction as required by TRIPS.
- **Expressly Provide for *Ex Parte* Civil Searches.** Article 179 appears not to provide judicial authorities with the clear express 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,” as required by TRIPS Article 50. The copyright industries are examining this provision and considering a test in the courts, but in the meantime, the implementing regulations should clarify the availability of this vital measure, in line with Article 50 of TRIPS.
- **Delete Provision Allowing for Government-Sanctioned Sell-Off of Pirated Products.** Article 180 provides that “the court 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 violates Egypt’s TRIPS obligations. Article 46 of TRIPS requires Egypt to give the judicial authorities “the authority to order that goods they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or . . . destroyed.” Clearly, sale in public auction would prejudicially harm the right holder. This provision amounts to a government-sanctioned sell-off of pirated products, and must be deleted.
- **Provide Modern, TRIPS-Compatible Presumptions.** The 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 implementing regulations must be amended to include them in order to comply with TRIPS.<sup>16</sup>

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<sup>16</sup> 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

- **Repeal Provision Requiring Translation Into Arabic.** Section 148 of the Code requires translation of all literary works into Arabic within three years of publication, or it is deemed in the public domain. This is an extremely disturbing development. This unprecedented provision violates Egypt's international obligations, is highly prejudicial to all right holders, including U.S. publishers, and it must be deleted.
- **Repeal Overly Broad Compulsory License.** Article 168 of the Code contains a compulsory license for copying and translating works. It is not limited to literary works in printed form, and apparently 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 implementing regulations, or deleted altogether.<sup>17</sup>
- **Repeal Overly Broad Moral Rights Provision.** The moral rights provisions in the Code impinge on exclusive rights, in violation of TRIPS and Berne (TRIPS Article 9.1, Berne Articles 8 and 12). Article 142(3) provides that the author may reject "any amendment in the work, which the author considers as changing or distortion of his work," regardless of whether the author has transferred economic rights. In this form, this provision violates Berne Article 12, as it would undermine the exclusive 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 Code. The 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 violate Berne Article 8, as it would impinge on an author's exclusive translation right.

## Provisions Which Must Be Clarified to Confirm TRIPS Compliance

- **Confirm The Egypt Provides Full Retroactive Protection.** There is no provision in the Code 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.<sup>18</sup>

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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.

<sup>17</sup> 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.

<sup>18</sup> 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.

- **Confirm that Egypt Provides Border Measures as Required by TRIPS, Including Ability to Interdict and Take *Ex Officio* Actions.** The 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.
- **Confirm Narrow Scope of Temporary Copy Exception.** Article 171(9) provides what IIPA hopes is a narrow exception for certain “ephemeral” copies, where such copy is made “during digital broadcasting or receiving digitally stored work,” with the proviso that such copying is performed “through normal operations used by the rightful owner.” IIPA believes that, like U.S. law, Egypt should not provide an exception for temporary copies. Barring that approach, Article 171(9) appears to be fairly narrow, since it requires the person availing himself of the exception must be “the rightful owner.”
- **Confirm that Article 171 Exceptions Are Subject to Berne “Tripartite” Test.** The law contains overbroad exceptions to protection (TRIPS Article 13). Article 171 (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.
- **Confirm That the IPR Code Provides Adequate Civil Damages as Required by TRIPS.** Nowhere in the Egyptian law is there provision for adequate compensatory damages, as required by Article 45 of TRIPS. Only Article 179 of the Code provides for some “cautionary measures,” including “[c]alculating the revenue of [illegally] exploiting the work or performance or sound recording or broadcast, then distraint this revenue in all cases,” although it is unclear whether this is intended to cover all civil damages. 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.<sup>19</sup>

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<sup>19</sup> 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

- **Delete Provisions That Unreasonably Restrict the Ability to Freely Contract.** Articles 150, 151 and 153 are restrictions on the ability to enter into freely-negotiated contracts, and should be abolished. Specifically, Articles 150 and 151 contain transfer provisions that impose undue burdens on the freedom to contract, while Article 153 is an unreasonable restriction on the ability for an author to enter into arrangements that might include future works under a private contractual agreement.
- **Amend Performers' Moral Rights Provision.** In Article 155(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 Article 155(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.
- **Delete Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This amounts to a compulsory license and should be deleted.
- **Clarify Panoply of Exclusive Rights for Producers of Audiovisual Works.** Article 177(5) clearly should not apply to 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," [Article 138(11)]. Article 177(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.<sup>20</sup> 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.
- **Delete Right of Publicity.** Article 178 appears to create a right of publicity in a person's likeness, and does not belong in a copyright law.

## WIPO Treaties Implementation

IIPA is pleased to see that the 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).<sup>21</sup> In particular, IIPA makes note of the following points with respect to

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<sup>20</sup> 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."

<sup>21</sup> Egypt's consideration of the treaties goes back at least to October 14, 1999, when the United States and Egypt issued a



Egypt's attempt to implement the WCT and WPPT:

- **Temporary Copy Protection.** The definition of reproduction in the Code means “making one or more copies of a work or a sound recording via any means or any method or form, including permanent or temporary electronic storage of the work or sound recording” [Article 138(9)], which appears to implement Article 1(4) and the Agreed Statement to Article 1(4) of the WCT.
- **Economic Rights, Including Communication to the Public/Making Available.** The economic rights as to works (Article 147, clause 1) provides that authors have the exclusive right “to grant license or prohibit any exploitation of his/her work by any means”), and sound recordings (Article 157(1) provides that producers of sound recordings have the exclusive right to “ban any exploitation of their recordings by any way without prior written license”), are broad enough that they may fully satisfy the WCT and WPPT.<sup>22</sup>
- **Protection Against Circumvention of Technological Protection Measures.** The attempted implementation of the requirement to prohibit circumvention of technological protection measures is commendable. Articles 181(5) and (6) fall short of WIPO treaties' requirements in a few ways. Specifically, while Article 181(6), the prohibition on the act of circumvention, applies to both access controls and controls on the exercise of exclusive rights, Article 181(5) which prohibits preparatory acts with respect to circumvention “devices” etc. only goes to so-called “copy controls” but not access controls. Second, the law does not clarify whether the prohibition on devices extends to component parts. Third, a commercial purpose test (“for the purpose of selling or renting”) is imposed on the prohibition of devices, which is WIPO treaties-inconsistent, as is the apparent requirement that the act of circumvention be done “with bad faith.” Other indirect proof methods, such as how a device is marketed, or whether there is a commercially significant use of the device other than to circumvent, are not included in the provision. Finally, it is absolutely essential that the law provide for administrative and civil remedies. In many cases involving circumvention, speedy injunctive relief is the surest way to mitigate damage being caused by circumvention. Unfortunately, the Egypt Code only provides for criminal penalties.

## Implementing Regulations Must Make Further Clarifications/Changes

Under Article 3 of that Code, “executive regulations” of the law were to be issued within one month of the “effective date.” In addition, according to Article 3, “competent ministries within their competent jurisdiction shall issue the decrees implementing this law.” While the deadline has come and gone, IIPA still views the “executive regulations” as an important opportunity to deal with many of the issues raised above, to resolve longstanding problems faced by the copyright industries in

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“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.

<sup>22</sup> Specific enumeration, in Articles 147, 156 and 157, is missing with regard to a “distribution” right (WCT Article 6, WPPT Articles 8 and 12). Also unclear whether the Code complies with WCT Article 8 and WPPT Articles 14 and 15, although it appears the drafters tried to comply. Specifically, the term “public transmission” is defined in a way that may comply with WCT Article 8, but authors of works receive a right of “public display to the public” which it is unclear is intended to cover exactly the same right. With respect to compliance with WPPT Article 14, Article 157 gives producers of sound recordings a broad exploitation right, including the specifically enumerated right to “display these works via computers or other mediums of communication.”

Egypt, and to clarify some other issues.

- **Resolve 'False Licensee' Problem.** A mechanism should be established in the regulations to deal explicitly with the problem of pirate distributors obtaining permits from the government to reproduce and sell in Egypt. Such a mechanism would require the Minister of Culture to ensure that applicants for permits to produce or distribute copyright material in Egypt have the authorization of the right owners. Such a mechanism should also require the applicant to identify the right owner and to provide documentary evidence that the applicant is authorized to reproduce or distribute such material. Refusals to issue a permit or suspensions of permits should be based on any circumstances that reasonably give rise to suspicion that the documents may be incomplete or fraudulent. In addition, the Minister should refuse to issue a permit or suspend a permit if the right owner informs the Minister that another party has exclusive rights in Egypt or that the specific applicant is not authorized. The Minister should also take necessary steps to verify the authorization of the applicant as documented in any contract or license as regards to the commencement or expiration of the license, the territorial scope of the license, the identity of the licensee, as well as the nature and the quantities of goods involved. It is vital that such provisions punish applicants who provide false or misleading information in the application documents, submit an application without having obtained the authorization of the right owners, or provide other false documentation, false contracts, or false licenses in support of an application. IIPA suggests fines in the amount of 10,000 Egyptian pounds; an applicant that violates the regulation should also be barred from re-applying for five years.
- **Explicitly Confirm Criminalization of Corporate End-User Piracy of Business Software.** Article 147 of the IPR Code provides broad rights in respect of computer programs, namely, "the right to grant license or prohibit any exploitation of his/her work by any means." The regulations must now confirm that the language in Article 181(7), namely, that it is an offence to breach "any literary or financial right of the author . . . stated by this law" includes the unauthorized use of software in a business setting (i.e., "end-user piracy" of business software).<sup>23</sup> Failure to criminalize end-user piracy would implicate Egypt's TRIPS (Article 61) obligations.
- **Adopt Proper Government Software Management Procedures.** The government of Egypt should make legal software use a priority, to comply with its international obligations to protect software, to set an example for private industry, and to appropriately manage software technology, which is 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. Over 27 nations, including China, Korea, Philippines, Taiwan, Thailand, Ireland, France, Czech Republic, Spain, U.K., Greece, Hungary, Bolivia, Chile, Colombia, Paraguay, Jordan, Kuwait

<sup>23</sup> One way to confirm that corporate end-user piracy of business software is deemed a criminal offence would be to explicitly confirm that exclusive rights under copyright in software include the right to authorize the use of software in a business setting. The following proposed language would achieve this result:

The exclusive right in Article 147(1) of the IPR Code, which grants authors and their heirs the right to grant license or prohibit any exploitation of his/her work by any means, shall include the right to grant license or prohibit the use of software in a business setting, and shall be actionable under Articles 179 and 181(7).

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. It is time for Egypt to consider doing the same; the regulations provide the mechanism for making this momentous announcement.<sup>24</sup>

## 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 2001, \$21.7 million of Egyptian goods were imported into the U.S. duty-free, accounting for 2.5% of its total imports to the U.S. For the first 11 months of 2002, \$21.3 million of Egyptian goods entered the U.S. duty-free under the GSP program, accounting for 1.7% 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.

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<sup>24</sup> The following proposed text could be adopted verbatim in the regulations:

Each agency [of the government of Egypt] shall work diligently to prevent and combat computer software piracy in order to give effect to copyrights associated with computer software by observing the relevant provisions of international agreements in effect in Egypt, including applicable provisions of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, the Berne Convention for the Protection of Literary and Artistic Works, and relevant provisions of Egyptian law, including the IPR Code.

1. Each agency [of the government of Egypt] shall adopt procedures to ensure that the agency does not acquire, reproduce, distribute, or transmit computer software in violation of applicable copyright laws.
2. Each agency [of the government of Egypt] shall establish procedures to ensure that the agency has present on its computers and uses only computer software not in violation of applicable copyright laws.

These procedures may include:

- a. preparing agency inventories of the software present on its computers;
  - b. determining what computer software the agency has the authorization to use; and
  - c. developing and maintaining adequate record keeping systems.
3. Contractors and recipients of [Egyptian government] financial assistance, including recipients of grants and loan guarantee assistance, should have appropriate systems and controls in place to ensure [Egyptian government] funds are not used to acquire, operate, or maintain computer software in violation of applicable copyright laws. If agencies become aware that contractors or recipients are using [Egyptian government] funds to acquire, operate, or maintain computer software in violation of copyright laws and determine that such actions of the contractors or recipients may affect the integrity of the agency's contracting and [Egyptian government] financial assistance processes, agencies shall take such measures, including the use of certifications or written assurances, as the agency head deems appropriate and consistent with the requirements of law.
  4. [Egyptian government] agencies shall cooperate fully in implementing this order and shall share information as appropriate that may be useful in combating the use of computer software in violation of applicable copyright laws.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# INDIA

### EXECUTIVE SUMMARY<sup>1</sup>

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**Special 301 recommendation:** IIPA recommends that India be retained on the Priority Watch List. Estimated trade losses in 2002 are \$468.1 million.

**Overview of key problems in India:** While India has a large, significant indigenous copyright industry,<sup>2</sup> and a good copyright law, the major issues in India are high piracy rates and debilitating deficiencies in the enforcement system. The primary obstacles to reducing piracy rates in India are police corruption (larger pirates are often protected by the police), reluctance to act *ex officio* in criminal cases, lack of resources and training, and an overburdened and slow court system that prevents conclusion of even the simplest criminal or civil cases in a timely manner. In addition, effective action is not being taken against imports of pirate OD product from Pakistan, Malaysia and other countries, and only recently against some of the nine indigenous OD factories in India. India must adopt an optical disc law like its neighbors in Asia; many of the factories raided to date produce virtually no legitimate product. The criminal system is slow, cumbersome, and fraught with delays and unnecessary expense. For this reason, the motion picture industry and business software industry have resorted to bringing civil cases, the former against cable pirates (obtaining injunctions in the process) and recently even against pirate retailers, rental libraries and video parlors and the latter against corporate end-user software piracy. However, while injunctions issue fairly promptly, these cases move far too slowly. While the injunctions offer some deterrence, this is not sufficient. India is also in the process of drafting amendments to its copyright law and in doing so must fully and properly implement the WIPO "Internet" Treaties and then ratify them.

**Actions to be taken by the Indian government:**

- Establish a national centralized body dedicated to, and trained in, IPR enforcement;
- Adopt an optical disc law to deal with increasing optical disc piracy;
- Improve and strengthen existing state level intellectual property police cells and ensure that they act *ex officio* against piracy crimes;
- Adopt meaningful court reform to decrease burdens, costs and delays and ensure that cases are concluded promptly with deterrent penalties and damages;

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

<sup>2</sup> 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.

- Adopt amendments to the copyright law that properly implement critical aspects of the WCT and WPPT, including protection for temporary copies, adequate and effective protection against the circumvention of technical protection measures and ensure that ISP liability rules are clear, with narrow exceptions, and with an effective notice and takedown system.

**INDIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>3</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	75.0	60%	70.0	60%	47.0	60%	66.0	80%	66.0	80%
Records & Music	6.6	40%	NA	40%	6.0	40%	8.0	40%	6.0	30%
Business Software Applications <sup>4</sup>	350.0	75%	256.0	70%	181.6	63%	160.2	61%	158.0	65%
Entertainment Software	NA	NA	NA	90	NA	80%	42.8	86%	36.8	84%
Books	36.5	NA	37.0	NA	36.0	NA	35.0	NA	30.0	NA
<b>TOTALS</b>	<b>468.1</b>		<b>363.0</b>		<b>270.6</b>		<b>312.0</b>		<b>296.8</b>	

## COPYRIGHT PIRACY IN INDIA

Piracy in India continues to be a serious problem, with increased pirate production from at least 3 of a reported 9 OD plants with at least 14 production lines and increasing imports of pirate OD product from Pakistan and Malaysia. Continued book, music, video and cable piracy hamper the development of what should be one of the best copyright markets in Asia.

**Book piracy:** Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals became starkly evident to both domestic and foreign publishers in 2000-2001 when the industry began an impressive program of continuing raids against book pirates at all levels, which continued throughout 2002. 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

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>4</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$238.4 million at 69% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

reference volumes and high quality offsets, are readily available.<sup>5</sup> Publishers estimate that any best seller suffers from 50 to 60% piracy, despite the fact that prices for legitimate titles in India are among the lowest in the world. Percentages may soar even higher for certain individual works.<sup>6</sup> 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.<sup>7</sup> Raids undertaken by publishers have had some effect on organized commercial photocopying, but organized copying and distribution continues in some sectors. For instance, copying remains a problem at private educational and research institutions and is on the rise with regard to medical texts.<sup>8</sup> Another recent phenomenon is that published materials in digitized form (including interactive published materials on CD-ROM) are now widely available in the pirate markets in India, mostly manufactured domestically. Furthermore, the National Institute of Science Communication and International Resources has digitized a number of textbooks and is planning to offer free access to university students through the Internet. This would decimate the college textbook market. The Ministry of Human Resources, Government of India, must prevent this plan from being enacted, as it is sure to lead to blatant and uncontrollable digital piracy.

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 on CD-ROM) are now widely available in the pirate markets in India, mostly manufactured domestically.

**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, video CDs (VCDs) and increasingly DVDs (both parallel imports and pirated copies) for their transmissions. These cable systems seriously affect all member company business, including theatrical, home video and television. Since 1999, MPA has brought civil actions against the major cable television networks in an attempt to limit cable television piracy. The restraining orders passed by the civil court (Delhi High Court) against the entire networks (including all franchisees, distributors and cable operators forming part of the network) have been a deterrent and have brought down cable piracy by many percentage

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<sup>5</sup> Publishers estimate that approximately 300 modern offset printing presses are located within blocks of the Delhi Police Commissioner's Office alone, of which at least a third are seasonally engaged in printing and binding of pirated trade books and textbooks.

<sup>6</sup> For instance, 18,000 pirate copies of the Harry Potter books were seized in 2002 and early 2003. Publishers estimate that these seizures reflect only 1/5 of total pirate production of the work. This is startling when compared with legitimate sales of the books—totaling only 75,000 over three years.

<sup>7</sup> For instance, Sivakasi, in the southern state of Tamilnadu, exported US\$150,000 of pirated textbooks during 2002.

<sup>8</sup> Recently, a leading publishing company found one of its medical journals copied and bound, with a title embossed in gold, alongside legitimate products in the Cardiology Department of the Apollo Hospital in New Delhi. This is merely one example of the ways pharmaceutical companies are becoming increasingly organized in their illegal reproductions of medical texts and reference books.

points. However, MPA must be constantly vigilant and continue to seek new injunctions and where possible, contempt orders against recidivist cable systems. Recently, MPA has begun joining (in civil suits) the government departments that license the cable systems and sought orders directing these departments to cancel the licenses of the errant systems. This is expected to put added pressure on the cable networks. Courts have recently issued notices to the departments but no orders have yet issued. These court actions require constant monitoring and initiation of fresh criminal prosecutions and civil cases for copyright violation, including contempt of court proceedings, all of which are costly and time-consuming, but, nonetheless, somewhat effective.

**Video piracy:** 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 and without desperately needed optical disc legislation, it will be difficult to close or force a reduction in piracy. In addition to the pirate production coming from the above two factories, pirate optical discs are also imported from Malaysia, and now Pakistan. Finally, such factories have become easier to set up in India in rural areas due to tax concessions and other benefits.

In 2002, the MPA representative—along with a member of Parliament from the local film industry as well as the president of a local film association—presented a memorandum signed by over 200 film personalities from the local industry as well as Hollywood to the Home Minister. In the memorandum a request was made to initiate action against two errant OD factories. According to information, the government has initiated action against these factories. It is believed that the state governments have been informed of these and appropriate police agencies have been directed to investigate and put an end to these pirate operations.

MPA has also successfully obtained appropriate orders from the Delhi High Court against some of the major pirate markets in Delhi and Chennai. The Delhi High Court has not only passed restraining orders but has also issued directions for discreet investigations on an ongoing basis and directions to the police to assist in conducting raid and seizure operations as and when required. In other cases appropriate orders have been passed against importation of pirate/parallel import product against video libraries and restraining orders against unauthorized rental of MPA member company titles. Directions have also been issued against libraries stocking and renting in an unauthorized manner, to hand over to MPA representatives all pirate copies and parallel import copies of MPA members company title DVDs and VCDs.

**Music piracy:** In 2002, the Indian and international recording industry suffered its most significant decline in years. In a recent article in *Billboard*, it was reported that the industry is on the brink of collapse.<sup>9</sup> They report a decline in their last fiscal year from revenues of \$123 million to less than \$90 million. That represents a 20% decline in 2002, following a 23% decline in the year before that. The local music industry is responsible for about 80% of the legitimate music market in India. The industry estimates the piracy rate at 40-50% for cassettes and 60% for CDs. In short, the legitimate music business is decimated by counterfeit cassettes (in which the inlay cards differ in quality, color of printing, do not contain the name of the company on the

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<sup>9</sup>[http://www.billboard.com/billboard/billboard\\_members/currenteditorials/article\\_display.jsp?vnu\\_content\\_id=1803209](http://www.billboard.com/billboard/billboard_members/currenteditorials/article_display.jsp?vnu_content_id=1803209)



leader tape or embossed on the cassette), pirated copies (name and contact of company manufacturing 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), many emanating from pirate plants in Pakistan (whose music market also has witnessed a steep decline—by almost 70%). 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. Pirated CD-Rs containing 100 or more songs each in MP3 format retail for about US\$0.83. Legitimate CDs sell for between US\$2 and \$3.

**Piracy of business software:** Corporate end-user piracy (unauthorized use of business software in a business setting) is endemic in both large and small Indian companies, while piracy at the retail and wholesale level is also prevalent, including hard disk loading and the outright sale of pirate software in many of the famous pirate markets throughout India. The piracy rate continues to rise, from 63% in 2000, to 70% in 2001 and to 75% in 2002.

**Internet piracy:** A large number of websites continue to make use of Indian-origin repertoire in 2002, and one report in early 2002 involved the burning of MP3s onto discs for sale over Internet distribution networks in India.<sup>10</sup> One U.S. software company took action against the sale of pirated software on the Internet over a popular auction site. BSA has to date brought no actions dealing with Internet piracy, but has issued successful cease and desist letters to ISPs concerning pirated software offered for sale at auction. These sites were promptly taken down and BSA believes that such piracy is subject to both criminal as well as civil action. MPA has also successfully issued warning notices to some pirates offering pirate products for sale through the Internet.

**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 disc for domestic consumption, as well as increasing CD-R “burning” in shops.

**Piracy of 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.

## COPYRIGHT ENFORCEMENT IN INDIA

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The challenge posed by the Indian enforcement system is to make the criminal system work, despite corruption, inefficient court procedures, lack of training and massively long delays, followed by woeful fines and virtually no significant jail terms. While there have been a few recent signs of hope in this dreary scenario, many copyright owners (the movie and business software industries) have been forced to resort to an also slow and inefficient civil system, which has the virtue at least of being able to award (somewhat) deterrent injunctions (with the threat of

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<sup>10</sup> See Manohar Sharma, “Music Industry Battles MP3 Piracy,” *Times of India*, January 31, 2002.

possible contempt citations and in the case of end-user software piracy result in some settlements.

## Criminal Enforcement

Criminal enforcement against piracy in India has been rife with frustrations for both the Indian and U.S. copyright industries. In the over 15 years that IIPA has been working on Indian issues, there have been no more than 10 convictions<sup>11</sup> for copyright piracy, as far as industry is able to ascertain. Until this year, when the police began to run “suo moto” (*ex officio*) raids, the criminal process has been cumbersome, costly, and time-consuming and without deterrent impact on the market for copyrighted products. The Economic Times of India recently reported that the Law Ministry had estimated that only 6% of serious crimes are prosecuted in India; the success of petty crime actions is only 33%. Until this woeful record changes, it simply will not be possible to gain control over piracy in India.

For example, the music industry obtained 1140 raids in 2002, carried out by the police, with seizures of almost 677,213 pirate audiocassettes, over 278,617 pirate audio CDs, a reported 152 cassette duplicating machines and 248 CD-R burners.<sup>12</sup> Arrests increased slightly to 1,250 in 2002 from 1,193 in 2001. There were 126 convictions involving music piracy reported by the music industry in 2002, virtually all for violation of Section 52A (failure to use the required certificate). In only 10 cases, jail terms were awarded plus fines from Rp500 to RP50,000 (US\$10 to \$1,050). In all other cases only fines were awarded and at much lower levels, though some pretrial detention occurred before bail was posted. All in all, however, this record is insufficient to deter piracy effectively and the legitimate music industry in India is slowly shrinking and concerned about its very survival. Historically, the Indian Music Industry (IMI) has had the greatest success of all copyright industries in getting raids and seizures, reporting 196 convictions in the last two years, though, as noted above, virtually all were under Section 52A and resulted in small fines, with only a few jail terms. However, this lack of deterrence in the system is now taking a severe toll. Piracy rates in the cassette market are estimated at 40-50% and in the CD market at 60%, with even higher rates for international repertoire, according to recent reports. The move of police to taking *ex officio* actions may help but only if followed by convictions with significant deterrent penalties. It should also be noted that CD-R seizures continue to rise (over 100% from 2001 to 2002), indicating that this is becoming an increasing problem in India.

Piracy of music on the Internet is taking a toll as well. The local music industry established an Internet Anti-Piracy Group in 2002 and through year's end, 2484 sites were investigated and 633 sites containing local repertoire were identified as infringing. Only about 10% of these offending sites were locally based. Only 30 of these offending sites were taken down in 2002.

The publishing industry has been increasingly active, and with considerable success, in addressing piracy of published materials (in analog and digital forms). Results continued to be impressive in 2002. Significant raids involving large seizures continued in 2002. For example in

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<sup>11</sup> There have been a number of convictions for failure to use the required certificate on audio and videograms under Section 52A of the Copyright Act but virtually none under the Section 63B, the criminal piracy provision.

<sup>12</sup> By contrast, in 2001, 1,082 raids were conducted, with seizures of over 500,000 pirate audiocassettes, over 125,000 pirate CDs, a reported 383 cassette duplicating machines, and 86 CD-R burners.

January and February 2002, three warehouses of a notorious pirate were raided in Mumbai and 34,000 pirated copies seized. In May, a major pirate was arrested and again three warehouses emptied and printing presses seized. In September 2002, again in Mumbai, a major pirate “fixer” was raided, arrested and 12,500 pirated books seized. All in all, since 2000, the AAP/UK Publishers Association/local publishers anti-piracy program has raided 181 businesses, arrested 167 persons, seized more than 173, 400 pirated books, 1800 CD-ROMs, 3 printing presses, 44 copiers, 3 computers and 2 CD burners. While an excellent record with the result that pirated books have been cleared from many of the traditional markets, publishers have still not obtained a single conviction for book piracy. While 55 criminal cases have been filed (with the publishers’ lawyer undertaking a great deal of the work), no cases have yet been brought to trial, in part due to a failure by police and prosecutors to efficiently process cases. Furthermore, as do the other copyright industries, publishers face significant procedural hurdles to prosecution, including inadequate presumptions to prove subsistence of copyright. It is expected that 11 cases will be heard sometime in 2003. What is clear is that all these raids have revealed 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 and local book publishers. While publishers note that eight *ex officio* actions have now been instituted following on site training by publishers, without direct complaint by the right holder, they request that the government take a more proactive approach to anti-piracy activities in the publishing sector, including more frequent self-initiation of raids and effective post-raid prosecution, including time bound destruction of seized pirate stocks and imposition of deterrent penalties.

The MPA facilitated 206 police actions resulting in the seizure of 222,162 pirate VCDs, 3,687 DVDs and 1,270,190 inlay cards in 2002. As a consequence of some of the Police Cells (In Delhi, Bangalore, Cochin, Trivandrum, Mangalore, Hyderabad and Gurgaon) beginning to commence *ex officio* raids, (following intense lobbying by MPA and others) the criminal enforcement situation has improved somewhat and MPA has gone back to running more criminal raids. Since August 2002, virtually all raids run by MPA have been *ex officio* by police in Delhi and Bangalore. Raids have also been run in Ernakulum, Cochin and Gurgaon and lately in Hyderabad. Prior to this (and to this day in many cities), right holders were required to file a complaint with the complainant having to be ready to travel to a distant court at any time over a potential 10-year period (the average course of a criminal case in India). MPA determined to, in effect, stop its criminal program as a result and resort to civil actions, but recently more criminal cases have been run.

In November 2000, MPA ran the first raid on an optical disc facility engaging in pirate production. 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 revealed the increasingly damaging nature of optical disc piracy in India, and suggests a growing domestic production that previously didn’t exist or went undetected. Unfortunately, the plant has reopened and was raided again in January 2002.

The police training imparted by MPA for conducting *ex officio* raid actions also resulted in the police conducting an *ex officio* raid on another OD plant in Delhi in November 2002. This plant largely indulged in piracy of music, software and local film product.

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).<sup>13</sup> Since then, not a single criminal case has reached conclusion. By the end of 2002, the motion picture industry had 818 criminal cases pending in the courts.

The business software industry also began a program of criminal actions using the new determination of certain police cells to bring *ex officio* action against retail and wholesale pirates. The Delhi police conducted a number of raids in 2002 at the notorious Nehru Place, a hub for pirate software and also at the infamous Palika Bazaar. Police in Mumbai also conducted retail raids in the city. A total of 25 retail raids were conducted against software pirates in 2002 with large quantities of CD-ROMs being seized, many of which contained compilations of software programs from many different U.S. software publishers. Meanwhile, for the business software industry, 50 criminal cases against pirate resellers of software dating back to 1996 are still unresolved (81 in 2001). Fortunately, as a result of action taken by the Delhi High Court in 2002, some of these cases were compounded and allowed to be settled and removed from the crowded docket. Unfortunately, this does not provide the kind of deterrence needed. There are now five cases active in the criminal courts. Two of these were initiated in 1999 and 2000 and are active in the Hyderabad courts. Such cases, in places far from Delhi, add exponentially to the cost of supporting the case. Despite all this action and some progress in getting *ex officio* raids, there have only been two convictions to date. These cases were filed in 1999 and the convictions were obtained on February 6, 2003 in Hyderabad under Section 63 of the Copyright Act. The accused were sent to six months rigorous imprisonment with the fine of Rp 50,000 (US\$1,050), the minimum fine required under the Copyright Act. It should also be noted that for the first time in Chennai, a special Public Prosecutor was appointed in a BSA criminal action.

## **Lack of Deterrence, 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 and the government announced in 2002 the setting up of 19 such cells. Unfortunately, not all are even remotely active. The cells 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.<sup>14</sup>

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<sup>13</sup> 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 may have since been reversed on appeal.

<sup>14</sup> 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.

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 that 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, the police in many cities simply refuse to act *ex officio* and invariably require a complaint from the right holder. The police will then only seize the product of that right 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 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.

Fortunately this seems to be changing somewhat as noted above, with more *ex officio* actions now taking place. But despite this advance, convictions remain rare and deterrent penalties even rarer.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002					
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	BOOKS	TOTALS
Number of Raids conducted	206	25	1,140	181	1552
Number of cases commenced	206	11	NA	55	272
Number of defendants convicted (including guilty pleas)			126	0	126
Acquittals and Dismissals	4		NA	NA	4
Number of Cases Pending	813	74	NA	NA	887
Total number of cases resulting in jail time	Virtually all cases entail some pre-trial jail time		10	Pre-trial jail time	10+
Suspended Prison Terms	0		NA	0	0
Maximum 6 months	0		NA	0	0
Over 6 months	0		NA	0	0
Over 1 year	0		NA	0	0
Total Suspended Prison Terms	0		NA	0	0
Prison Terms Served (not suspended)	0		10	0	10
Maximum 6 months	0		NA	0	0
Over 6 months	0		NA	0	0
Over 1 year	0		NA	0	0
Total Prison Terms Served (not suspended)	0		10	0	10
Number of cases resulting in criminal fines	0		126	0	126
Up to \$1,000	0		126	0	126
\$1,000 to \$5,000	0		0	0	0
Over \$5,000	0		0	0	0
Total amount of fines levied	0		NA	0	0

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

## CIVIL ENFORCEMENT

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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, although defendants regularly challenge these injunctions and it can take up to five years before a contempt citation is actually enforced.<sup>15</sup> To date, the motion picture industry has filed 18 actions, 8 against some of the largest cable networks in the country and others against specific shops in some of the largest retail markets in the country and of late certain video libraries and video parlors. On November 26, 2002, for example, the Delhi High Court granted an injunction order covering any MPA film (past, present or future) against certain shops in the infamous “Palika Bazaar” and appointed a Court Commissioner empowered to conduct further investigations over a three-month period. This Commissioner has broad powers: to conduct surprise visits, to seize pirated goods and documents, and to force the shopkeeper to disclose pirate suppliers. Notices in this case were also issued to the landlord of “Palika Bazaar” ordering New Delhi Municipal Corporation (NDMC) to disclose details about the tenants. It is hoped that this action will eventually lead to NDMC canceling leases of pirate outlets.

The injunctions against cable networks have been as broad as to cover over 45 cities consisting of in excess of 8 million cable homes. Following these examples, almost every Hindi film released in India today is preceded by a civil injunction order. Such an order has almost become an industry norm. Four contempt proceedings have also been 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. In October 2002, an injunction was obtained against one of the Delhi’s larger cable networks—Home Cable Network—and in this case, the government ministries responsible for licensing the cable system was joined in the action and it is hoped that eventually an order will be obtained to cancel the license of cable operators that engage in unauthorized cable transmissions.

The MPA recently obtained an injunction barring unauthorized rental and importation against perhaps the largest video library in India.

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 brought against unauthorized use of business software in a business setting, so-called business end-user piracy of software. In 2002, BSA and an individual software company filed three civil actions (four were filed in 2001) and conducted civil raids with local commissioners appointed by the Delhi High Court.<sup>16</sup> During the period 1999 to 2002, BSA initiated 13 civil actions against corporate end user piracy. In each of these cases, interim injunctions and Anton Pillar orders were granted. Multiple plaintiffs were permitted to file combined actions, which brings a cost

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<sup>15</sup> 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.

<sup>16</sup> There have been 13 civil cases against pirate corporate end-users since 1999, and all but 3 have been settled. There are also 6 active civil cases against counterfeit resellers and computer resellers who load hard disks with pirated software prior to sale (so-called “hard-disk loaders”).

savings. Of these 13 cases, 10 have been concluded, with total damages recovered amounting to around US\$54,000. Two others are expected to be settled by May, 2003. The remaining one involves criminal contempt where the Division Bench of Delhi High Court has asked the defendants for full details of their software installations and use. 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. Changes to the Civil Procedure Code effective July 31, 2002 compressed the life of litigation, and a case can reach trial within 12 to 16 months.

While more properly labeled as an administrative action, 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. The first ever raid under that Act was conducted in November 2002. On a complaint made by the MPA, Mr. Chetan Ram, Sub-Divisional Magistrate, New Delhi conducted simultaneous raids on two cable networks, Bindra Communications at Gole Market and RM Video network at Udyan Marg. In addition to exhibiting pirate movies, these operators were also found violating a provision of the Delhi Entertainment and Betting Tax Act, 1996, and had not paid the necessary entertainment tax dues. R.M Cable network was not even registered as a cable operator. The Sub-Divisional Magistrate had sealed the entire equipment used for the broadcast and cable networks were completely shut down and the premises housing the cable networks were also sealed. The cable networks were only allowed to commence operations after almost 10 days with an undertaking from the owners to the effect that the said cable networks shall not violate / infringe the copyrights of any copyright holder. This should have a significant deterrent impact.

After many months of delay, authorized officers have been appointed to enforce the provision of the said Act. These included the District Magistrate, the Sub-Divisional Magistrate, the Commissioner of Police, the Entertainment Tax Commissioner and the Assistant Entertainment Tax Commissioner.

<b>CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2002</b>		
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>
Number of civil raids conducted	0	2
Post Search Action		
Cases Pending	18	9
Cases Dropped	0	
Cases Settled or Adjudicated	0	
Value of loss as determined by Right holder (\$USD)	1,875,000	
Settlement/Judgment Amount (\$USD)	0	



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

This overall criminal and civil enforcement record implicates India's TRIPS enforcement obligation in each area. Its enforcement system has the following deficiencies that render it incompatible with the TRIPS Agreement:

1. Maximum statutory fines are too low to deter major infringements; fines actually imposed are too low; and the reported requirement that actual knowledge be proved in criminal cases all violate TRIPS Articles 41 and 61.
2. There have been negligible criminal convictions for piracy in India since January 1, 2000 in violation of TRIPS Articles 41 and 61.
3. Court procedures are overly burdensome; courts are severely backlogged and there are massive delays in bringing criminal and civil cases to final judgment in violation of TRIPS Articles 41, 41(2), 42 and 61.

## What Needs to Be Done?

The Indian enforcement system is in need of very substantial reform. While some recent improvements have been seen such as increased *ex officio* criminal raids, pre-trial detention of criminal arrestees, broad civil injunctions with the appointment of powerful court Commissioners, all these welcome actions are only meaningful if right holders can pursue criminal and civil cases expeditiously and obtain quick and deterrent fines, jail terms, significant civil damages and effective contempt rulings with real teeth in them. The following actions and reforms must be made for India to reduce piracy and bring its enforcement system into compliance with its TRIPS obligations.

- Preferably a National Anti-piracy Task Force should be created to take criminal and civil actions against piracy. If this is not achievable, resources must be provided to the states to equip and train state IP Task Forces. The Home Ministry should take the lead in providing this training and resources and the Home Minister should issue a strong and widely publicized condemnation of piracy and the damage it is doing to India and urge all police forces to take immediate action to root it out;
- Specialized IP courts should be set up to get around the massive backlog of civil and criminal cases pending in the Indian court system. Failing that, chiefs of all the high courts should appoint special judges to try copyright piracy crimes and civil cases imposing deadlines for resolving them finally. These courts or special judges should at

least be responsible for completing a set number of “model” cases with deterrent penalties to deliver a message to the Indian public about piracy which has never been delivered;

- Significantly increase the number of *ex officio* raids against piracy at all levels. This will require a significant increase in the resources and manpower in the IPR cells and the local police forces;
- Reform the judicial system to prevent unjustified continuances; adopt case management techniques; eliminate court backlogs and focus on new cases and their speedy conclusion;
- Treat piracy as a serious economic crime which is undermining one of the strongest, fastest growing industries in India; impose deterrent penalties on pirates and establish clear standards for damages in civil cases, including implementing a statutory damage system which results in real deterrence;
- Adopt a modern OD law;
- Further modernize the copyright law and particular its enforcement procedures and penalty levels; bring the law fully into compliance with the WIPO treaties to prepare for the new era of e-commerce.

## DEFICIENCIES IN THE STATUTORY AND REGULATORY REGIME

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### 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\$1,050) and a maximum of two lakh rupees (US\$4,200). The minimum jail term was doubled to one year and the minimum fine increased to one lakh rupee (US\$2,100) 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\$1,050). 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 *never* 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. BSA has proposed the deletion of Section 52(1)(ad) to the Core Group now engaged in drafting amendments to the Copyright Act.

For the last three years, this Core Group of academics, government officials and local, Indian private sector representatives appointed by the Indian government has been considering amendments to the law to bring it into compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The work of this Core Group, despite its importance to the entire international community of right holders, has been conducted in secret with foreign organizations not being permitted officially to view the draft as it is being completed or to comment on it. IIPA urges the Government of India to open up this process fully to all interested parties, to release immediately the text of the draft of such amendments now being discussed. We believe the government can benefit from the wide experience of U.S. right holders, as well as other right holders and governments, that have been operating under new laws that have implemented these new treaties.

The Core Group is now considering some of the most important issues that will face all governments in modernizing its copyright infrastructure as e-commerce develops. These issues are equally critical to U.S. and Indian copyright holders, including: protection for temporary reproductions; defining the scope of the “communication to the public” right; presumptions to assist right holders in exercising and enforcing their rights; providing for the full and Treaties-compatible protection for technological protection measures that right holders use to protect their digital, and easily copied and transmitted works from unauthorized access and from copyright infringement; the protection of rights management information; and the application of limitations and exceptions to subject matter, including computer programs, and rights in the digital environment; and the establishment of clear secondary liability of Internet Service Providers and an effective notice and takedown system. IIPA urges the USG to engage immediately with the Government of India on these critical issues before a draft is introduced into the Indian Parliament.

## **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 that 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 Programme Code. If any of these "Authorized Officers" has reason to believe that the Programme Code has been or is being contravened by any cable operator, they have been empowered to seize the equipment being used by the cable operator for operating the cable television network. These "Authorized Officers" are also empowered to prohibit any cable operator from transmitting or re-transmitting any program or channel that 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 only 2 (and very recent) cases of seizure of the equipment by authorized officers under the act, despite it having been in operation for over two years (since September 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 2002, \$1.8 billion worth of Indian goods (or 16.9% of India's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 52% increase over the same period in 2001. As India caused losses to the U.S. due to piracy of \$468.1 million in 2002, 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

## 2003 SPECIAL 301 REPORT

# INDONESIA

### EXECUTIVE SUMMARY<sup>1</sup>

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**Special 301 recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List.

**Overview of key problems:** The huge Indonesian market remains dominated by piracy of virtually all kinds of copyrighted materials. Enforcement efforts have been sporadic and uncoordinated, rarely lead to effective prosecutions, and almost never result in convictions of pirates with deterrent sentences imposed. Indonesia continues to be a safe haven for optical media piracy (CD, VCD, CD-ROM, and increasingly DVD), so production facilities have relocated there and established distribution, retail, and export channels which must be disrupted, using the enforcement tools that a comprehensive optical media regulatory regime could provide. Chronic problems of book piracy and end-user software piracy also continue unabated. The audio-visual sector in particular encounters significant barriers to market access, which exacerbates the piracy problems they face. The 2002 revision of copyright law remedied a number of TRIPS deficiencies, but several critical shortcomings remain, notably the need to modernize legal rights of record producers and to extend terms of protection across the board.

**Actions to be taken in 2003:**

- Adopt and begin to enforce a comprehensive optical media regulatory regime that covers import and use of raw materials, production equipment, and facilities.
- Establish a national coordinating body for intellectual property rights enforcement, reporting to an official at the highest levels.
- Carry out sustained enforcement activities against production facilities, distribution channels, and retail outlets used by optical media and book pirates.
- Employ new statutory authority for criminal enforcement against end-user software pirates, while stepping up training and education efforts.
- Improve training and performance of prosecutors and judges in IPR cases, while issuing sentencing guidelines that call for deterrent sentences.
- Allow foreign audio-visual producers to participate directly in importation and distribution of their product, and relax bans on foreign investment in media businesses.
- Ratify and implement the WIPO Performances and Phonograms Treaty and give record producers the exclusive right to control online dissemination of their products.
- Extend duration of copyright protection to follow international trends.
- Implement the new copyright law with detailed provisions on technological protection measures that safeguard copyrighted materials.

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

**INDONESIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002 <sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	28.0	90%	27.5	90%	25.0	90%	25.0	90%	25.0	90%
Records & Music <sup>3</sup>	92.3	89%	67.9	87%	21.6	56%	3.0	20%	3.0	12%
Business Software Applications <sup>4</sup>	102.9	90%	63.1	88%	55.7	89%	33.2	85%	47.3	92%
Entertainment Software	NA	NA	NA	NA	NA	99%	80.4	92%	81.7	95%
Books	30.0	NA	30.0	NA	32.0	NA	32.0	NA	30.0	NA
<b>TOTALS</b>	<b>253.2</b>		<b>188.5</b>		<b>134.3</b>		<b>173.6</b>		<b>187.0</b>	

## 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. At the same time, price competition among pirates continues to drive prices down. According to published reports, pirate VCDs sell for as little as Rp5000, or approximately US\$0.56 (*cf.* Rp50,000 or more for legitimate VCDs).<sup>5</sup> Piracy of DVDs, which was first detected in mid-2001, is escalating even more rapidly, with a price war driving street prices down to Rp22,000 (about US\$2.50) by late 2002. At this price, DVD piracy is disrupting the legitimate VCD market, to say nothing of legitimate DVDs, which generally retail for Rp 140,000-200,000 (US\$15.80- 22.55). Pirate VCDs and DVDs appear in

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> 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.

<sup>4</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$32.9 million at 87% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> Lubis, "RI to set up property rights task force," *Jakarta Post*, 18 January 2003, at 4.

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 Motion Picture Association of America (MPAA) estimates that piracy rates for audio-visual material in Indonesia remain at 90%, causing trade losses of \$28 million in 2002.

The situation is similarly bleak for other copyright industries. The local recording industry association, estimating that six of every seven sound recordings in the market are pirate, and noting that monthly sales have plummeted over seventy percent since 1997, says that it is “on the brink of extinction.”<sup>6</sup> The Recording Industry Association of America (RIAA) estimates that piracy levels in Indonesia have climbed to 89%, more than seven times the rate in 1998, causing \$92.3 million in losses to the U.S. recording industry in 2002.

Software piracy in all its forms remains rampant throughout Indonesia. Pirate product is readily available at retail, and unauthorized copies of business software applications are prevalent in businesses and public institutions throughout the country, due to corporate end-user piracy. The Business Software Alliance estimates that the piracy rate in Indonesia climbed to 90% in 2002, causing losses estimated at \$102.9 million.

Until several years ago, the vast majority of pirate optical media product in Indonesia was imported or smuggled into the country from elsewhere, but now there is clear evidence of widespread domestic production of pirate optical media products. Illicit factories from Malaysia continue to relocate to Indonesia, and current estimated optical media production capacity far exceeds the possible legitimate demands. An estimated 36 production lines for VCDs are located in Indonesia, mainly in the Jakarta area, but also in Surabaya and Batam. At least six plants also have the capacity to produce “stampers,” or unauthorized masters for further optical media production. Most pirate DVDs in the market are still imported from Malaysia, but reports in September 2002 indicate that facilities in Jakarta are now producing pirate DVD discs. As soon as DVD player prices fall further and become affordable for more Indonesians, demand will increase and the pace of domestic pirate DVD production is expected to ramp up.

The infiltration of organized criminal enterprises engaging in massive optical media production in Indonesia demands a swift and sustained response. As discussed below, Indonesia must promptly implement a comprehensive regulatory and reporting regime for optical production, including controls on production equipment, raw materials, and facilities. It also needs to dismantle its onerous market access barriers so that legitimate optical media product will be available to satisfy growing demand.

## **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 illegal reprints or unauthorized translations of U.S. books. Photocopy shops in and around universities are becoming more aggressive and increasing the volume of

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<sup>6</sup> Moestafa, “Indonesia’s record industry dying as piracy gets worse,” *Jakarta Post*, 3 February 2003, at 4.

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. The Association of American Publishers (AAP) estimates losses due to piracy in Indonesia at \$30 million for 2002.

Although Internet piracy is not prominent due to low Internet penetration rates, the few infringing sites identified to date give rise to great concern. Indonesian sites (including those linked to educational institutions) that host infringing MP3 files have generally not responded to cease-and-desist letters sent by the recording industry.

## COPYRIGHT ENFORCEMENT IN INDONESIA

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002	
ACTIONS	MOTION PICTURES
Number of raids conducted	35
Number of cases commenced	17
Number of defendants convicted (including guilty pleas)	
Acquittals and dismissals	
Number of cases pending	16
Total number of cases resulting in jail time	
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)	
Number of cases resulting in criminal fines	
Up to \$1,000	
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied (in US\$)	

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS 2002	
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



## Some Enforcement Continues, but Without Needed Coordination or Follow-Up

Indonesia's efforts to enforce its copyright law against pirates during 2002 were sporadic at best. Raids were carried out against some retail outlets for pirate optical media products, and even against a few factories, but the effort devoted by the government to enforcement continues to fall very far short of what is needed to respond to the country's massive piracy problems. The great majority of these raids were instigated by right holders, not by police acting on their own volition. Government officials at the highest levels have denounced piracy, but concrete results in terms of consistent and coordinated enforcement have never materialized.<sup>7</sup>

The lack of coordination of enforcement resources has been a chronic problem in Indonesia, and IIPA has long advocated 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. Early in 2003, an intellectual property rights official in the Ministry of Justice and Human Rights announced that an inter-agency task force reporting to that ministry would be established.<sup>8</sup> While co-ordination at this level should certainly be encouraged, the success of this body will largely depend on whether its membership includes high-ranking police, customs, and prosecutions officials with direct responsibility for intellectual property enforcement action by their departments. This remains to be seen.

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 by police and prosecutors, 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. For example, of a total of 41 cases filed by the motion picture industry with the police in 2002, prosecutors have taken action on only 3, and not one has yet gone to trial.

The problem is typified by one of the only criminal prosecutions to result in conviction of a commercial pirate in 2002. The defendant had been found in possession of over one million pirate and pornographic VCDs, and was a major distributor of pirate optical media product in Jakarta. He was sentenced to pay a fine of about US\$1,500 and to serve 21 months in prison. However, in fact, he spent no significant amount of time in prison, and within a short time was back on the street, continuing his piratical activities where they left off, and even becoming a more significant pirate player, by some reports. When a prosecution of a major pirate figure produces this result, it is no wonder that piracy is seen as an attractive, profitable, and low-risk business in Indonesia.

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

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<sup>7</sup> See "President Calls for Integrated Program to Eradicate Piracy," Organisation of Asia-Pacific News Agencies, 26 April 2002.

<sup>8</sup> Lubis, op. cit.

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 that 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 providing for deterrent penalties in IPR cases should be issued to dispel the notion that piracy deserves only nominal punishment. A longer-term solution must look toward the establishment of a specialized criminal IPR court in Indonesia, along the lines of the model that has proven successful in Thailand. The newly adopted copyright legislation, which gives specialized commercial courts jurisdiction over civil 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. In addition, the copyright law does not come into force until July 2003, leaving the old law with all its inadequacies still in place.

Addressing the serious problem of corporate end-user piracy of business software applications requires not only copyright enforcement, but also training and education about proper software asset management (SAM) practices. The criminalization of corporate end-user piracy in the 2002 copyright law amendments was a positive step, but, as previously noted, the amendments do not come into effect until July 2003. During this interim period, the government should work with industry to educate businesses on SAM and the changes to the copyright law. In September 2002, the Minister of Justice and Human Rights keynoted an industry-sponsored corporate end-user seminar in Jakarta on the importance of using legal software. In February 2003, BSA and the Directorate General of Intellectual Property held a press conference to highlight the problem of software copyright violations and plan to combat corporate end-user piracy.

## **MARKET ACCESS BARRIERS FOR U.S. COPYRIGHTED PRODUCTS**

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For years, Indonesia has enjoyed the dubious distinction of being one of the markets in the world least open to U.S. copyrighted products. Despite economic reforms and liberalization in other sectors, the overarching market access barrier affecting the copyright industries remains in place: the blanket prohibition on foreign company participation in, or even investment in, importation, distribution, 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,<sup>9</sup> 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.<sup>10</sup>

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%. 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\$450) 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 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.

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<sup>9</sup> Presidential Decree No. 96 of July 2000, later ratified by Decree 118 of August 16, 2000.

<sup>10</sup> A new broadcast bill currently under consideration within the government would allow some minority foreign investment in private broadcasting institutions in the future, but would also impose content and dubbing quotas that would impede access of U.S. audio-visual producers into this new sector.

# **COPYRIGHT LAW AND RELATED ISSUES**

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## **Optical Media Legal Controls Need to Be Implemented**

For the last several years, as Indonesia has experienced a growing problem of optical media piracy, it has lacked the legal tools needed to confront and control this destructive phenomenon. Today, due largely to the decisions of international criminal syndicates to move illegal optical media plants from Malaysia and elsewhere in Asia to Indonesia, the country has enough illegal production capacity within its borders not only to supply the domestic pirate market, but to export damaging optical media piracy to foreign markets. Thus it is past time for Indonesia to follow the lead of some of its neighbors and 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.

An important milestone on the path toward success in this effort was passed in 2002 when, as part of the new copyright law (see discussion below), the Indonesian government acquired clearer statutory authority to issue and enforce regulations to license optical media production facilities (see Article 28 of the new law). Now Indonesia must move as quickly as possible to translate this authority into reality. 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.

Much of the groundwork has already been laid. An interagency drafting committee with representatives from the Department of Industry and Trade, the Ministry of Justice, Customs, the police, and interested industry representatives began during the summer of 2002 on regulations to implement Article 28 by regulating raw material, production equipment, and facilities needed to produce optical media. These regulations should be finalized and sent to the President for signature in order for them to take effect as soon as the new copyright law comes into force on July 29, 2003. Of course, aggressive implementation of the new regime is the key to success: once new legal tools in the fight against optical media piracy are made available, they must be used vigorously. 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.

## **Copyright Law Amendments Enacted**

For over five years after 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 had been at a standstill. That changed in July 2002 when a comprehensive revision of the copyright law was enacted (although it does not take effect until July 2003). IIPA is still reviewing an unofficial translation of the new law, but it is clear that when it takes effect, it will remedy many of the shortcomings of

the current law that kept Indonesia from full compliance with its obligations under the WTO TRIPS Agreement, even after January 1, 2000 compliance deadline. For example, under the new law:

- End-user piracy of computer software is clearly defined as a criminal offense under Article 72(3) of the new law, which prohibits unauthorized copying of programs “for commercial purposes”;
- Criminal liability for violations of the neighboring rights of a sound recording producer are more clearly provided for;
- Provisional measures such as *ex parte* seizures—a crucial enforcement tool in software piracy cases especially—are made available under Articles 67-70 of the new law, as TRIPS Article 50 requires;
- Criminal penalties are increased in many cases, to levels that could be deterrent if aggressively applied in practice, and minimum penalties have been provided for some offenses under Article 72(1);
- The definition of “duplication” now makes specific reference to temporary copies as falling within the scope of the copyright owner’s exclusive rights;
- Article 73(1) requires confiscation and destruction of the tools used to commit copyright piracy as well as of pirate copies;
- Terms of protection for all works now appear to meet TRIPS minima.

The copyright law revision also moved Indonesia forward in its efforts to implement the WCT. These steps include:

- Inclusion of Internet dissemination within the scope of the author’s exclusive rights over publication or “announcement”;
- Basic provisions (in Articles 25 and 27 respectively) to safeguard rights management information and technological protection measures used to protect copyrighted materials. However, the protections in these areas will need to be much more detailed and specific before full WCT compliance can be achieved.

In sum, this wholesale rewrite of Indonesia’s copyright law is a significant step forward in copyright reform. However, substantial concerns remain unaddressed. While our review of this new law is continuing, and some other problems may be identified, three main concerns have already emerged which the Indonesian government should be urged to resolve promptly.

First, the new law reflects the continuing inability or unwillingness of Indonesia to modernize its protections for performers and producers of sound recordings to meet evolving global norms. While Indonesia’s prompt ratification of the WCT set an excellent example for its neighbors, its failure to ratify the companion WIPO Performances and Phonograms Treaty (WPPT) has long been cause for concern. The new copyright law does little or nothing to enable Indonesia to comply with the new global norms embodied in the WPPT. Most important in this regard, producers of sound recordings must be granted exclusive rights to control the

dissemination of their products over the Internet, similar to the broad “publication” or “announcement” right accorded to authors of other copyrighted works. (In addition, Indonesia should move as quickly as possible during 2003 to cure its anomalous position in international copyright fora 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.)

Second, Indonesia missed a critical opportunity to modernize its law in line with international trends by extending the term of protection for all protected materials beyond the minimum levels required by the Berne Convention and WTO/TRIPS. This omission is likely to become more problematic as other countries in its region adopt copyright term extension legislation, or take on bilateral obligations to do so.

Finally, it is disappointing that Indonesia chose to delay the effective date of all the needed reforms to its copyright law for a full year. It should use that hiatus wisely by crafting strong implementing regulations, particularly on critical topics such as outlawing tools to circumvent technological protection methods, so that when the law comes into force it will have a better chance of achieving its objectives.

## **Other Legislation/Regulations**

Indonesia’s border control measures leave serious gaps that must be filled to ensure that Indonesia is providing full TRIPS-compatible protection, and could be further strengthened.<sup>11</sup> 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, but there has been no further progress since then.

Two separate drafting teams from two universities are working on draft “cyber laws.” The University of Indonesia’s draft deals with e-commerce and related matters and responds to instructions from the Ministry of Trade and Industry. The University of Padjaran’s draft focuses mainly on technology matters as its instructions came from the Department of Posts and Telecommunications. A new cyber law is slated to be implemented by 2004.

## **Generalized System of Preferences**

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 provides “adequate and effective protection for intellectual property rights.” In 2001, \$1.3 billion worth 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 2002, \$1.4 billion worth of Indonesian goods (or 15.6% 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 13.6% increase over the same time period in 2001. Indonesia’s failure to address effectively the endemic problem of copyright piracy creates serious questions about whether it meets the criteria for continuing favorable treatment under the GSP program.

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<sup>11</sup> 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# ISRAEL

### EXECUTIVE SUMMARY<sup>1</sup>

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Israel should remain on the Priority Watch List, due to its failure to criminalize and enforce against the unlicensed use of software in a business setting, so-called corporate “end-user” piracy of business software, in violation of TRIPS.

Israel was elevated to the Watch List for the first time in 1997, in recognition of rapidly growing CD piracy. In 1998, in recognition of both CD piracy and an antiquated law, as well as the end-user piracy problem, Israel was elevated to the Priority Watch List. It has remained there since.

Recognizing the ongoing security problems and violence that have plagued Israel for more than two years, and recognizing that Israel is no longer the source of pirate production of optical discs for export that it once was, at least one chief reason remains for keeping Israel on the Priority Watch List this year: the utter failure of the government to criminalize and address the massive problem of corporate end-user piracy of business software. Israel took a major step backwards in 2002 by carving out end-user piracy from the criminal liability provisions of the Copyright Ordinance amendments (which were otherwise generally strengthening measures, and went into effect November 3, 2002). Failure to criminalize corporate end-user piracy of business software is a violation of Article 61 of TRIPS, and represents substantially worse treatment for the business software industry than may have been available a year ago. Proposed coordination between the police and customs is welcomed. On another positive note, the first successful judgment in a civil case against a corporate end-user pirate of business software was handed down in 2002.

Required actions for 2003:

- Amend Section 10(c) of the Ordinance to explicitly criminalize corporate end-user piracy of business software (by amending that article to provide, “any person **who uses**, sells hires or distributes an infringing copy of a work in a commercial scale or **to such an extent as to affect prejudicially the owner of the copyright** is committing an offence”).
- Fortify Special Police IPR Units with significantly more manpower, ensure that they use *ex officio* authority to bring about raids in critical mass to deter piracy, and allow the National Police Unit to coordinate districts, for more effective and sustained enforcement.
- Instruct police attorneys and prosecutors to expeditiously handle incoming copyright piracy files as a matter of priority and proceed with criminal prosecution of pirates within short periods of time.

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<sup>1</sup> For more details on Israel's Special 301 history, see IIPA's “History” Appendix to this filing.

**ISRAEL**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	50%	15.0	50%	15.0	50%	15.0	50%	11.0	40%
Records & Music <sup>3</sup>	34.0	50%	40.0	25%	45.0	30%	70.0	45%	60.0	40%
Business Software Applications <sup>4</sup>	NA	39%	36.9	40%	51.3	41%	54.8	44%	47.8	48%
Entertainment Software <sup>5</sup>	17.2	68%	66.5	89%	52.0	NA	30.9	54%	28.5	55%
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	0.7	NA
<b>TOTALS<sup>6</sup></b>	<b>82.2</b>		<b>159.4</b>		<b>164.3</b>		<b>171.7</b>		<b>148.0</b>	

## COPYRIGHT PIRACY IN ISRAEL

Copyright piracy continues to hurt copyright owners trying to do legitimate business in Israel. It also hurts the Israeli government, which cannot collect tax revenue and accrue other social and economic benefits from legitimate copyright industries.<sup>7</sup>

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> The recording industry losses and levels include domestic losses/levels as to U.S. repertoire only, and do not include, as in some previous years, estimate of losses due to export piracy. The legitimate market in Israel suffered terribly in 2002, and indeed, pirate unit sales also decreased, although much less so than the decrease in sales of legitimate units.

<sup>4</sup> BSA's estimated piracy losses for 2002 are not available, and piracy levels for 2002 are preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$40.0 million at 39% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> IDSA has revised its methodology for deriving the value of pirate videogame products in-country. IDSA reports that the decrease in the value of pirated videogame products in Israel in 2002 appears to be due primarily to the methodological refinements which allowed IDSA to more comprehensively evaluate the levels of piracy in the personal computer (PC) market.

<sup>6</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Israel were \$162.5 million. Because BSA's losses and levels were revised, estimated total losses to the U.S. copyright-based industries in Israel in 2000 are adjusted to \$159.4 million.

<sup>7</sup> By their very nature, pirates operate underground, hidden from the eyes of the law and tax authorities. Since piracy along with counterfeiting involves a considerable volume of undeclared/unreported business activity, Israel suffers a significant



- **Corporate End-User Piracy of Business Software.** A large portion 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. Corporate end-user piracy affects not only U.S. companies, but also local Israeli software producers.<sup>8</sup> Unfortunately, the Israeli government, instead of taking action to support trade and the growth of local industry, substantially rolled back protection against this most financially devastating form of business software piracy.
- **CD-R Piracy.** The method of “burning” content onto CD-Rs has slowly become the method of choice for pirates since the pirate optical disc production-for-export problem was resolved in Israel. For example, in 2002, roughly 90% of the pirate music market was “burned” CD-Rs (while only 10% of the pirate music market in 2002 remained imported CDs from faraway loci such as Russia and Thailand). The recording industry notes a climb in overall piracy levels (all repertoire, including Israeli, International, and U.S.) to 50%, largely because of CD-R “Burning.”<sup>9</sup> Stores in major marketplaces, including in Tel Aviv, Haifa, and Herzlia engage in “in-store burning” of major motion picture titles, as well as their own CD-R compilations of games and business software, sometimes putting hundreds of software titles onto a single CD-R.<sup>10</sup> CD-R burning operations are also the main source of pirate entertainment software in Israel, although factory produced (silver discs) pirate personal computer (PC) games continue to be shipped from Russia. Piracy of PlayStation® games continues on a massive scale, though piracy of games for the PlayStation2® platform is not yet sizeable. Pirate entertainment software product can still be found in retail stores, though the primary source of pirate videogames is flea markets. The popularity of CD-R piracy in the motion picture industry is increasing because of the availability of subtitles on the Internet that can be overlaid onto a movie that has also been downloaded from the Internet.
- **Optical Disc Piracy.** Manufactured optical discs (CDs, CD-ROMs, VCDs, DVDs) remain popular in Israel, although, as noted, they made up a smaller percentage of pirate music and audiovisual works than in the past, being replaced rapidly by the “burned” CD-R. At the same

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loss in revenues. In 2002, several copyright-based and other industries affected by counterfeiting estimated that Israel loses at least NIS 500 million (US\$102.8 million) due to unreported sales of pirated/counterfeit goods (VAT, custom duties, purchase tax, income tax).

<sup>8</sup> A number of Israeli companies have recently approached the BSA for membership, concerned that piracy is negatively impacting their businesses.

<sup>9</sup> The domestic retail piracy situation for recorded music is worse now than at the height of optical disc production for export. Ironically, the situation has gotten worse for local music as the use of Special IPR Police Units in Israel has increased. During the late 1990s, the recording industry was battling massive optical disc pirate production for export, both through private channels and through the use of civil proceedings. After all avenues were exhausted, the Israeli government filed specific criminal claims against pirate optical disc plants and their owners. All concerted actions (including civil actions, in which raids could be taken any time, including weekends or holidays) succeeded in weeding out pirate production for export, and the music piracy level fell to 20%. By the end of 2000, the recording industry reported that only seven pirate sales points were active in “Carmel Market” and “New Central Bus Station” in Tel Aviv. By contrast, piracy now accounts for 50% of the market. In 2002, as in the late 90s, dozens of market stalls are back in Israel (30 or so in Carmel Market and New Central Bus Station) selling pirated CDs.

<sup>10</sup> Raids on such market vendors are usually non-deterrent, as pirates replace one vendor who has been caught with another without a criminal record in order to minimize the possible penalties to the offender.

time, the audiovisual industry began to suffer more directly from OD piracy in 2002; the average cost of a VCD/DVD player was the same as that of a VCR in Israel, and pirate VCDs and DVDs imported from Asia and from Russia became widely available at street and flea markets, as well as advertised on the Internet. Nonetheless, there were not significant seizures of pirate VCDs and DVDs in 2002.<sup>11</sup> Parallel imports of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) are still widely available in Israel. Russian-language business software products remain in plentiful supply. Pirate factory-produced entertainment software (mostly of console games), imported from Turkey, Eastern Europe and Asia, can be found in flea markets and small retail shops. “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 the game companies (and the pirates) transition to newer formats.

- **Videocassette Piracy.** The current security situation in Israel has affected the videocassette piracy market. In the past, thousands of videocassettes a day were entering the country from Palestinian Authority-controlled areas. The number produced and sent into Israel has now fallen dramatically, but local Israeli labs have taken up the slack, and seizure levels are about the same as they were in previous years.<sup>12</sup> The level of piracy in retail stores is estimated to be 20%, and ALIS (the local anti-piracy organization working on behalf of the motion picture industry) now puts the overall rate of video piracy at about 50%.
- **Internet Piracy.** As a country that prides itself on its technological know-how, Israel is fast becoming a hot spot for piracy over the Internet. Israel now boasts 1.94 million Internet users.<sup>13</sup> Dozens of Internet sites are taking advantage of this increasing percentage of Netizens, by listing stores that will “custom burn” content onto CD-Rs and ISPs are aggressively advertising their broadband capacity in connection with the possibility to download copyrighted content at high speeds. The borderless nature of the Internet also means that such piracy needn’t be hemmed in by national boundaries – those same sites and stores also deliver pirate content anywhere in the world. Sites hosted in Israel have been found to contain illegal downloads, “cracks,” “serial numbers” and other information to circumvent copy protection.

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<sup>11</sup> ALIS (the local anti-piracy organization working on behalf of the motion picture industry) seized 18,786 illegal VCDs and 1,858 DVDs in 2002. Pirate DVDs have recently declined in popularity due to importation problems and the absence of Hebrew subtitles.

<sup>12</sup> The motion picture industry estimates a pirate market of about 1.5 million pirated cassettes/disks being sold to the public each year in Israel. According to intelligence information, close to 30 pirate recording/duplication studios operate within Israel and the territories of the Palestinian Authority, which distributes about 2,000 counterfeit cassettes and disks a day. The average number of VCRs used to produce the pirate cassettes in each studio ranges from 20 to about 200 VCRs (found in a large pirate studio located within the territory of the Palestinian Authority). Within Israel, those running pirate studios are usually ex-cons, who for some reason found in this occupation a way to make an easy profit and the sense that they are not committing an offense that would draw the attention of the law enforcement agencies in Israel. The owners of the pirate studios within the territories of the Palestinian Authority maintain business contacts with Israeli cons with whom they jointly run these pirate studios. The Israelis are usually the ones that set up the distribution networks in Israel. According to assessments of the intelligence agencies, there are about 40-50 big distributors who receive the cassettes/disks from the pirate studios, which they distribute on the markets and in stores on order.

<sup>13</sup> The World Factbook reports that there were 21 Internet service providers in Israel as of 2000, with 1.94 million users as of 2001. See <http://www.odci.gov/cia/publications/factbook/geos/is.html#Comm> (citing Nielson NetRatings to derive the Internet universe of 1.94 million users as of July 2002).

- **Public Performance Piracy of Motion Pictures.** Illegal public screenings continue to be a problem in cafes and pubs, one that has grown since the introduction of pirate DVDs/VCDs and new sophisticated performance equipment.
- **Book Piracy.** While there are relatively few pirate producers of published materials in Israel, police raids conducted in 2002 yielded seizures of tens of thousands of pirate books produced in the Palestinian Territories and brought into Israel.<sup>14</sup> Such reprint pirated books are distributed in stores as original products, selling for full price, thereby making it difficult for consumers and enforcement officers to identify. Moreover, there is a serious problem involving the photocopying and reproduction of textbooks by various educational institutions, from elementary schools to universities. These activities are carried out privately by students and by teaching staff in various institutions, who produce study files that include reproduced material. In the field of photocopy reproductions, several business organizations operate openly and undisturbed.

## COPYRIGHT ENFORCEMENT IN ISRAEL<sup>15</sup>

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)		

<sup>14</sup> One recent example involved the pirate photocopying of 60,000 copies of a best selling novel by author Tzruya Shalev, which were distributed on the market at half the market price of the legal publication.

<sup>15</sup> In 2002, several industry groups affected by piracy and counterfeiting in Israel, assembled a work plan for fighting piracy and counterfeiting. IIPA agrees that the plan set out presents a laudable set of goals for the Israeli government to achieve. The essential features of the plan are to involve the joint activity of various government ministries and enforcement agencies. For example, the Ministry of Industry & Commerce would be assigned to visit business establishments and markets and to exercise their authorities, including confiscation of goods and imposing fines. The Ministry of Finance would allocate resources as part of the State budget to fight piracy and counterfeiting, earmarking at least 50 positions for a special police unit (as noted below, in 2002 there were only 22 positions of the Special IPR Police Unit filled). The MOF would also incorporate the Income Tax and VAT commissions in comprehensive activity, and investigate piracy and counterfeiting activities on its own in order to reap tax and VAT benefits for the State. The Ministry of Justice would update legislation to further stiffen penalties, including against corporate end-user piracy of business software. The MOJ would continue activities aimed at raising awareness among judges of the importance of IPR and the need to impose deterrent punishment. The Ministry of Internal Security would allocate more positions for the Special IPR Police Units and fill those positions already allocated, and increase the frequency of raids, and shorten the time from the filing of a complaint to enforcement of the law. The Ministry of Education would initiate an educational project concerning intellectual property that would incorporate as part of the homeroom class a set of lessons on intellectual property and wise consumer habits, and regulate the practice of photocopying and duplication of books in the possession of the educational institutions, which today constitutes copyright infringement as well as payment of royalties for their use.

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 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)	

#### ISRAEL CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES
Number of raids conducted	
Number of cases commenced	319
Number of defendants convicted (including guilty pleas)	61
Acquittals and dismissals	0

Number of cases Pending	612
Total number of cases resulting in jail time	1
Suspended prison terms	
Maximum 6 months	
Over 6 months	1
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)	1
Number of cases resulting in criminal fines	60
Up to \$1,000	
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied (in US\$)	

#### ISRAEL CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES
Number of civil raids conducted	350
Post-search action	226
Cases pending	759
Cases dropped	
Cases settled or adjudicated	163
Value of loss as determined by right holder (\$USD)	
Settlement/judgment amount (\$USD)	

### New Law Lacks Criminal Remedy Against Corporate End-User Piracy, But Civil Actions Against End-User Piracy Successful in 2002

The new Copyright Ordinance amendments (discussed below), while strengthening criminal penalties against piracy in general, were formulated specifically to exclude corporate end-user piracy of business software from criminal liability. This exclusion makes it legally impossible to take criminal actions against corporate end-user pirates, and indicates to businesses that they needn't consider unlicensed use of software a serious form of piracy. As a result, the Business Software Alliance's educational and public relations campaigns aimed at educating the public on the detrimental harm inflicted on software developers/right holders due to unlicensed software usage cannot be effective.

It remains the case in Israel that no person has ever spent a day in jail or been fined for unlicensed use of software in a business setting. Now that a criminal remedy has explicitly been excised from the law, the only possible avenue is civil relief. In 2002, the Israeli courts began to respond more favorably in civil cases against corporate end-user pirates. For example, in August, 2002, the Haifa District Court delivered a favorable civil judgment against an end-user pirate (a company involved in end-user piracy and its manager), awarding NIS210,000 (US\$45,000) in damages. Notably, the award was based on the lower end of Israel's statutory damages system

(approximately US\$2,000 per title, not per copy).<sup>16</sup> Another important decision implicating end-user piracy was delivered by the Jerusalem District Court in November, 2002, in which the court held that the separation of the genuine end-user license from the genuine physical software (CD) amounted to a breach of the license agreement.<sup>17</sup> [Upheld in the Supreme Court decision of 29 January 2003 (reference motion for leave for appeal 10994/02).] Finally, IIPA learned of a raid in January 2003 against a major company to determine whether there was any end-user piracy of software.<sup>18</sup> Nonetheless, positive case results as these do not hide the overall lack of deterrence in the system caused by lack of a criminal remedy to fight corporate end-user piracy of software.

## More Raids and Seizures in 2002 Against Piracy, But ...

All the copyright industries had their share of positive raids in 2002. The Business Software Alliance reports that in 2002, there were 173 police seizures (complaints filed to the Police, not *ex officio* actions), 9 customs seizures and 6 seizures in conjunction with civil/criminal actions brought against piracy. These raids resulted in the seizure of well over 90,000 pirate discs, broken down into 68% PlayStation® games, 15% business software applications, and 17% games for personal computer.<sup>19</sup> However, these cases also demonstrate the high prevalence of piracy and do very little to address the more significant economic loss represented by end-user piracy of business software.

The Motion Picture Association, through its local organization, ALIS, continued to be highly successful carrying out raids in 2002, resulting in the seizure of thousands of pirate products.<sup>20</sup> Many of these raids were conducted against CD-R burning laboratories that were producing large amounts of pirate discs. These raids often netted 10 or more CD burners and pirate DVDs that were being used as masters. The police have also stepped up their actions against retail stores carrying pirate product. One indication of increasing boldness on the part of Israeli enforcement authorities is that they raided a pirate optical disc plant near Ramallah in the West Bank town of Beitunya in

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<sup>16</sup> The case was followed by substantial PR and media coverage. See Civil File 554/00 in the District Court of Haifa, dated August 4, 2002.

<sup>17</sup> See *Microsoft Corporation v. Agama Ltd.* (Jerusalem District Court, Civil Case 4219/02), November 11, 2002. The Judge in the case also held, for the first time ever in Israel, that the doctrine of “contributory breach” (a tort doctrine) applies to copyright in addition to patent. In this context, the sale of a license separately from the media contradicts the terms of the license, thus the sale of that “worthless” license contributes to a tort, namely, infringement of copyright committed by the end-user who has purchased the (worthless) “license.” In marketing the license separate from the medium, the defendant assisted in the “authorization” of illegal software and in doing so prejudiced the intellectual property of the claimant in the case.

<sup>18</sup> Sapir Peretz, *BSA Raids ORS Office to Look for Pirate Software*, Globes, Jan. 12, 2003, at <http://www.globes.co.il> (describing the BSA action against ORS Human Resources in the Tel Aviv District Court, in which it is suspected ORS is using NIS250,000 worth of unlicensed software; the Tel Aviv District Court issued a search warrant for the ORS offices in Tel Aviv, and the company's computers were examined to see whether they carried pirated Microsoft software).

<sup>19</sup> Civil enforcement statistics for the business software community in 2002 indicate three civil raids conducted, two cases pending, and five cases settled, for total damages collected amounting to \$96,096.

<sup>20</sup> For example, on May 21, 2002, ALIS working with the police raided an optical disc lab in Netanya, seizing ten CD-R burners, two color copy machines, 103 pirate VCDs, hundreds of pirate PlayStation games, and 69 pirate videocassettes. One suspect was arrested] In another raid, an optical disc pirate was raided on Sept. 11, 2002, in Ashdod city after months of investigation. Pirate CD-Rs of Disney's films including 100 copies of *Monsters Inc.*, as well as 280 pirate CD-Rs containing other films, 1,500 labels, 2 computers, 15 CD-R burners and one color photocopier were seized in the raid. A DVD of *Monsters Inc.* that was apparently used as the master was also found.

August.<sup>21</sup> The head of the plant and a worker were arrested, and an estimated 40,000 tapes and discs were seized.<sup>22</sup> IIPA congratulates the government for tracking this plant, that cost right holders literally millions of dollars during its operation. Other raids by the recording industry yielded similar successful results.<sup>23</sup>

Each industry has a stronger tale to tell in 2002 than in previous years on successes in the fight against Internet piracy in Israel, but the problem of Internet piracy continues to grow and an increasing number of illegal sites and/or ISPs directly or indirectly involved in making illegal sound files available challenge the copyright industries, encouraged by a sense of immunity from the law. Internet piracy is increasing as to audiovisual works as well, and ALIS (the local anti-piracy organization working on behalf of the motion picture industry) recently conducted a number of successful Internet raids. Three criminal cases were filed against Internet pirates in 2002.

### **... Criminal Enforcement Not A Government Priority, and Special Police Units Remain Understaffed/Underfunded, Fostering Recidivism**

Israeli law enforcement authorities and prosecutors have shown little inclination to undertake criminal enforcement of the existing copyright legislation against commercial pirates. In addition, the police are not actively pursuing Internet piracy cases (and only in rare instances are the police willing to assist in the raiding of Internet pirates). These factors leave self-help groups like ALIS (the motion picture industry's anti-piracy organization) heavily reliant on civil search warrants to conduct raids. It is partly due to these factors, but also because of general lack of deterrence in sentencing, that Israel has to sustain extraordinarily high recidivism rates, which amounted to more than 50% of investigated offenses in 2002.

The Israeli government's establishment of Special IPR Police Units for intellectual property rights enforcement in 1999 was positively viewed by the copyright industries as ushering in a new era of cooperation with right holders.<sup>24</sup> The main advantage of the Units is their existence as a specialized group to investigate, raid, and file claims against suspects in criminal IPR proceedings. However, more than three-and-a-half years later, the Units remain insufficiently staffed and funded to deal with the volume of cases being presented to them, and in fact, even lost personnel in 2002.<sup>25</sup> As a result of continued lack of resources, the number of raids being run by the police is

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<sup>21</sup> Yehezkel Laing, *Counterfeit CD Plant Raided Near Ramallah*, The Jerusalem Post, August 28, 2002, p. 3.

<sup>22</sup> Police reportedly worked for six months to uncover the plant, which cost millions of dollars to the Israeli and foreign record industries, churning out tapes sold to Israeli distributors for NIS 4-NIS 6, a fraction of the market price for legitimate product. In addition to the tapes and optical discs, the police found many machines for the manufacture of the counterfeit materials. Tapes and CDs seized included those of famous Israeli musicians like Eyal Golan, Sarit Hadad, Aviv Gefen, Rita, and Rami Kleinstein, as well as song compilations.

<sup>23</sup> For example, recording industry forensics experts examined eleven infringing discs seized in a January 2002 raid on a pirate reseller, discovered the plant (a newly opened plant in Israel) that produced them, and raided the plant on February 18, 2002, seizing 126 suspect stampers (the valuable "mother" discs from which pirate CDs can be mass-duplicated) and 3,500 pirate compact discs. Eight suspects were arrested, their computers removed and their equipment sealed. The plant is now subject to close supervision and regular checks.

<sup>24</sup> The Israeli Police IPR Unit was established in 1999 following extensive pressure from right holders.

<sup>25</sup> Initially, when the IPR unit was planned, it was intended to include about 70 officers operating within the four districts in the country, in addition to a national unit in command of the district units that could manage large cases that extended



decidedly small – too small to form a critical mass sufficient to deter piracy. In addition, it is the Units' practice to wait for copyright owners to bring forward evidence of infringement rather than taking actions *ex officio*. As a result, right holders are often left paying for investigations, a very costly undertaking.<sup>26</sup> Further, the Units act separately from one another and appear to have no central coordination of effort or management of large cases running across district lines.<sup>27</sup> The agents of the units are also called upon for other duties and only work during regular office hours. This makes the whole system ineffective for the fight against pirate sales at evening markets and during the weekends (see below).

Other problems abound, leading to hefty delays and inefficiencies in the enforcement process. After all the evidence has been supplied to the police regarding a raid target, the police take a minimum of one month but usually longer to conduct the raid, resulting in tip-offs and loss of evidence. Post-raid preparation of the case for prosecution can take months or longer (up to three years).<sup>28</sup> In addition, Units refuse to act on Fridays, Saturdays and holidays, which also happen to be some of the busiest times for pirates. Finally, due to budgetary constraints among police in Israel, to this day no depots have been allocated to store seized pirate product, and therefore, 2.1 million pirate music units (CDs and audiocassettes) and more than 500,000 business and multimedia units continue to be stored at industry sites, creating a potentially dangerous situation for the chain of evidence, since pirates will claim the evidence of the alleged crime was under the continuous control of an interested party.<sup>29</sup>

## Progress on “Sampling” Pirated Goods

Another issue that plagued right holders in the past involved 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

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over several districts. In reality, the Unit has never functioned as envisioned. In its first year, there was only one officer from the national unit and a ‘pilot’ unit operating in the Tel-Aviv district. In 2001-2002, the IPR unit had a total of 20-22 personnel, well below the promised 70. IIPA understands that the Central District Unit (in Kfar Saba) lost one officer in 2002 (there are now only two investigators). The Central District Unit also lacks equipment, computers, and Internet access, hindering its ability to combat piracy including Internet-related piracy issues.

<sup>26</sup> Unduly relying upon right holders to pay for and run their own investigations complicates and raises costs of the complaint process, because it often requires right holders to hire private investigators, e.g., to conduct test purchases. Right holders must also send representatives on each raid, collect the seized pirate materials, and store them in warehouses rented and insured by them, again raising costs of enforcement in a tangibly burdensome way.

<sup>27</sup> There is no central coordination from the national unit, meaning that each district unit, such as the Tel Aviv District, or the Central District, Unit is run by its own officer, with the national officers having little or no say in the district's affairs.

<sup>28</sup> For instance, in a case brought against Millenium Computer, in which three illegal computers were purchased (in which the seller engaged in illegal “hard-disk loading” of pirate software onto the computer prior to sale), the investigation by the police took over 12 months (ending in 2001), but to date the case is still with the public prosecutor with no court date fixed. Such undue delay in achieving a judicial result is on its face a bar to effective enforcement that constitutes a deterrent to further infringement, as required by TRIPS. Such delays further demoralize the Police IPR Units, since their cases which get forwarded to the police attorney get stuck in bottlenecks, and it is often one to three years before the raid target defendants are indicted. In addition, most prosecutors wish to close cases by letting defendants plead out (guilty plea), not wishing to await a court's ruling. In such cases, pirates are rarely detained for more than 48 hours and rapidly are back in business.

<sup>29</sup> It should be noted, however, that the warehouses are guarded by the police at all times.

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. Still, large seizures require extensive sampling of hundreds of CDs, which burns up a significant amount of industry time and resources.<sup>30</sup>

## **Criminal Sentences Slowly Increased in Length and Severity in 2002, But Some Procedural Hurdles Remain at the Courts**

The Israeli government seems to be coming around to recognize the problem of lack of deterrence and the important role strong criminal sentencing plays in achieving reductions in piracy.<sup>31</sup> This recognition from the police, prosecutorial, and judicial levels has resulted in the imposition by courts of some incrementally stronger criminal sentences in 2001 and 2002.<sup>32</sup> In at least five known cases in 2001-2002, jail time was actually served.<sup>33</sup> Nonetheless, most of those cases involve relatively small-time pirate resellers at flea markets in Israel, not against managers of the larger warehouses or production facilities. And, such strong sentences, including imprisonment, still make up but a drop in the bucket of criminal investigations, most of which, due to police and prosecutorial bottlenecks, result in very few arrests (most defendants are never detained for more than two days, meaning they are back on the streets and in business swiftly, except in one case reported by ALIS in which the defendant was held without bail until his trial), and most cases result not in convictions but in guilty pleas, with negligible fines that hardly constitute a cost of doing business for the pirate. Further, as noted, there has never been a conviction in Israel against a corporate end-user pirate of business software, and the copyright amendments in 2002 may have precluded the possibility, without further amendment, that such a criminal action could be taken.

A couple of procedural hurdles at the court level hinder right holders' abilities to seek enforcement through the courts. One 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 became more

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<sup>30</sup> Each month the Business Software Alliance has to conduct sampling for around fifteen seizures per month.

<sup>31</sup> In February 2001, the Ministry of Justice published a report, *Recent Developments in Intellectual Property Rights in Israel*, in which it referred to the need to make an intensive effort against those who organize counterfeiting and "to achieve criminal sentences that will provide a deterrence to future criminal activity of this kind" (report, page 10).

<sup>32</sup> For example, two recidivists from Ashdod City, who owned a pirate video business that operated in Tel Aviv, Jaffa, and Holon, received 10-month suspended sentences and were fined a total of \$29,000 in late January 2003. This was the largest fine ever imposed in Israel for copyright piracy, and the suspended sentences are much longer than the usual three months.

<sup>33</sup> See Howard Poliner, Criminal Enforcement of Copyright and Trademark Rights in Israel: Recent Trends, World Intellectual Property Report, May 2002, Vol. 16, at 22-23. The author cites *State v. Massika* (Tel Aviv, Crim. App. 70758, August 2001) in which the defendant was sentenced to 13 months' imprisonment (and an additional 20 months suspended) upon conviction for possession with intent to sell hundreds of pirate videocassettes and packaging (the 13 months was calculated by adding a prior seven month suspended sentence with an additional six month sentence for the instant offence). The author also cites *State v. Amir* (Kfar Saba, 3090/00, September 2001) (five month sentence for flea market CD/audiocassette stand, served consecutively with separate drug sentence), *State v. Ben Lulu* (Be'er Sheva, 2550/01, November 2001) (12 month sentence plus six month suspended sentence, plus a US\$1,200 fine, for 22-year old recidivist pirate reseller at flea markets), *State v. Levy* (Nazareth 2091/00, February 2002) (12 months imprisonment for recidivist pirate reseller in flea market), and *State v. Swissa* (Eilat, 1453/99, July 2001, on appeal by State for heavier sentence) (six months' community service and 12-month suspended sentence plus a US\$15,000 fine for possession and sale of pirate goods over a long period of time).

burdensome in 2001 due to a change to the Rules of Civil Procedure prohibiting plaintiffs' lawyers from acting as receivers.<sup>34</sup> This rule adds an additional layer of cost and makes the Anton Piller order procedure even more burdensome than before. The only improvement in recent years occurred when courts began setting more reasonable guarantee terms on Anton Piller orders (between US\$5,000 and \$7,500 per case) following the passage of the 1999 Commercial Torts Law. In one recent positive decision, an Anton Piller Order was granted against a "Doe" defendant.<sup>35</sup>

Another longstanding problem, proving subsistence of copyright ownership, appears to have been dealt with in legislation in 2002. Under the old law there was a refutable presumption of ownership, which resulted, in some cases in which defendants placed the presumption at issue, in requests by judges that senior executives of software companies fly to Israel to testify on such basic matters. Under the 2002 amendments to the copyright law, the old presumption is deleted and replaced by a new presumption, which will be applicable for both criminal and civil proceedings (a notable improvement). The amendments (Section 9 of the Copyright Ordinance) provide that if a name of a person appears on the work he is presumed to be the author and owner of the copyright, "unless proven otherwise."<sup>36</sup> This amendment appears to put into place a strong presumption that can only be rebutted by proof to the contrary. IIPA hopes that this new, stronger presumption, will avoid the circumstance by which a defendant can force a copyright owner to fly to Israel to prove subsistence of copyright ownership simply by placing the question of copyright ownership at issue.

## **Some Gains in Government Software Management**

Some of the greatest software success stories worldwide involve government's leading public and corporate efforts to legitimize software usage. For example, when governments issue executive orders instructing government agencies to (1) conduct audits; (2) assess software needs; (3) budget for those needs; (4) purchase properly licensed software and support services – industry tends to follow suit. This role of government as a leader in proper use of software is critical to demonstrate leadership in a host of other IT related areas. Appropriate use of software by governments demonstrates an overall commitment to growing a local information technology industry and an information technology literate population. Managed use of software requires new thinking and understanding of the value of digital technologies. Legitimate use of software by a government also indicates a sincere commitment to implement its WTO obligations.

Israel has taken some positive steps to properly license business software by its government agencies. In 2001 and 2002, the "Inter-Ministerial Committee" on intellectual property policy was active in working with the business software industry to address proper use of software

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<sup>34</sup> 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.

<sup>35</sup> This decision is particularly helpful to copyright owners. Normally, in order to get a civil search warrant, the right holder needs to specify the name, identification number, and the address of the defendant, which for the stalls and markets is extremely difficult information to come by. The court's willingness to grant "Doe" orders will enable right holders to obtain warrants more easily, and raid a pirate stall regardless of who the seller is at that moment.

<sup>36</sup> It also provides that the presumption will apply to pseudonyms if known in the public, and that for anonymous works, the publisher shall be presumed to be the owner.

and to provide guidance to each of the government ministries. They have established clear government targets and have conducted investigations of many of these targets in 2002. Despite the positive efforts, the compliance rate of local municipalities with these guidelines has not matched that of the central government. Further, for those central government agencies moving to use licensed software, the efforts seem to be piecemeal. Licensing occurs on some forms of software, but not all.

## **MARKET ACCESS ISSUES IN ISRAEL**

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### **New Provision Curtails U.S. Programmers' Freedom to Sell Advertising, Violates WTO Services Agreement**

On May 9, 2002, Israel's Council for Cable and Satellite Broadcasting adopted a new provision – an add-on to the existing Bezeq Law – that regulates the pay television industry. The provision prohibits foreign television channels from carrying advertising aimed at the Israeli market. This provision violates Israel's commitments in the WTO Services Agreement to provide full market access and national treatment for advertising services and should be deleted. This provision is not applicable to foreign broadcasters transmitting to at least eight million households outside of Israel.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **New Legislation in 2002 Leaves Out Criminalization of End-User Piracy of Business Software**

Following on a Ministry of Justice memorandum proposing certain amendments to the Copyright Ordinance purporting to strengthen criminal enforcement in Israel, the Knesset passed the Bill for the Amendment of the Copyright Ordinance (No. 8), 5762-2002 (effective November 3, 2002). The new law strengthens criminal liability in a number of ways. For example, the Law increases the maximum prison sentences to five years for certain offenses ("making of infringing copies for commercial purposes" or "import of infringing copies for commercial purposes") and up to three years for other offences ("the sale, rental or distribution of infringing copies not as a business but in a commercial volume" and the "holding an infringing copy in order to trade therein"). In addition, the law will impose improved presumptions regarding copyright ownership that apply to both civil and criminal proceedings, and while it appears that the new presumption is very strong (in that the burden is on defendant to show proof to the contrary regarding subsistence of copyright ownership), it remains unclear how this provision will be interpreted in practice. Finally, criminal liability will be imposed on the officer of a company in which an offence is committed (unless he proves he did everything possible to prevent the offence from being committed). Companies shall be subject to double fines for copyright offences.

Unfortunately, the Law represents a major step backwards for the business software industry since it excludes corporate end-user piracy of business software from criminal liability.<sup>37</sup>

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<sup>37</sup> The former criminal liability provisions were replaced with provisions making it a crime to engage in the commercial activity of piracy. However, because the provision now limits liability to persons engaged in the sale, hire or distribution of infringing work "as their business," corporate end-user piracy of business software is left without a criminal remedy, in violation of TRIPS. The memorandum released by the Ministry of Justice in 2001 which described the legislation it was

The failure of the Law to criminalize corporate end-user piracy of business software implicates Israel's TRIPS obligations. Article 61 of the TRIPS Agreement requires criminal penalties to be applied at least in cases of commercial piracy, including corporate "end-user" piracy of business software. Under the criminal provisions of the Israeli law prior to passage of the 2002 amendments, a respectable argument had been made that Section 3(c) of the Copyright Ordinance might allow for an interpretation that included corporate end-user piracy of business software.<sup>38</sup> Section 10 in the new law is unambiguous in its exclusion of corporate end-user piracy. Section 10(a) provides that any person making an infringing copy of a work for the purpose of "trading in that copy" commits an offence. Section 10(c) provides that "any person engaged in the business of sale, hire, or distribution of an infringing copy of a work or sells, hires or distributes infringing copies of a work on a commercial scale" commits an offence. Both provisions clearly exclude the unlicensed use of business software in a business setting. Section 10(c) should be amended to expressly criminalize corporate end-user piracy of business software.<sup>39</sup>

## **Ministry of Justice Position on Payment for the Broadcasting and Public Performance of U.S. Repertoire Violates Israel's Obligations**

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.<sup>40</sup> If this opinion is followed in Israel, would amount to a reversal of current

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considering made it fairly clear that corporate end-user piracy of business software would fall outside the scope of what the Ministry understood by the term "by way of trade," i.e., they never intended to criminalize corporate end-user piracy of business software in this legislation. That is highly unfortunate. Specifically, the Memorandum stated,

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.

<sup>38</sup> Section 3(c) provided that a person who knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists commits an offence. It was long thought by right holders, and indeed, some key scholars in Israel agreed, that this formulation was broad enough to encompass unlicensed use of software in a business setting. Other theories included the possibility that "distribution" could be interpreted to include the distribution within an office of unlicensed software; informal discussions with the Ministry of Justice confirmed that this was possible, but one question that arose was whether one computer was enough for criminal liability, or whether the unauthorized use of software in a business setting had to extend to multiple users. The 2002 amendments appear to have closed the door on these possible arguments.

<sup>39</sup> We propose that Section 10(c) be amended to provide that "any person who uses, sells hires or distributes an infringing copy of a work on a commercial scale or to such an extent as to affect prejudicially the owner of the copyright commits an offence."

<sup>40</sup> Israel protects sound recordings as "works" under the Berne Convention and should be bound under that Convention to

practices in which U.S. repertoire is compensated. The Ministry of Justice continues to aggressively pursue this policy wherever and whenever possible.

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.

## **Israeli Copyright Laws Still TRIPS-Deficient**

Even after amendment of the Ordinance, Israel's copyright laws remain out of sync with the TRIPS Agreement. The legal regime in Israel includes a modified version of the Copyright Act, UK (1911), which was adopted in the Copyright Order (1924), and the Performers and Broadcaster Rights Law (1984) providing neighboring rights to performers and broadcasters (and limited rights to an employer of a performer).<sup>41</sup> Some provisions of the Israeli legal framework 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

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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 compositions."

<sup>41</sup> Other ancillary legislation includes the Copyright Order (Berne Convention) (1953) (as amended through 1981), which implemented the provisions of the Berne Convention (Brussels Act [1948] text) in Israel, and the Copyright Order (Universal Copyright Convention) (1955), which implemented 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."

exception to national treatment to sound recordings.

- There is no exclusive right in sound recordings to control the “direct or indirect reproduction” as required by TRIPS Article 14.2.
- Recent amendments to the copyright law failed to address rental rights issues for software. Copies of software acquired prior to January 1, 2000 do not carry a rental right in violation of TRIPS Article 11. The transitional provisions of the 1999 Amendments provided that copies of computer software acquired prior to the effective date of the law do not carry a rental right. This is TRIPS-incompatible, since Berne Article 18 permits no such exception.

### **Enforcement Deficiencies (On Their Face)**

- Corporate end-user piracy of business software is not made subject to criminal penalties, as required by Article 61 of TRIPS.

### **Enforcement Deficiencies (In Practice)**

- In Section 7C of the Copyright Ordinance, the court may only order the destruction of the manufactured objects so long as the party filing the motion notifies the police and the police are present to hear the motion. The requirement for police presence seems unreasonable, in light of the fact that the police are already understaffed and under-supported. If, in practice, this requirement results in the failure of courts to order destruction of manufactured objects, such a failure may defeat the effectiveness of the provision and render it inconsistent with Article 61 of TRIPS.
- Israel must provide adequate protections for witnesses who seek to report copyright infringement, and it must dedicate adequate police, prosecutorial, and judicial resources to the problem. It also must simplify and expedite enforcement procedures and process a greater volume of cases, with greater results, through its judicial machinery.
- 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\$2,053 - \$ 4,106), 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 of a work 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.

## **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. Mediation efforts having failed in early 2002, the first hearing was held on June 18, 2002. These efforts may be facilitated by a recent, unrelated decision by the Supreme Court holding that cable retransmissions are subject to copyright protection.<sup>42</sup> 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.

## **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. IIPA highly encourages the government of Israel to swiftly implement the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), to which Israel is a signatory, and both of which came into force in 2002.

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<sup>42</sup> In a separate case against Tevel, one of the three cable operator defendants in AGICOA's action, the Supreme Court of Israel held that works retransmitted by cable are subject to copyright protection. That order was appealed to the full Supreme Court panel, with the appeal triggering a stay in further proceedings against Tevel.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# KUWAIT

### EXECUTIVE SUMMARY<sup>1</sup>

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Kuwait should be elevated to the Priority Watch List. Some enforcement activity occurred toward the end of 2002; yet, Kuwait remains one of the worst countries in the Gulf region when it comes to retail copyright piracy, and will not take the steps necessary to improve the situation unless it is elevated.

Kuwait was placed on the Priority Watch List in 1998, and kept there in 1999, for its failure to enact copyright legislation, leading to total market domination by pirates. With the passage of copyright legislation before TRIPS went into force (in December 1999), Kuwait was lowered to the Watch List, and has remained there since.

Copyright enforcement in Kuwait waxed and waned in 2002. After some positive reporting and promises made by the Kuwaiti government's recently-formed Interministerial Task Force, enforcement nearly ceased until the end of 2002, when raiding activity picked up again. The raids, however, were only against small targets, and in several cases the pirate product was returned to the pirates. The leadership of Sheikha Rasha Naif Al-Sabbah (Copyright Office in the Ministry of Information) demonstrates the will of the government, but results have been less than impressive (the government's own report from early 2002 indicated that of 79 piracy cases commenced, only 15 had been resolved, including four acquittals and four non-deterrent fines).

Required Action for the Kuwaiti government in 2003:

- Make public declarations at the highest level of the Kuwaiti government that piracy will not be tolerated in Kuwait.
- Run and support 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, and including raids against corporate end-user piracy of business software).
- 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.
- Amend the copyright law to bring it into line with the TRIPS Agreement, establish an adequate legal framework for electronic commerce by protecting copyright in the digital environment, and join the WIPO "Internet" treaties.

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<sup>1</sup> For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to filing.

**KUWAIT**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	10.0	95%	9.0	85%	8.0	85%	8.0	85%	7.5	85%
Records & Music <sup>3</sup>	3.4	64%	NA	70%	3.0	70%	1.0	65%	3.0	50%
Business Software Applications <sup>4</sup>	NA	NA	4.5	76%	6.6	80%	10.5	81%	5.3	88%
Entertainment Software	NA	NA	NA	85%	NA	NA	3.1	82%	3.7	85%
Books	2.5	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS <sup>5</sup>	15.9		16.0		20.1		25.1		22.0	

## COPYRIGHT PIRACY IN KUWAIT

### Kuwait Remains a Pirate Market

Piracy continues to dominate the domestic market in Kuwait. Because of such little progress in the fight against piracy, piracy levels have crept upward in 2002, for example, to an alarmingly high 95% for audiovisual materials. Pirate optical discs (DVDs, VCDs, CDs, CD-ROMs) have become the dominant carrier of pirate content in the Kuwaiti market and are openly sold on the streets.

An informal breakdown of piracy in the Kuwaiti market looks like this:

- **Optical Disc Piracy Wipes Out the Legitimate Domestic Market:** Optical disc piracy (CD, VCD, DVD, CD-ROM and “burned” CD-R) of all kinds of copyrighted materials (movies, music, business software, entertainment software, multimedia publications) has decimated

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> The piracy level figures from 1999-2002 are for “international” repertoire. The overall piracy level for the same period remained roughly 50%, while the piracy level for Indian repertoire only remained extremely high in 2001, at over 90%.

<sup>4</sup> BSA’s estimated piracy losses for 2002 are not available, and the estimated piracy level for 2002 is preliminary; both will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimated losses were not available, but were finalized in mid-2002, and those figures are reflected above. BSA’s trade loss estimates reported in the chart represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study, which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> In IIPA’s 2002 Special 301 report, IIPA estimated that total losses to the U.S. copyright-based industries in Kuwait in 2001 were \$11.5 million. Because of the addition of BSA’s final 2001 loss statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in Kuwait due to piracy in 2001 increase to \$16 million.

the domestic market in Kuwait (with hundreds of thousands of units being distributed monthly). Large quantities of pirate VCDs and DVDs of imported movies from Asia, and home-produced “burned” CD-Rs, are becoming more widely available. Discs are brought by air directly into Kuwait. Retailers continue to maintain large stocks of pirate product, openly displaying and selling pirate discs which often include uncensored versions of motion pictures not yet released in the theaters or on video (so-called “pre-release” piracy). Pirate VCDs in particular have been entering the country from Asia in large quantities since 1998. Little progress has been made with the government, and as a result the piracy rate for audiovisual materials has climbed to over 95%. Audio CDs of international repertoire are sold by Kuwaiti wholesalers for as little as US\$1.20, and are mainly sourced from Pakistan (which now rivals Southeast Asia as a principal source for pirated CDs). Unauthorized compilation CD-ROMs, including copies of top-end engineering programs, entertainment software,<sup>6</sup> and routine business software applications are available openly on the streets.

- **Corporate End-User Piracy of Business Software and “Hard-Disk Loading” Hurt Software Publishers:** Corporate end-user piracy (unlicensed use of software by a business) and the illegal loading of an *à la carte* menu of business software tailored to the customer's preferences 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).
- **Videocassette and Audiocassette Piracy:** Pirate videocassettes are still sold openly in Kuwait, although most piracy in the market is on optical disc. Video product found consists mainly of uncensored pirate copies of movies that haven't been released in the theaters (so-called “pre-release” piracy). Audiocassette piracy still exists, but is rapidly being replaced by audio CDs of international repertoire.
- **Book Piracy:** 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.
- **Cable Piracy:** Cable piracy, in which pirates transmit copyrighted material illegally within apartment blocks and residences without the authorization of rights holders, is also present. The Ministry of Information has now conducted four raids against blatant cable pirates, but we have no information on the penalties (if any) applied.

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<sup>6</sup> Console-based games are close to 99% pirate in Kuwait, while newer console-based games are approximately 65% pirate, and PC games are approximately 80% pirate. Many reportedly enter the market through Syria and the United Arab Emirates (Dubai), having been shipped from Asia.

# COPYRIGHT ENFORCEMENT WANES IN KUWAIT

## KUWAIT CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	ENTERTAINMENT SOFTWARE
Number of raids conducted	4	1
Number of cases commenced		
Number of defendants convicted (including guilty pleas)		
Acquittals and dismissals		
Number of cases pending	many	Many
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		
Up to \$1,000	Unknown	Unknown
\$1,000 to \$5,000	Unknown	Unknown
Over \$5,000	Unknown	Unknown
Total amount of fines levied (in US\$)	Unknown	Unknown

## Few Raids Run in 2002, Even Fewer Follow-Up Actions

The year 2002 was another disappointing one for copyright enforcement in Kuwait. Consistent with experiences over the last few years, raids have been sparse and are carried out by the government only after immense pressure is applied by the industries, the U.S. government, and local Kuwaiti companies.<sup>7</sup> In a number of recent cases, acting on intelligence provided by the recording industry, several shipments of pirated optical discs were seized by Kuwaiti Customs. Most of these came by “air freight,” originating from countries such as Indonesia and Malaysia. In September 2002, in one of the largest seizures ever in Kuwait, Kuwaiti Customs officials seized a shipment of 52,000 pirated discs (a combination of audio, entertainment software, and movies) coming from Thailand, which were destined for delivery to a company in Kuwait. Nonetheless, pirates continue undeterred by such sporadic actions, since deterrent penalties or sentences are rarely ever handed down.<sup>8</sup> Some actions in 2002 against cable pirates have resulted in the stopping of illegal distribution of cable (Pay TV) signals to over 500 homes.

<sup>7</sup> For example, in January 2002, 7,200 pirate 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. The Business Software Alliance has also been successful in securing a number of raids during 2002.

<sup>8</sup> For example, in 2002, the courts handed down exactly one conviction against a software pirate.

In 2002, the business software industry continued to work with the Ministry of Information, and the Business Software Alliance was successful in securing a number of raids. The business software industry remains hopeful that the head of the copyright office will be able to increase enforcement in the country in 2003. Problems still exist with enforcement, including political pressures and bureaucratic disagreements among Kuwaiti government agencies. For example, a decree was to be issued in October 2002 shifting agency enforcement functions, but that decree was never issued. Further, basic concerns, such as the difficulty in securing essential meetings with senior level officials to address piracy, make enforcement efforts more difficult. Finally, some individuals in the Kuwaiti government seem to be more interested in focusing on the types of investigative tools in use, rather than actually enforcing the law. Political endorsement of anti-piracy activities from the highest levels of government is necessary to move enforcement forward in Kuwait.

## **Customs Willing to Improve, But Political Will Lacking in Other Agencies**

Enhanced cooperation with Kuwaiti Customs has proved productive over the last year and it is encouraging to note that they have stepped up their enforcement activities in respect of piracy of optical discs. At the request of the Director General of Kuwaiti Customs, an international record industry team conducted several training sessions for Kuwaiti Customs officers in October 2002.<sup>9</sup> In 2002, the business software industry continued to work with the Ministry of Information.<sup>10</sup> However, political pressures from superiors and bureaucratic arguments with the Department of Intellectual Property have slowed efforts by the Copyright Office, and the industry has been unable to secure a meeting with senior level officials (including the Assistant Under Secretary for IPR & IT). Political commitment to enforce copyright must come from the highest levels of government.

## **End-User Piracy Test Case Is Important**

There is great potential to achieve progress in the struggle against corporate end-user piracy of business software in Kuwait in 2003. One important case brought by the business software industry against a corporate end-user of unlicensed software remains pending. Through this case, the Kuwaiti government can demonstrate its ability to address the issue of end-user piracy of business software and can send an important political message to other end-users regarding the Kuwaiti government's views on this issue. Support from the Ministry of Information and Kuwaiti enforcement officials will be critical to seeing the successful end of this case.<sup>11</sup>

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<sup>9</sup> Other training sessions conducted in 2001 have not led to successful enforcement results. The copyright industries conducted a major training program in October 2001, organized by the Ministry of Information, and attended by over 100 individuals. However, disappointingly, such training activities were followed by only sparse enforcement activity in 2002.

<sup>10</sup> Several raids were run by the Ministry of Information in November 2002, but little information other than the occurrence of the raid has been provided by the Ministry.

<sup>11</sup> The case, which remains pending, involves a suit against one of the largest commercial groups in Kuwait. After agreeing to an audit and to legalize its software usage, Business Software Alliance members conducted the audit, which revealed widespread unlicensed software usage. However, after being presented with overwhelming evidence, gathered with the company's cooperation and consent, the company refused to legalize.

## Inter-Ministerial Task Force Highly Disappointing

An Inter-Ministerial Task Force set up to deal with intellectual property concerns was announced with great fanfare and numerous commitments in late 2000.<sup>12</sup> However, little progress was made in 2002 through the Task Force with respect to any of the numerous promises made. By February 2002, MOI reported that it had sent 79 cases for prosecution (meeting its stated target of 45 copyright piracy cases for 2001), but the results from those cases were quite disappointing, with four acquittals, four non-deterrent fines, only seven cases in which materials were confiscated in addition to a fine, and a whopping 64 cases still being considered by the prosecutor or awaiting decision or sentencing.

## Procedural and Market Access Barriers Remain

There remain some procedural barriers and market access restrictions that have made operating in Kuwait burdensome. For example:

- **Prohibitively High Censorship Fees:** In the absence of genuine copyright enforcement, local licensees and distributors of audiovisual works have been forced to seek alternative means of protection. The Motion Picture Association has sought some limited “anti-piracy protection” from the Ministry of Information’s censorship department by asking that it verify copyright authorization before giving censorship approval for a title. MPA has provided certificates confirming the distribution arrangements of its member companies for the Ministry of Information’s use in this process. However, using this process as a main line of defense against piracy is costly, since the censorship fee of approximately US\$114 per title is a heavy burden distributors face in trying to market and protect their products; the process is also wholly inadequate to deter piracy. The costs involved are especially burdensome, considering the modest sales legitimate products can achieve in the face of widespread piracy (this is all the more true for older, catalogue titles). The censorship fee should be reduced and limited to new titles only.
- **Import Duty on Software:** There is a four percent (4%) customs duty on business software; this import duty should be eliminated.
- **Prohibitively High Import Fees on Satellite Equipment:** The government of Kuwait imposes a fee amounting to KD100 (US\$333) on each satellite receiver that is imported into Kuwait.

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<sup>12</sup> The Task Force is made up of the Ministry of Information (Sheikha Rasha Naif Al-Sabbah, and Ms. Manal Baghdadi, Legal Affairs Controller), 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), 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.

# COPYRIGHT LAW AND RELATED ISSUES

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## Kuwait's Law Should Be Amended to Comply with TRIPS, WIPO "Internet" Treaties

The Kuwaiti Law on Intellectual Property Rights (1999) ("Copyright Law") passed the National Assembly in December 1999 (effective February 9, 2000), and provides the basis for enforcement against rampant piracy in Kuwait. IIPA remains concerned that the Kuwaiti government has failed to introduce promised amendments to comply with TRIPS. Without amendments, Kuwait's law will remain in violation of TRIPS. The Kuwaiti government has also missed an opportunity to modernize its law with the latest international norms found in the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). 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 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" which points to the origin of the work (i.e., the author or right holder), not whether the work introduces anything innovative or new.
- **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 require 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 the way 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 that 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, 14.5, and 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, which requires 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 (US\$1,667) 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.
- **The Need to Criminalize Corporate End-User Piracy of Business Software:** 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 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 swiftly accede to and implement the WCT and WPPT. The WCT went into effect on March 6, 2002, and the WPPT went into effect on May 20, 2002. As Kuwait, like the rest of the GCC countries, looks to the future, 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 WIPO treaties is essential to establish 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 unauthorized uses. 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

## 2003 SPECIAL 301 REPORT

# LEBANON

### EXECUTIVE SUMMARY<sup>1</sup>

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Lebanon should remain on the Priority Watch List, with an out-of-cycle review. Piracy, especially cable piracy, still dominates the market. The government of Lebanon took some initial steps to improve protection of software in 2002.

Lebanon was placed on the Watch List in 1999 and was then elevated to the Priority Watch List in 2001, where it remained in 2002. IIPA filed a petition in 2001 to have the U.S. government evaluate whether to suspend some or all of Lebanon's benefits under the Generalized System of Preferences trade program for failure to adequately protect copyright.

Cable piracy continues to decimate the market for the motion picture industry. Retail piracy of other copyrighted materials (music, movies, business software, and entertainment software) is now dominated by optical discs, some produced locally and many more imported from Syria and Asia. The cable piracy issue could be solved quickly if the government demonstrated the will and deployed the resources to do so. Some raids against activities involving pirate software were helpful in 2002, and the government has recently indicated privately its willingness to redouble its efforts to solve longstanding piracy problems.

Required Action for 2003:

#### Enforcement Coordination

- Issue a statement at the highest level of the Lebanese government that copyright enforcement will be treated with high priority.
- Form a specialized IPR unit of the police, with dedicated resources and power to act *ex officio* anywhere in Lebanon.
- Appoint a national network of specialized prosecutors dedicated to copyright cases.
- Improve the efficiency of the court system, through the streamlining of IPR cases, creation of specialized courts, or other equivalent methods.

#### Enforcement

- Close down substantially all the unlicensed "community cable" television stations operating in the country.
- Carry out raids (and initiate prosecutions) against at least 100 retail stores selling pirated optical discs containing copyrighted materials (business software, entertainment software, motion pictures, videocassettes, audiocassettes, and books).
- Instruct police during raids to seize all clearly infringing materials, regardless of whether they are specifically identified in the complaint.
- Instruct Customs authorities to take *ex officio* action to interdict and seize pirate product entering the country.

#### Legislative

- Amend the copyright law to bring it into line with TRIPS and WIPO "Internet" treaties, including deletion of overly broad exemptions for educational use of business software.

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<sup>1</sup> For more details on Lebanon's Special 301 history, see IIPA's "History" Appendix to this filing.

**LEBANON**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	8.0	80%	8.0	80%	8.0	60%	8.0	60%	8.0	80%
Records & Music <sup>3</sup>	2.0	67%	2.0	65%	2.0	68%	2.0	60%	2.0	40%
Business Software Applications <sup>4</sup>	NA	74%	1.1	79%	1.3	83%	1.6	88%	0.9	93%
Entertainment Software	NA	NA	NA	NA	1.5	96%	0.5	70%	0.6	70%
Books	2.0	NA	2.0	NA	2.0	NA	2.5	NA	2.5	NA
<b>TOTALS<sup>5</sup></b>	<b>12.0</b>		<b>13.1</b>		<b>14.8</b>		<b>14.0</b>		<b>12.4</b>	

## COPYRIGHT PIRACY IN LEBANON

### Cable Piracy Problem Still Destroys Market for Audiovisual Materials

Rampant cable piracy continues to devastate the local theatrical, video, and television markets. An estimated 1,300 cable operators serve over 60% of the Lebanese population, retransmitting domestic and foreign terrestrial and satellite programming without authorization to their subscribers (over 60% of the Lebanese population) 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 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.

Largely as a result of cable piracy, receipts from ticket sales to movie theaters dipped approximately 27% in 2002, compared with sales in 2001. Local broadcast television stations have

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> Loss figures for sound recordings represent U.S. losses only. Piracy levels represent the piracy level for "international" repertoire, whereas the "overall" piracy rate was 40% in 2001 and 45% in 2000. The piracy level for "Arabic"-only repertoire was more than 30% in 2002, indicating that the local music market is being infected by piracy as well. The piracy level for 1998 represented above is the "overall" piracy rate.

<sup>4</sup> BSA's estimated piracy loss estimate for 2002 is not available, and levels for 2002 are preliminary; both losses and levels will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$1.3 million at 78% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Lebanon were \$13.3 million. Because of the adjustment to reflect BSA's final 2001 statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in Lebanon in 2001 are lowered to \$13.1 million.

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.<sup>6</sup> In 2000, a study of the economic impact of cable piracy estimated that the Lebanese government is losing approximately US\$38 million per year due to cable piracy (including lost taxes, social security contributions, and the earnings of the Lebanese government if the cable industry were legitimate).<sup>7</sup>

## Lebanon Remains a Piracy Haven

Piracy continues to hurt the domestic market in Lebanon. A sampling of the market reveals:

- **Retail Piracy of Pre-Recorded Optical Discs (CDs, VCDs, DVDs, CD-ROMs) of Copyrighted Materials:** Pirate versions of virtually any copyrighted materials (business software, entertainment software, sound recording, or published interactive software such as encyclopedias or educational materials on CD-ROM) can readily be purchased in retail markets in Lebanon for US\$5 or less. Piracy of personal computer (PC) games remains the predominant form of entertainment software piracy in Lebanon. It is believed that about 70% of factory-produced pirated entertainment software product is being imported from Asia, including from Malaysia, while about 30% is domestically sourced.<sup>8</sup> Retail piracy at kiosks and open markets continues unabated. Internet piracy of entertainment software products remains relatively low due to lack of adequate access. Pirate DVDs imported from Asia are widely available. Zone I DVDs are freely imported into Lebanon and often released prior to the theatrical release of member company titles. Pirate sound recordings are sold openly at fixed location retail shops and at the airport, with Lebanese traders importing stocks of CDs from Eastern Europe and Asia. CD-Rs “burned” with “MP3” music data files are imported from Malaysia. CD-Rs “burned” with music appeared with more frequency in 2002. Syria is used as the major “transit country” for shipments of pirated discs into Lebanon.
- **Retail Videocassette/Audiocassette Piracy:** Pirate videocassettes of motion pictures not yet released in the theaters or on video continue to cause major commercial damage in Lebanon. Such pirate copies are often of poor quality, having been taken with camcorders inside theaters. The home video market in Lebanon is estimated to be 80% pirate. Locally and regionally manufactured music audiocassettes are ubiquitous in Lebanon. As with pirate music CDs, Syria supplies many pirate cassettes. Music piracy hurts local musicians and artists.<sup>9</sup>
- **Hard-Disk Loading Piracy:** Retail piracy of business software takes several forms, including the sale of hardware loaded with unlicensed software (“hard-disk loading” piracy), in addition to the mass CD replication of pirate copies of business software.

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<sup>6</sup> As an interesting aside, rampant cable piracy has even hindered the pirate video market, as the ease of watching pirated cable channels, and the wide variety of available product, has made pirate cable stations a more popular alternative than obtaining pirated product from a video store.

<sup>7</sup> The study was carried out by Statistics Lebanon, Ltd. between April and June 2000.

<sup>8</sup> In 2001, several customs seizures of product destined for South America and elsewhere were found to be sourced from Lebanon.

<sup>9</sup> 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 production and distribution of Lebanese repertoire, but these investments are undermined by the current high piracy levels for music.

- **Book Piracy:** 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 Disc Pirate Production in Lebanon

IIPA continues to express concern over an unregulated CD plant operating in Beirut, which had been producing over 150,000 discs per month.<sup>10</sup> Without proper controls, this plant appears to be transforming Lebanon from a country with a small domestic piracy problem to a country with an over-production and pirate export problem. The plant is believed to be involved in reproduction of a range of copyrighted products including sound recordings, entertainment software, and some business software. Lebanese authorities should immediately contact and investigate 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 disc piracy. In particular, the Lebanese government should introduce effective optical media plant control measures, including the licensure of plants that produce optical discs; the tracking of movement of optical disc production equipment, raw materials, and production parts (so-called stampers and masters); the compulsory use of manufacturer's codes (both mastering codes and a mould code), in order successfully to halt the production of pirate optical discs; plenary inspection authority as to licensed plants and search and seizure authority as to all premises; and remedies, including revocation of licenses, civil, administrative, and criminal penalties for violations of the regime.

## COPYRIGHT ENFORCEMENT IN LEBANON

### LEBANON: CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of raids conducted	0	21
Number of cases commenced	0	21
Number of defendants convicted (including guilty pleas)	0	5
Acquittals and dismissals	12	1
Number of cases pending	5	22
Total number of cases resulting in jail time	0	
Suspended prison terms	0	
Maximum 6 months	0	3
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	

<sup>10</sup> 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.

Total prison terms served (not suspended)	0	
Number of cases resulting in criminal fines	0	5
Up to \$1,000	0	
\$1,000 to \$5,000	0	4
Over \$5,000	0	1
Total amount of fines levied (in US\$)	0	

### LEBANON: CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	0	21
Post-search action		21
Cases pending	0	5
Cases dropped	0	1
Cases settled or adjudicated	0	22
Value of loss as determined by right holder (\$USD)	n/a	
Settlement/judgment amount (\$USD)	n/a	

### LEBANON: ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of raids/searches conducted	0	1
Number of administrative cases brought by agency	0	
Number of defendants found liable (including admissions/pleas of guilt)		
Ratio of convictions to the number of raids conducted		
Ratio of convictions to the number of cases brought		
Number of cases resulting in administrative fines		
Total amount of fines levied		
US\$0-\$1,000		
\$1,001-\$5,000		
\$5,001-\$10,000		
\$10,000 and above		
Total amount of restitution ordered in how many cases (e.g., \$XXX in Y cases)		

## Some Raiding in 2002, and More Self-Help Efforts, Both Revealed and Worked to Curtail Piracy

In 2002, some raiding activity occurred, marking the first time the government of Lebanon has taken any efforts to address the massive retail piracy problem in the country. For example, the Business Software Alliance, in conjunction with the police, conducted more than 20 store raids in 2002, revealing numerous copies of pirate business software, entertainment software, and sound recordings; those results remain with the Chief Prosecutor's office for decisions as to whether to prosecute.<sup>11</sup> No progress was made during 2002 against cable piracy, though the number of

<sup>11</sup> In one of those raids, Lebanese Police, with the assistance of the BSA, raided a major holiday fair in early January 2002. Two major resellers of pirated software were caught selling dozens of pirate optical discs.



operators has been reduced through consolidation in the pirate market. The business software industry also has engaged in some “self-help” activities over the last few years in Lebanon. For example, the industry teamed with several Lebanese trade associations, including the hotel associations, in an effort to improve the legal use of computer software by corporate end-users.

## **Most Cases Languish in Court or Fail Due to Prosecutorial Error**

The Lebanese prosecutors and courts have proved wholly unsuccessful in combating cable piracy. Litigation efforts, both civil and criminal, have practically stalled, while 1,300 pirate cable operators remained largely undeterred from pirating. Of the cases brought against 17 cable pirates since late 1999, 12 were remanded by the court to the public prosecutor due to lack of jurisdiction in November 2001.<sup>12</sup> The Chief Prosecutor’s office had made the initial error of referring the cases to the wrong trial court. While the decision of the court in Beirut has been appealed, the case files have been remanded to the public prosecutor for forwarding to the appropriate court. None of the criminal cases brought thus far (including the remaining five defendants whose cases were not remanded) has led to in these cases against cable piracy a positive court decision.<sup>13</sup> Civil enforcement has demonstrated itself to be equally futile. Procedural problems in 2002 resulted in ineffective enforcement against known cable pirates.<sup>14</sup> Two other civil actions brought in 2000 against pirate cable operators resulted in orders requiring payment of trivial amounts of money in the event of further infringement. Obviously, in well over three years since the first cases were brought against known cable pirates, the courts have been entirely ineffective in deterring cable piracy.

## **Some Post-Raid Prosecutions in 2002 Resulted in Convictions and Fines**

Even when cases are brought, the judicial process is harmed by lack of specialization at the prosecutorial and court levels, and by certain procedural errors and hurdles, resulting in inefficient handling of cases, incessant delays in adjudication,<sup>15</sup> and lack of deterrent sentencing.<sup>16</sup> Notwithstanding such endemic problems in the pretrial and court system in Lebanon, IIPA hopes that 2002 marked a turning point in judicial enforcement, as a couple of sentences were handed down by the courts against pirates.

The business software industry reaped the benefits of some judicial decisions in 2002. In April 2002, the Criminal Court of Beirut sentenced the general manager of a major reseller in

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<sup>12</sup> In 1999, the Motion Picture Association filed seven criminal actions against “unknown” defendants in a Beirut court on behalf of the member companies. The public prosecutor ultimately used those initial actions to prosecute 17 individuals allegedly engaged in cable piracy. After many continuances had been granted to the defendants, the court decided on November 15, 2001 that it had no jurisdiction over 12 of the defendants who were not Beirut residents. Those cases have all been appealed, and a ruling on the 12 acquittals is expected in the first quarter of 2003.

<sup>13</sup> In the interim, the court has requested that MPA’s counsel provide U.S. copyright certificates for all the titles involved for which MPA claims ownership on behalf of the members, and that counsel restate the specific demands. These interim requests marked the first time in the case MPA’s counsel was asked for copyright certificates, and essentially requires counsel to rehash demands already made in the complaint.

<sup>14</sup> In one case (the “Elio Sat” matter), lack of police cooperation following a court-ordered inspection rendered it impossible to obtain the evidence necessary to prosecute the case. In yet another cable piracy case (the “Itani” matter), a court-appointed expert was unable to act quickly enough to catch the pirate cable operator “in the act” to obtain the evidence necessary to proceed.

<sup>15</sup> For example, postponements, even of urgent matters, remain the norm, and criminal cases can take years to reach judgment. It takes about two years to finish the trial stage of a case.

<sup>16</sup> One case which is indicative of non-deterrence in the judicial system in Lebanon was handed down on December 29, 2001 in the Criminal Court of Beirut against a pirate reseller of software, in which the court fined the pirate US\$667, and awarded the plaintiffs US\$1,334, well below the value of the software seized in the raid, and hardly a deterrent.

Lebanon to one month in jail (and ordered him to pay US\$6,600 in compensatory damages), marking the first such sentence in Lebanon against a software pirate.<sup>17</sup> The case is on appeal. In another case decided in 2002, the Criminal Court of Beirut sentenced a pirate end-user of business software (an engineering firm) to a substantial fine and compensation for damages, totaling US\$20,000 for software piracy. Third, the Criminal Court of Beirut handed down a decision against a major bank, meting out a fine of LL5,000,000 (US\$3,316) and awarding damages of LL5,000,000 (US\$3,316). This case is also on appeal. In a further case against an engineering firm, closing arguments were heard, and a decision was expected in early 2003. Unfortunately, nine other criminal cases against various pirates remained pending in 2002 due to an error in processing by the Chief Prosecutor's office (six were forwarded to the wrong trial court).

## **Enforcement Coordination Is Needed, But Many in Lebanon Lack the Political Will**

Such sparse case results (notwithstanding the success for the software industry), and the immense self-help efforts necessary to achieve even those results, indicate clearly that the enforcement system in Lebanon does not yet function in a manner conducive to deterring, much less eradicating, piracy. The main reason for this continuing lack of effective enforcement in Lebanon is the lack of motivation or government will among Lebanon government agencies. Motivating the executive branch in Lebanon to take action against piracy has been nearly impossible, but it is a key, along with improving the efficiency of the court system, to making serious inroads against piracy in Lebanon. The President and the Prime Minister should immediately issue political statements to make fighting copyright piracy (including cable piracy) a high priority for all Lebanese government agencies. Such a step is absolutely essential to break the chain of indifference exhibited by Lebanese authorities for years.

For example, in 2002, the Ministry of Economy and Trade (MOET) failed to take any actions against piracy. In one rare case from 2001, MOET inspectors actually commenced a raid, but decided to cease running the raid after the reseller became agitated. Such lack of commitment among Lebanon's government officers is commonplace.<sup>18</sup> In other instances in 2002, raid targets were tipped off as to impending raids. Sometimes, Lebanese officials simply turn their heads to the existence of piracy. For example, known pirate product from countries like Ukraine has regularly been allowed into Lebanon by Lebanese Customs officials, even though they have been given adequate evidence of the illegality of the goods entering.<sup>19</sup>

In addition to a directive at the highest level to commit to the fight against piracy, Lebanon's leaders must establish a specialized IPR unit, in the police or elsewhere, with dedicated resources to deal with copyright infringements. Such a unit should be given *ex officio* authority (no *ex officio* actions were taken in 2002 against piracy). With all the incidents of prosecutorial error noted above,

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<sup>17</sup> The decision was appealed, and there has been no appellate decision as of the date of this filing.

<sup>18</sup> There are only two to four part-time inspectors in the Department of IP Protection tasked to fight piracy. In the area of software piracy, these inspectors lack computer knowledge. In addition, startlingly, these officers only work until 2 p.m. (meaning piracy after 2 p.m. cannot be addressed), and won't work with computer experts. 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"). By contrast, in June 2001, the motion picture and satellite television industries organized a press conference to launch a public education campaign urging cable subscribers to choose only legitimate cable companies. 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. Such candor and willingness to take responsibility is to be commended, but the fact remains that cable piracy continues to thrive in Lebanon.

<sup>19</sup> Even though the recording industry has repeatedly requested written answers from the police and enforcement authorities, no explanation has been forthcoming as to why pirated CDs from Ukraine have been allowed into Lebanon.

movement should be made to establish a specialized group of prosecutors, trained in copyright, to handle all copyright cases (including preparing cases for the proper court to avoid the problems experienced by the business software and motion picture industries). Such a core group would work with the IPR unit or other enforcement officers (e.g., customs) to prepare cases for prosecution. To avoid judicial delay and ineffective judicial enforcement, it would also be helpful if certain judges who have received specialized training in copyright were assigned to hear such cases.

## **COPYRIGHT LAW AND RELATED ISSUES**

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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). Unfortunately, the law remains deficient with respect to international standards in several respects. The government of Lebanon must consider the far-reaching consequences of its failure to bring its law into compliance with international standards, including potential negative effects on its chances to quickly accede to the World Trade Organization. WTO Members will expect Lebanon to achieve minimum standards of intellectual property protection as spelled out by the TRIPS agreement. Each of the items noted below are likely to arise in the accession process, and we strongly encourage Lebanon to take measures to address these deficiencies.

### **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. A new Ministerial Ordinance to implement the provisions of Article 25 of the Copyright Law was issued in July 2002. IIPA has not seen this Ministerial Ordinance, but understands that the Ordinance addresses some areas of concern raised by IIPA in the past.

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 Ministerial Ordinance was issued on July 1, 2002, and amended yet a previous set of regulations that allowed libraries and educational institutions to interfere with technological protection measures used on computer software (a serious concern raised in IIPA's 2002 Special 301 report on Lebanon). The Ordinance clarifies the terms under which “not-for-profit” educational institutions and public libraries may make use of the exception. Namely, we understand that they must comply with the following conditions:

- The institution or library must already possess at least one legal copy of the computer program.

- The decision to copy the program must be made by the “appropriate authority” within qualifying institution or library (which we believe indicates that the institution or library is free to designate the person to make such decisions).
- The exception only allows copying of the computer program by the institution or library.
- The computer program to be copied must have a general educational or cultural purpose. IIPA is deeply concerned that this provision is overly broad that it could lead to unintended coverage of other content.
- Only one copy per institution or library may be made available for use by students. This restriction appears to narrow the scope of the Article 25 exception somewhat.
- The copy made must be available for lending only by regularly enrolled students in qualifying institutions.
- The copy made by the public library must also be put at the disposal only of students regularly enrolled in a not-for-profit educational institution.
- The use of the copy of the computer program shall be limited to use in the premises of the qualifying institution or library.
- The copyright owner should be informed of the number of copies made, and the category and number of students that will use it.

The Ordinance appears to significantly narrow the scope of the exception in Article 25, but leaves some concerns and ambiguities intact. For example, the last sentence of the original law in Article 25(1) provides, “[t]he student shall have the right to make one copy for his personal use.” This clause appears not to be consistent with the thrust of the Ordinance, which mentions the “use” by the student as the object of the exception, not copying. An analogy may be made to lending of published materials in analog form by a school or public library. The library may lend the copy of the book to a patron, but under no circumstances consistent with international treaties may a student make a copy of the entire book! In the case of Article 25, it is patently clear that the student must not be able to make a copy of the computer program.<sup>20</sup> IIPA is unaware of any similar legal exceptions in any other copyright law worldwide that are as broad as this one. Finally, the exception in Article 25 threatens to set a precedent for newly graduated students to pirate software.

On balance, the bottom line is the same: Article 25(1) gives certain institutions the ability to copy and distribute a computer program without authorization of the right holder, and without any compensation to the copyright owner in the computer program. As such, the provision runs afoul of the well-established standards of international copyright law, and ultimately, Lebanon must delete Article 25 to comply with international treaty obligations (e.g., Berne, Paris [1971] text, TRIPS, WIPO “Internet” treaties, etc.).

## **Other Deficiencies in the Copyright Law, 1999**

- 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 Articles 23, 25-30, and 32-34.
- Exclusive licensees have no standing to bring civil claims.

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<sup>20</sup> The last clause of Article 25 also fails to meet international obligations in that it 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 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. The broad and unrestrained ability of a student to copy software, whether or not he has acquired an original copy, is in flagrant violation of Lebanon’s Berne commitments, and cannot comport with international standards in the TRIPS Agreement.

- Works and sound recordings are not explicitly given full retroactive protection in line with international treaties (Berne and TRIPS).

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.

## **Proposed Cable Law Must Not Substitute for Immediate Enforcement Against Cable Piracy**

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 Copyright Law and other laws, which are sufficient to eradicate this damaging form of piracy.

## **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 on the World Wide Web. 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) with 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 inadequate and ineffective. During the first 11 months of 2002, Lebanon imported \$18.6 million of products into the United States without duty, or 35.6% of its total imports into the U.S.<sup>21</sup> Lebanon should not continue to expect such favorable treatment, since it fails to meet the discretionary criteria in this U.S. law.

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<sup>21</sup> During 2001, Lebanon imported \$35.9 million of products into the United States without duty, or 39.1% of its total imports into the U.S.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# LITHUANIA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Lithuania be elevated to the Special 301 Priority Watch List for 2003. The primary reasons for this elevation are the fact that Lithuania has one of the highest piracy levels in the region, and that it is a major distribution outlet for illegal optical discs flowing in from Russia and Belarus, transshipping into Scandinavia, Eastern and Western Europe. These piracy and transshipment problems have negative impacts far beyond Lithuania's borders and remain unsolved due to the totally ineffective enforcement on the borders and inside the country, and despite continuing international pressure for improvement. Lithuania has been on the Special 301 Watch List since 2000 and has not resulted in any improvement in reducing piracy or resolving the inadequate enforcement measures by the Lithuanian government.

**Overview of key problems:** 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. Among the three Baltic nations, Lithuania is the worst in terms of transshipment of pirated materials through its borders. Failures by the police (especially the Economic Police), prosecutors, and by customs officials, to engage in effective domestic criminal enforcement are destroying the possibility of establishing legitimate markets for copyrighted materials in Lithuania. Despite recent legislative changes, Lithuanian law fails to provide for a TRIPS-compatible civil *ex parte* search remedy. Stronger criminal sanctions against organized crime are necessary, including the commencement of criminal searches and raids. Some industries report concerns with possible piracy ties to organized crime elements in Russia. Several serious evidentiary hurdles that impede effective criminal enforcement must be lifted. Estimated 2002 trade losses due to copyright piracy in Lithuania are at least \$16.9 million.

On the legislative front, amendments to the 1998 Copyright Act are needed to ensure its level of protection is up to modern standards, including those of the two WIPO 1996 treaties, of which Lithuania is a member. Recent advocacy by anti-copyright groups to press for amendments which would undercut the teeth of the copyright law appears to have been diverted, due to the active work of the copyright industries and the U.S. Embassy in Vilnius. Still, the Ministry of Culture's amendments continue to contain troubling provisions, which do not effectively implement Lithuania's international obligations, and the package appears to be set for a legislative vote in the Parliament (Seimas) on/about February 24, 2003.

**Actions that the Lithuanian government should take in 2003:** Lithuania must act to ensure improvement in both copyright legal reform as well as effective enforcement:

#### Legislation

- Copyright law reform must be achieved in concordance with the modern obligations of the two 1996 WIPO treaties and TRIPS;

- The government should draft optical media regulations to regulate the production, distribution and export of optical media.

#### Enforcement

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority;
- Police must commence criminal raids as well as implement administrative actions (such as taking licenses away from infringing kiosks) and criminal prosecutions must commence, including against those operations run by organized crime elements;
- Customs officers must start using the *ex officio* authority given to them with 2001 law amendments and strengthen their activities to intercept pirate product;
- The law must be revised to permit civil *ex parte* searches without advance notice to the suspect and courts must then issue these orders;
- The judiciary must relax its onerous evidentiary burdens (especially regarding expert reports for some industries) in criminal cases;
- Cooperation between enforcement authorities must improve, and a centralized IPR police unit should be reestablished;
- Continued implementation of the 2002 government software legalization decree is needed.

**LITHUANIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1999 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	12.0	85%	7.0	85%	7.0	85%	5.0	85%
Motion Pictures	NA	90%	1.5	NA	1.5	80%	NA	100%
Business Software Applications <sup>2</sup>	4.9	54%	3.9	56%	NA	76%	NA	80%
Entertainment Software	NA	80%	NA	NA	3.5	98%	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>16.9+</b>		<b>12.4+</b>		<b>12.0+</b>		<b>5.0+</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$2.5 million at 76% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

Lithuania participates in the U.S. Generalized System of Preferences (GSP) program, which offers preferential trade benefits to eligible beneficiary countries and includes a discretionary criterion that the country must provide “adequate and effective” intellectual property rights protection.<sup>3</sup> 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, intended 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 agreement never entered into effect because Lithuania did not ratify it.

In May 2001, Lithuania acceded to the World Trade Organization, and its law must currently comply with the substantive and enforcement obligations under the TRIPS Agreement. Also, the European Commission has identified problems with inadequate copyright enforcement in Lithuania and called on that government to intensify measures to combat piracy and counterfeiting, strengthen border controls, and improve coordination between enforcement bodies.<sup>4</sup>

## **COPYRIGHT PIRACY IN LITHUANIA**

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### **Lithuania Is a Key Regional Transshipment Point for Pirated Products**

Given its pivotal geographical location between Eastern and Western Europe, and its ineffective border enforcement, Lithuania remains a major regional transshipment area for pirated material—music CDs and audiocassettes, CD-ROMs containing entertainment and business software, videos, VCDs, DVDs and videogame cartridges. Most of the material is produced in other countries, especially Russia and more recently, Belarus. The Lithuanian market is flooded with pirate product produced in Russia. Products are then shipped through Lithuania to other countries in Eastern, Central, and Western Europe, predominantly Poland, the other Baltic States, Germany and Scandinavia. Lithuanian nationals have also been notable in UK airports as hand-carriers of pirated discs in suitcases.

Up until January 2001, Lithuanian customs officials did not have the proper (*ex officio*) authority to do their jobs. Unfortunately, customs officials have not used their *ex officio* power at all so far. Indeed, the recording industry reports customs did not take any anti-piracy actions in 2002. This unacceptable behavior continues to hamper their key potential in the field of IP protection in the region. These officials must start using their authority to commence criminal investigations and seizures when they detect illegal activity.

### **Optical Media Piracy**

There is one known CD manufacturing plant in Lithuania. In the absence of any state control or supervision of the plant's activity, the possibility that it is involved in unauthorized production cannot be discounted. The Lithuanian plant, which competes with other plants in the

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<sup>3</sup> During the first 11 months of 2002, \$3.6 million worth of Lithuanian goods (or 1.3% of Lithuania's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 68.2% decrease from the same period in 2001. For more details on Lithuania's Special 301 history, see Appendices D and E of this 2003 Special 301 submission.

<sup>4</sup> To access the European Commission's October 2002 annual report on EU enlargement and Lithuania, go to <http://www.euractiv.com/cgi-bin/cgint.exe/?1100=1&204&OIDN=1504033>.



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 indicate that the plant plans to expand and increase its capacity, possibly to include DVD production. In the course of 2002, the plant acquired new and modern equipment. It is anticipated that the plant's annual optical media manufacturing capacity is in the region of 8 million discs per year. This clearly exceeds the legitimate demand in the Lithuanian pirated copyright market.

In order to avoid the possibility of illegal CD production within Lithuania, steps must be taken quickly to regulate optical disc plants. Lithuania should work with all the copyright industries to adopt proper tools to regulate the production, distribution and export of optical media. For more details, see the industries' recommended elements of any OD regulatory regime at the end of this report.

## **Internet Piracy**

Internet piracy is establishing itself in Lithuania. Many sites contain web advertising of infringing copyrighted hard goods. The recording industry group IFPI reports that, in 2002, it identified and sent 15 "cease & desist" notices to 60 infringing sites estimated to be contained around 16,500 illegal files. As a result, 36 of those sites (i.e., 62%) were removed from Internet. The local recording industry group FGPA sent out 32 "cease & desist" notices in 2002. FGPA reports that upon FGPA's and performers' request, the police initiated only one administrative case against the website offering illegal music products on Internet ([www.music.lt](http://www.music.lt)). Generally speaking, the Lithuanian enforcement authorities have not addressed piracy on Internet almost at all, which resembles their inactivity to combat with the physical piracy. Despite the increasing figures, several websites have been operating with impunity for over three years without any prosecutorial action to shut them down. To date, there are also no court cases dealing with the Internet piracy. MPAA also 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 less than satisfactory.

Another popular form of music piracy on the Internet in Lithuania is selling recorded CD-Rs (mostly in MP3 format) 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. These same techniques are used for distributing pre-recorded CD-Rs for pirated entertainment software products, in addition to the numerous "warez" sites providing pirate videogames for download.

## **Piracy Remains High Across All Industries**

The recording industry reports that the music piracy situation in Lithuania continued to worsen in 2002. The streets of the main cities are still full of kiosks selling pirate CDs and videocassettes. The levels of piracy for sound recordings and music in Lithuania continued to be as high as 85% in 2002 (the same since 1999). As with the developing trend elsewhere in the region, the share of pirated audiocassettes in overall music piracy is decreasing. Currently, around 25% of all pirated sound carriers are audiocassettes and 75% pirated CDs (and CD-Rs). The legitimate music industry in Lithuania is struggling for survival in the midst of piracy. Organized criminal groups are now involved in heavy pirate CD traffic, with extremely limited enforcement activity by the authorities. Despite what is understood to be further major pirate distribution groups in action, 2002 has not seen a repeat of the successful actions of the two

previous years, which netted over 100,000 and 200,000 pirated discs respectively. Estimated trade losses due to recording and music piracy were \$12 million in 2002.<sup>5</sup>

In addition to the 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 and Belarus. This product is then shipped to Estonia and Latvia as well as to Poland and other neighboring countries. However, investigating the transshipment of CDs through Lithuania has proven very difficult as Lithuanian customs do not use its ex officio authority to seize the shipments in transit. Regrettably, the recording industry has to report that customs did not conduct any anti-piracy actions in 2002.

The Interactive Digital Software Association (IDSA) reports that all of the pirated entertainment software product (especially prerecorded silver discs) is now coming from Russia. Distribution of pirated material in the country is controlled by Russian organized crime syndicates which are now affixing “logos” or “brand names” to their products. These pirated materials are then stored in Lithuania for distribution throughout Eastern and Central Europe, as well as for distribution in Lithuania itself. There is a small but growing local market involved with burning videogames for the PC on gold discs, now at about a 30% piracy level. In addition, Internet piracy is rapidly rising. As recently as 2000, estimated videogame piracy levels were over 90% of the market. There has been some improvement in the domestic market due to enforcement actions being undertaken by entertainment software companies. Retail piracy is moving to the flea markets, kiosks, and taking to the Internet. The biggest problem, by far, for this industry is the flood of Russian-produced pirated entertainment software into Lithuania, both for domestic consumption and transshipment to surrounding countries. This industry also reports problems with ineffective enforcement by Lithuanian customs officers. Estimated level of piracy of entertainment software products in Lithuania was 80% in 2002.

The Business Software Alliance (BSA) reports that the piracy rate for business software in Lithuania dropped slightly over the past year to 53% in 2002. The Gariunai flea market remains a notorious source of pirated materials, although police activities to remedy this have increased. It is believed that the market attracts “piracy tourism” from neighboring countries. BSA believes that there is steady improvement with regard to central government use of software. Since the 2001 government software management decree issued by the Ministry of Interior, funds have been allocated by Central Government for licenses to procure legal software, although the extent to which this has been applied is unclear. Local governments remain a source of serious concern for BSA. Estimated U.S. trade losses due to business software piracy in Lithuania increased to \$4.9 million in 2002.

The Motion Picture Association of America (MPAA) reports that Lithuania continues to be the least developed market of the Baltic states for audiovisual products. Although it is the largest of the three Baltic countries, MPA member companies do release legitimate films in local cinemas and on video with subtitles and local publicity materials. It is estimated that the video piracy rate remains around 90%. Pirate cassettes are duplicated locally using Russian-language masters. The country is also a conduit for pirate product to Poland and Germany and other Baltic states, and has a porous border with Belarus. The legitimate video industry is trying

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<sup>5</sup> This figure reflects the conclusion of a more in-depth examination of the market than has taken place in the past. It reflects more accurate information rather than a rapid surge in losses inflicted by piracy of U.S. recorded music. It also includes a very conservative estimate of the losses inflicted by pirate activity at the Baltic Optical Disc CD plant, which exports part of its output to other countries in the region. There is little doubt that previous reports underestimated the scope of the problem, but the recording industry has no mechanism for reassessing past estimates.

to make inroads into this predominately pirate market, and local partners of several MPA members work closely with enforcement officials, particularly the tax police. These companies conduct extensive media campaigns, highlighting every enforcement action and every legislative initiative undertaken by the authorities. The Internet is beginning to take hold, and amateur websites are marketing pirate product. Cooperation with Internet Service Providers (ISPs) has reportedly been good in getting such sites removed. Television piracy is also reported to occur in Lithuania, with small cable stations showing unlicensed blockbuster movies.

## **COPYRIGHT ENFORCEMENT IN LITHUANIA**

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In order to comply with its WTO TRIPS multilateral obligations and its bilateral trade obligations, the Lithuanian Government must express its political will to put all of its enforcement tools into effective 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. In addition to passing its copyright law in 1998, Lithuania approved improvements to its criminal code in 2000 and revised its customs code in 2001 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 actually be implemented in practice, and judges, customs officials, police and prosecutors must start their actions to stop the organized criminal piracy activities within Lithuania.

### **Poor Coordination Between the Criminal Enforcement Agencies**

The Ministry of Finance decided to liquidate the specialized IPR unit (Tax Police), effective April 1, 2002, and Tax Police officials had IPR enforcement removed from their portfolio. The copyright industries find the liquidation of the Tax Police to be a huge step backwards in the copyright enforcement, since it was the only enforcement authority that started to build up the proper copyright enforcement by making more concrete efforts, which started to show some encouraging successful results.

The Economic Police and customs officers remain the only Lithuanian agencies with jurisdiction to pursue copyright infringements. Regrettably, local reports indicate that there is no communication and co-operation between these two law enforcement agencies. Furthermore, the Economic Police is reported to be weak in cooperating with other enforcement agencies responsible for IPR. In September 2002, the Economic Police created an IPR unit of three officials, which unfortunately takes very few actions against IPR crimes if any at all. The Economic Police has indicated that they cannot add more specialized IPR investigators to its operations due to limited budget resources.<sup>6</sup> The bottom line is that the copyright industries are gravely concerned that the number of effective anti-piracy actions in Lithuania will decrease without a larger, specialized IPR unit.

### **Police, Prosecutors and Judges Must Enforce Lithuanian Laws**

The new criminal code adopted in May 2000 provided criminal penalties for copyright infringement, given the *ex officio* authority to commence intellectual property infringement cases on their own volition (that is, without a specified complaint from the copyright or neighboring

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<sup>6</sup> Interestingly, the Lithuanian government did find funding to establish the State Expertise Centre under the State Forensic Bureau.

rightholder). The key is that this authority must now be utilized by the prosecutors to engage in effective enforcement action against IPR crimes. These penalties must now be applied to organized criminal syndicates working in Lithuania to stop the piracy. So far, the results are disappointing.

**Recording industry experience:** The recording industry reports that raids occur very sporadically, but there is no deterrent effect to this activity. The Economic Police refuses to provide any statistics related to its IPR activities.

The local recording industry group FGPA reports that it continued to assist the police actively in both administrative and criminal cases. According to the 2002 statistics, FGPA provided the total of 19 specialist opinions for 3,462 seized sound carriers (of those 3,448 CDs, 14 audiocassettes) in administrative cases, and the total of 21 expert opinions for 245,286 sound carriers (of those 244,481 CDs, 865 audiocassettes) in criminal cases.

Prosecutorial follow-up is almost non-existent in Lithuania. The music industry reports that the two recent major seizures of over 100,000 pirated CDs in 2000 and over 200,000 pirated CDs in 2001, have not received any prosecutorial follow-up whatsoever and is feared to be closed. 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 Tax Police initiated the case in spring 2000.

**Business software experience:** BSA reports that in 2002, there were 52 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 (the same number as in 2001).

In 2002, there were 26 administrative judgments at lower court level, a reduction on the number (42) handed down in 2001. As at early 2003, several further administrative cases are pending. Also in 2002, the tax and economic police also initiated nine criminal actions against resellers and end users. BSA has continued to obtain criminal judgments against both end users and resellers in 2002, including:

- Criminal judgment against reseller, sentence of 6 (six) months (suspended), and the confiscation of substantial number of CDs;
- Criminal judgment against reseller, sentence of one year imprisonment (suspended) and the confiscation of substantial number of CDs;
- Criminal judgment against reseller, sentence of six-month imprisonment (suspended for a one year), confiscation of assets in the amount of 1000 Litas (US\$282), confiscation of CDs and seven PCs.

Also in 2002, BSA continued to obtain civil judgments in both reseller and end-user cases: in total, 20 judgments at District Court/Court of Appeal level were handed down, resulting in damages awards in excess of 1,000,000 Litas (US\$310,000). BSA has relied heavily on the strong damages laws present in Lithuanian copyright law. BSA entered into 27 settlements with end-users and resellers in 2002, for a total value of 170,000 Litas (US\$52,700).

BSA received an alarming ruling in October 2002 from the Lithuanian Supreme Court. In a criminal case brought against the director of a company suspected of end-user piracy, it was found that the term "commercial purposes" did not extend to end-user piracy, but rather was limited to distribution only. The Supreme Court interpreted "commercial purpose" only to

“distribution” of illegal copies, which happens when the infringer receives direct income from this activity (as opposed to an indirect benefit). The director was acquitted on this basis. BSA is exceptionally concerned at this ruling as it effectively decriminalizes end-user piracy. BSA has asked the Supreme Court to issue a corrective Practice Direction confirming that “commercial purposes” are not limited solely to “distribution,” and that the Ministry of Justice makes this clear also when the new criminal code is brought into effect in May 2003.

## **Civil Actions: *Ex Parte* Searches and Damages**

The Lithuanian Copyright Act purports to include the critical enforcement tool of civil *ex parte* search orders but it fails to provide a TRIPS-compatible version. Because the law allows prior notice to be provided to the intended defendant, the usefulness of this search order is completely undermined. As a result, the BSA has not made any requests for a civil *ex parte* search order. Simply put, the law must be changed in order to comply with TRIPS.

The Lithuanian Parliament drafted a proposed civil search law in late 2002, which was presented in January 2003. BSA, together with other rightholders, objected to several provisions within the draft law, which were felt to be incompatible with TRIPS Article 50. Parliament has accepted the proposed changes put forward by BSA/rightholder groups, and the law is due to be enacted on February 24, 2003.

Also early in 2003, the Lithuanian Parliament proposed an amendment to the “statutory” damages laws present in the Copyright Act, seeking to replace those provisions with a capped remedy of the equivalent to US\$35 to \$35,000. BSA objected strongly to this change, as it will result in an effective cap on statutory recoveries for infringement of a rightholder’s rights, as opposed to being calculated by reference to a work or number of copies. Consultations are ongoing with the Lithuanian government with a view to modifying the proposal, so that statutory damages are awarded on a per-copy or per-work basis. The proposals are due to be presented to Parliament on February 24, 2002.

Some entertainment software companies report that they have had some success through civil enforcement. A majority of the cases are settled to the satisfaction of the company.

## **Inadequate Border Enforcement**

Much improvement is needed to stem the tide of pirated products entering Lithuania and being transshipped to other countries, as discussed above. Despite the adoption of the new customs code in January 2001, which afforded customs officials with the authority to make *ex officio* seizures (on their own initiative), such *ex officio* actions have rarely taken place. Lithuanian customs officials complain about the lack of cooperation with other Lithuanian agencies (including the Border Police) and their own inability to develop and complete piracy cases. It is crucial, that Lithuanian Customs start using its *ex officio* authority and taking actions against IPR crimes.

## **Administrative Fines Are Too Low in Copyright Cases**

Lithuanian’s administrative penalties are inadequate and non-deterrent. BSA and the recording industry report that the only available sanctions under the Administrative Code are monetary fines, which are less than the level of damages inflicted on the rightholder. These fines range between 1,000-2,000 Litass (US\$300-600) in copyright piracy cases. Regretfully, in

practice, the courts tend to apply the fines in the range of 100-200 Litas, sometimes 500 Litas. At the very least, the courts should stop finding the excuses to lower the fines and impose the statutory fines. Furthermore, the fines for repeated infringements should be at least in the level of 5,000 Litas. Unfortunately, amendments to strengthen these penalties are facing strong opposition in the Lithuanian Parliament. BSA is unaware of any proposals to increase administrative penalties. BSA believes that the level of administrative penalties is too low to constitute a genuine deterrent: In the 26 administrative judgments made in 2002, the average fine was 700 Litas (US\$220).

## **The Burdensome Problem of “Expert Opinions”**

There is a burdensome evidentiary problem related to proof of ownership affecting several copyright industries.<sup>7</sup> As with other countries in the region, the problem is that the courts will not apply a presumption of ownership. Therefore, in order to prove that a suspect product is in fact pirate, an “independent specialist” must reach a conclusion, which is then presented as evidence. The police have reported numerous instances where 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 rightsholders also still have to go through extremely cumbersome expert reports to pursue administrative actions against piracy. For example, every single CD has to be accounted for and inventoried. Furthermore, sometimes every single song on every single CD has to be accounted for and even listened to. 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. When the authorities and the industry make very large seizures (such as over 200,000 CDs in one action), the burden to complete such reports is completely onerous and counterproductive to efficient enforcement. 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.

The judiciary still has the tendency to not accept the opinions of the music industry in some cases. However, due to the years of “pioneering” this practice is slowly diminishing. Nevertheless, the recording industry believes strongly that legislative reform in the copyright act to establish a presumption of ownership is crucial to resolving this enforcement roadblock and expediting case processing.

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<sup>7</sup> 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.

MPAA notes that expert reports have to be filed for every product seized. Still, local distributors report having had cases processed relatively quickly (six months), but that many cases have been postponed because of technicalities found in the papers submitted.

In early 2002, the Ministries of Culture, Justice and Interior, along with the Prosecutor's Office, established a separate public center under the State Forensic Bureau, which would provide expert opinions in copyright cases with the approximate budget of US\$32,000 (120,000 Litas). This new State Expertise Centre started to operate late 2002 and currently employs two persons (instead of initially planned six). The Centre is like a "formalizer" of the expert reports, which will be continuously provided by the copyright industries. The recording industry believes that the creation of such a center is not a priority requirement in seriously challenging the piracy problem. These statutory opinions are contrary to European practice, whether the private sector usually provides the expert opinions on seized goods. It would be far preferable for these funds to be dedicated to creating an effective separate IPR police unit (like the liquidated Tax Police). Apparently, the ineffective and uncooperative Economic Police is applying to be an intermediary of the Centre's budget between the State and the Centre. This effort should be stopped, as it will hamper the attempt to get some order in the copyright enforcement.

## **Other Hurdles to Investigations**

**False contracts:** Several years ago, the copyright industries reported that police and prosecutors are similarly unable to deal effectively with false contracts that are common in this region. Lithuanian judges have indicated that there have been some difficulties allowing legal entities to commence copyright suits; however, some industries (software) report that this has not been a problem for them. This problems has diminished over the years, thanks the activities of the Tax Police.

**Rules on court fees:** The industries understand that the new code on civil procedure, published in February 2002, sets the level of court fees in IPR cases at a maximum level of 3% of the value of the claim. Prior to this 2002 requirement, Lithuanian courts were inconsistent in their application of court costs, apparently confusing the general provisions (which involve 5% of the value of the claim) and the civil code rules on intellectual property rights (which had been 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. The recording industry imposes the imposition of any such prohibitive court fees. A flat fee of 100 Litas has proven to be a reasonable amount and this criterion should be re-applied.

## **COPYRIGHT LAW AND RELATED REFORMS**

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There have been recent reforms to Lithuania's copyright law, criminal code, civil code and customs code. More recently, efforts to amend the 1999 Copyright Act have escalated, and close attention must be paid to that effort in order to avoid deleterious results, which could undermine, not improve, copyright protection and enforcement in Lithuania. Recent advocacy by anti-copyright groups to press for amendments, which would undercut the teeth of the copyright law appears to have been diverted, due to the diligent work of the copyright industries and the U.S. Embassy in Vilnius. However, the government's set of proposed copyright amendments still contain some troubling provisions, and a legislative vote is set for February 24, 2003.

## Copyright Act (1999)

Lithuania took a major step forward to improve its legal regime with the 1998 adoption of its comprehensive Copyright Act (Act No. VIII-1185), which replaced what was essentially the revised Soviet Civil Code.<sup>8</sup> The law entered into force on June 9, 1999. The Ministry of Culture was appointed by the government 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 law even provides for the recovery of profits and statutory damages in order to be consistent with the WTO TRIPS Agreement.

With respect to international treaties, Lithuania 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. Another positive note was Lithuania's accession to the two 1996 WIPO digital treaties—the WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT), making it one of the original 30 countries to put these treaties into force.

While the 1999 copyright law did represent a positive step forward in Lithuania, the law contained significant deficiencies. The 1999 Act even included some, but not all, of the provisions required by the two WIPO treaties. IIPA's observations on the key remaining problems and/or omissions in the law are summarized below:<sup>9</sup>

- The act must ensure that the right of reproduction covers temporary copies;
- The act's right of communication to the public needs to be amended to make clear it applies to all disseminations, not just "transmissions," and that there is no exhaustion of the distribution right by transmission;
- The act must allow right holders to fully enforce their rights against the circumvention of technological protection measures (TPMs). 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 law added protections for so-called "copyright management information" that is attached to or accompanies a work, performance, or sound recording. However, it does

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<sup>8</sup> After regaining its independence from the Soviet Union, Lithuania amended its copyright and administrative law, albeit only slightly, in May 1994. The 1994 amendments updated the 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. 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.

<sup>9</sup> In October 1998, IIPA submitted detailed comments to the Parliament on the penultimate draft of the bill, at the request of the drafters of the law and the government of Lithuania. There, 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 discussion in this section tracks most of the comments IIPA provided in that October 1998 document to the Lithuanian Parliament.



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.

- Article 69 of the Copyright Act reportedly provides for civil *ex parte* search procedures but not without advance notice to the target. The Lithuanian law must include *ex parte* search orders, at least as required by the TRIPS 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.
- 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.
- 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.
- 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.

## Current Efforts to Amend the Copyright Act

**Overview:** Legislative consideration of the latest package of copyright law amendments has been postponed to late February 2003; at that time, it is expected that the Legal Committee of Parliament will pass the package to the floor. Vigilance is required to ensure that deleterious amendments are not adopted. IIPA reported in our February 2002 Special 301 submission that it was likely that copyright amendments efforts would be resurrected during 2002. There we expressed concern over efforts some Lithuanian small business groups (such as retail shop owners, but more troubling, by some organized crime groups) in 2000 which lobbied for the removal of some of the criminal sanctions for IPR violations and the reduction in the levels of compensation and damages that can be awarded to right holders under the copyright act. Since the new criminal code (2000) had only been in place for a short time, and only sparingly used, the copyright industries vociferously objected to any effort to repeal the criminal sanctions. A similar anti-copyright faction again attempted in early 2003 to undermine the level of damages available under the copyright action (see further discussion below).

**The government's legislative package of 2002:** The Lithuanian government has indicated its intent to continuously improve its laws and regulations in order to make them compatible with TRIPS, the WIPO treaties and the various EU directives. The Culture Ministry set up a working group/commission to propose necessary changes to the copyright law; this group of government officials included representatives from the Ministries of Culture, Justice and Finance, along with former IPR police investigators and academics. Before their work was made available in June 2002, even the local copyright owners were not consulted. By summer and fall 2002, some local and international industry groups were able to submit their comments to the various Lithuanian agencies for their continued consideration. The Ministry of Culture accepted some, certainly not all, of the recommendations made by the copyright industry sectors (referring primarily to the recording and business software industries). The package has the support of the Lithuanian Supreme Court and the Culture Ministry, thus making it a challenge to achieve further amendments to strengthen the proposal.

The objective of the Culture Ministry's amendments were aimed at improving the law up to the standards of the WIPO treaties and various EU directives; unfortunately, this effort fell short. In the Fall of 2002, the local and international copyright industries had identified several problems and issues which required further improvement. For example, comments expressed concern over the following: inadequate provisions regarding the effective implement of the WIPO treaties' obligations on technological protection measures, especially allowing to circumvent the technological protection measures for private purposes; the lack of a provision establishing a presumption of ownership in sound recordings; creation of an overbroad private copying exception, including the obligatory rule to allocate 25% of the levies for cultural, social or other similar purposes, which should be decided by right holders; troubling provisions regarding the provisions regulating the collecting societies activities, especially exempting the collecting societies from the anti-trust rules; the scope and application of obligatory collective management to the exclusive right of making available and the fact that there would be only one collecting society allowed in each field of exceptions to protection.

**Legislative wrangling in late 2002 and 2003:** The Ministry of Culture's package was presented to the Legal Committee of Parliament in early autumn in 2002. A second set of amendments arrived at the Parliament's door when the Legal Committee of the Parliament decided in mid-December 2002, over the objection of the Ministry of Culture, to discuss a separate submission of some 20 amendments filed by attorneys known for representing clients

who prefer to weaken copyright provisions (called the “alternative project” for discussion’s sake). In mid-December, the Legal Committee decided to insert five of the proposals from the alternative project into the Ministry of Culture’s draft. Meanwhile, the Supreme Court voiced its support for the Ministry of Culture’s package at the very late stage of the amending process, thus making any additional amendments quite challenging.

In addition to the remaining deficiencies in the proposed amendments, the industries are particularly concerned by the Ministry of Culture’s continued unwillingness to accept most of the copyright industries’ recommendations, thus sticking by the draft it circulated in the Fall 2002. The troubling provisions listed above remain unresolved. In fact, its proposal to amend Article 67(3) of the current Copyright Act would adversely affect the ability of rightholders to collect damages. The current law provides that copyright owners, instead of getting reimbursement for losses (that is, damages), may claim compensation, the amount of which will be determined according to the price at which the produce has been legally sold, by increasing it up to 200%, or 300% if willful infringement is involved. The ministry’s amendment would allow the rightholder to receive 10 to 1000 minimum wages (US\$35-3,500), with the court taking into account the kind of infringement, the income status of the infringer, his motives and other circumstances including fairness, equity and discretion. Years ago, BSA in particular worked hard with the Lithuanian government to introduce this statutory damages provision in the current law; statutory damages are an excellent means to aid rightholders and courts in applying TRIPS-compatible levels of damages. Unfortunately, the Legal Committee continues to reject leaving the current law alone and instead wants to undercut an existing strong damages remedy.

Fortunately, the Legal Committee rejected all of the proposals in the “alternative project” on January 27, 2003, and the Seimas went out of session for a month. Legislative consideration of the copyright law amendments pending before Parliament have been postponed one month, and will likely be taken up on February 24, 2003, after Parliament returns from its break. Between now and then, it is likely that both the copyright industries and the anti-copyright forces will continue to advocate their views. It is imperative that the Seimas adopt a package which satisfies Lithuania’s bilateral and multilateral copyright obligations.

## **Criminal, Civil and Customs Code Reform**

Lithuania has revised its various codes affecting the enforcement of intellectual property rights in recent years.<sup>10</sup> Effective implementation of these amendments, resulting in the deterrence of copyright piracy, is key.

Amendments to the Criminal Code and the Criminal Procedure Code entered into force in 2000; these contain criminal liability for unlawful reproduction, importation, exportation, distribution, or other uses for commercial purposes. Reportedly, 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 (RMI) and technological protection measures (TPM), punishable by one and two year imprisonment terms, as well as fines. IIPA believes that these new fines and terms of imprisonment must be enforced to stop the spread of digital piracy (but see discussion above on the need to improve the copyright law’s coverage of TPMs and RMIs).

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<sup>10</sup> IIPA does not have the full translation of all these laws; this section relies on third-party summaries.

Amendments to the Civil Procedure Code entered into force in July 2001. The government believes that these amendments implemented a civil *ex parte* search remedy but the industry is clear that this remedy violates TRIPS and is therefore unavailable for copyright holders. Amendments to the customs code—the Law on the Protection of Intellectual Property in the Field of Import and Export of Goods—entered into force on January 1, 2001, with further implementation completed on October 1, 2001. These amendments give customs officials the authority to: (1) search, on their own initiative, *ex officio* (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 piracy transmissions at the border.

**Civil code reform:** The Lithuanian Parliament drafted a proposed civil search law in late 2002, which was presented in January 2003. BSA, together with other rightholders, objected to several provisions within the draft law, which were felt to be incompatible with TRIPS Article 50. Parliament has accepted the proposed changes put forward by BSA/rightsholder groups, and the law is due to be enacted on February 24, 2003.

## Government Software Legalization

The Business Software Alliance (BSA) believes that there has been steady improvement with regard to central government use of software. 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.” Since the 2001 decree, funds have been allocated by Central Government for license procurement, although the extent to which this has been applied is unclear. BSA reports that this recommendation was 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 (state-funded projects). Legalized software use in local governments remain a source of serious concern for BSA.

## Optical Media Regulations

The Lithuanian government should craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following eleven elements:

- 1) Licensing of facilities: Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and “production parts” (including “stampers” and “masters”), including requirements like production must take place only at the licensed premises, a license only be granted to one who has obtained “manufacturer’s code” (e.g., SID code) for optical discs and production parts, the licensee must take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.
- 2) Licensing of export/import of materials: Centralized licensing of export of optical discs, and import/export of production parts (including “stampers” and “masters”), raw materials

or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).

- 3) Requirement to apply manufacturer's code: Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer's code, and to cause each optical disc and production part to be marked with manufacturer's code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including making, possessing or adapting an optical disc mold for forging manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mold or any disc; selling a production part not marked with manufacturer's code, etc.).
- 4) License record keeping requirements: Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) Registration requirement for commercial optical disc duplication: Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.
- 6) Plenary inspection authority: Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.
- 7) Search and seizure authority: Plenary authority to enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.
- 8) Government record-keeping requirements: Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- 9) Criminal penalties for violations: Violation of any significant aspect of the regime is subject to criminal sanctions, including individual liability (fines and/or imprisonment).
- 10) Possibility of withholding, suspending, or revoking a license for prior copyright infringement, fraud in the application process, or violation of the Optical Disc Law.
- 11) Possibility of closure of a plant.

The copyright industries look forward to working with the Lithuanian authorities to draft, implement and enforce comprehensive optical disc regulations.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# PAKISTAN

### EXECUTIVE SUMMARY<sup>1</sup>

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IIPA recommends that Pakistan be elevated to the Priority Watch List. Pakistan has quickly emerged as one of the world's leading producers of pirate optical discs (CDs, DVDs, VCDs, CD-ROMs) of copyright material (music, audio-visual, business software, videogames, reference software), while the government has taken no steps to curtail production.

Pakistan has been on the Watch List for over a decade. USTR retained Pakistan on the Watch List in 2002, but recognized that "optical media piracy remains a growth industry in Pakistan [and that] Pakistan has emerged as one of the world's largest exporters of pirate CDs and optical media." In 2001, largely because of rising pirate optical disc production, IIPA filed a petition to the U.S. government to evaluate whether Pakistan continues to qualify for benefits under the Generalized System of Preferences (GSP) program (a U.S. trade program in which Pakistan enjoys trade benefits).

The optical disc pirate production problem has grown out of control in 2002. IIPA knows of five factory locations in which eight companies operate optical disc production lines in Pakistan (as many as twelve lines), and based on import of the raw materials, actual production may have risen as high as 66 million discs per year. Legitimate domestic demand is roughly seven million discs, resulting in more than a 9-to-1 ratio of discs produced to possible legitimate domestic demand, meaning that Pakistan is exporting its problem to the world. Shockingly, discs sourced from Pakistan are being found all over the world. Meanwhile, the domestic market in Pakistan is ravaged by piracy.<sup>2</sup>

Required Action for 2003:

#### Legislation

- Pass and implement an effective optical disc law to enable licensing and control over optical disc 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.

#### Enforcement

- Shut down known production facilities, if necessary by temporary executive order, pending their ability to demonstrate that they have some legitimate materials to produce (whereupon supervised access to the plant could be granted so as to permit the legitimate production, but thereafter closed again).
- Regulate/monitor the importation of the raw materials required for CD production (optical grade polycarbonate, for which there is no domestic source), if necessary by temporary executive order.

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<sup>1</sup> For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to filing.

<sup>2</sup> The seriousness of the piracy situation is exemplified by one case in 2002, in which two forms of organized crime came to a head: a Pakistani was caught in Karachi with pirated VCDs of motion pictures (produced in Pakistan), and 950 grams of heroin concealed in jewel boxes of some of the optical discs.

**PAKISTAN**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>3</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	12.0	95%	11.0	NA	10.0	60%	9.0	60%	9.0	60%
Records & Music <sup>4</sup>	60.0	83%	60.0	90%	65.0	90%	3.0	90%	2.0	95%
Business Software Applications <sup>5</sup>	NA	83%	9.2	83%	24.5	83%	14.1	83%	18.1	86%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	11.1	94%
Books	44.0	NA <sup>6</sup>	44.0	NA	45.0	NA	42.0	NA	40.0	NA
<b>TOTALS<sup>7</sup></b>	<b>116.0</b>		<b>124.2</b>		<b>144.5</b>		<b>68.5</b>		<b>80.2</b>	

## COPYRIGHT PIRACY IN PAKISTAN

### Pakistan Has Become One of the World's Largest Exporters of Pirate Optical Discs

Pakistan emerged in 2001 and continued in 2002 as one of the world's largest producers for export of pirated CDs and other optical discs (e.g., VCDs and CD-ROMs) of copyrighted

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>4</sup> Pakistan saw its already minuscule legitimate music market decline in value terms from \$9.2 million in calendar year 2000 to \$3.2 million in 2001. See Nyay Bhushan, *Industry Insiders Fear Imminent Collapse of Indian Music Industry*, February 01, 2003, [http://www.billboard.com/billboard/billboard\\_members/currenteditorials/article\\_display.jsp?vnu\\_content\\_id=1803209](http://www.billboard.com/billboard/billboard_members/currenteditorials/article_display.jsp?vnu_content_id=1803209). 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 is higher than that for overall repertoire; it was 99% in 1998, and virtually 100% for 1999 through 2002.

<sup>5</sup> BSA's estimated piracy losses 2002 are not available, and levels are preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$28.3 million at 87% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>6</sup> While no overall piracy rate for published materials is available from the Association of American Publishers, many publishers report unacceptably high piracy levels at around 90%.

<sup>7</sup> In IIPA's 2002 Special 301 report, IIPA estimated the total losses due to piracy in Pakistan for 2001 as \$143.3 million. Due to the revision in the loss to the business software industry, the total losses for 2001 are adjusted to \$124.2 million.

material (music, audio-visual, business software, videogames, reference software).<sup>8</sup> Five optical disc plants (with as many as twelve production lines) are responsible for production of tens of millions of discs.<sup>9</sup> Based on known imports of the raw materials used to make discs (optical grade polycarbonate), plants in Pakistan now produce up to 66 million discs per year.<sup>10</sup> Given Pakistan's 7.1 million legitimate domestic demand for discs, it is not surprising that the bulk of pirate optical discs are exported to India, but 2002 marked a watershed, with discs sourced from Pakistan showing up literally all over the globe.<sup>11</sup>

## Piracy in Pakistan Ruins the Domestic Market

Piracy phenomena in Pakistan include the following:

- **Optical Disc Piracy:** Pirate optical discs of all types of copyrighted content (music, audio-visual, business software, videogames, reference software) decimate the legal market in Pakistan, mainly through retail sales at roughly 12,000 or more retail outlets, kiosks and stores.<sup>12</sup> For example, pirate music CDs sell for around PKR35 to 65 (US\$0.60 to 1.12) per unit, while proliferating pirate DVDs, often containing movies that have not yet or have just begun their theatrical release, sell for PKR150 (US\$2.50) per unit for international motion pictures, to PKR210 (US\$3.33) per unit for Indian or Pakistani motion pictures. Indicative of the seriousness of the optical media piracy problem in Pakistan is the Rainbow Centre in Karachi, and Hafeez Center in Lahore, shopping arcades of 100s of retail outlets filled with pirated product, including a cornucopia of entertainment software. Even all the well-known and reputable local shopping malls have music, video, and computer shops offering pirated optical discs, and even the duty-free area of Karachi International airport has a retail shop filled with pirated optical media, including games software. Pirate business software is readily available in Pakistan for less than US\$1; for example, pirate Microsoft Office XP is available for PKR30 (US\$0.52).
- **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 2002. Book piracy (mainly photocopying of medical texts, computer books, and business

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<sup>8</sup> For the year 2001, industry estimated that of all optical discs exported out of Pakistan, 45% were audio CDs (23.8 million), 20% were Video CDs (VCDs) (10.6 million), 5% were MP3 music files (so-called "extended MP3") (2.65 million), and 30% software CD-ROMs (including business and entertainment software) (15.9 million).

<sup>9</sup> Industry knows the locations of these plants.

<sup>10</sup> Total known imports of polycarbonate from November 2000 to December 12, 2001 were 877,184 kilos (60 CDs per kilo). In 2002, estimated imports of polycarbonate, based on the first three months of the year, were 1.1 million kilos for the year.

<sup>11</sup> Pakistani-produced discs showed up in 2002 in India, 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. Of U.S. Customs seizures in 2002, Pakistan ranked fifth as the country of origin of pirated copyright materials, marking the first time Pakistan had ranked so high on the list. Data regarding known shipments of pirate product bear out the disturbing trend: from November 2001 to mid-March 2002, a total of 120 air shipments were sent from Karachi Airport to various countries, including approximately 476,663 pirated optical discs; from mid-March to mid-April 2002, a total of 22 air shipments were sent from Karachi Airport to various countries, including approximately 100,452 pirated discs; and from September 2001 to February 2002, 51 couriers have been identified who traveled from Karachi Airport to various countries, smuggling about 216,250 pirated discs.

<sup>12</sup> Retail "kiosks" operate in cities such as Karachi, Lahore, Islamabad, Faisalabad, Peshawar and Quetta.



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 was incremental improvement in 2001 as retail bookstores sold fewer pirated copies. However, 50% of the medical text and reference market remains pirated. 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 continued to be reprinted in 2002.

- **Corporate End-User Piracy of Business Software:** The phenomenon of corporate end-user piracy of business software (in which a company purchases one copy of software but loads it on all company computers, or in which a company exceeds its licensed number of users) is an emerging problem in Pakistan.
- **Cable Piracy:** Cable piracy is on the rise in Pakistan. According to a recent Neilson survey, in 2002, 19.0 million Pakistanis viewed pirate VCDs and DVDs per month through pirate cable channels. There are a number of unlicensed cable operators in metropolitan areas routinely transmitting pirate programming on their networks.

## **COPYRIGHT ENFORCEMENT IN PAKISTAN**

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While in previous years, IIPA had reported some progress against retail piracy, including noting the establishment in 1999 of special intellectual property task forces in major cities, the year 2002 witnessed decreased drive and resolve among Pakistani authorities to tackle piracy. If not already the case, it is only a matter of time that criminal syndicates (frequently also connected with other organized crime syndicates) will take over the manufacture and distribution of pirate optical discs. Such lawlessness must not be allowed to go unfettered.<sup>13</sup> One industry group's members (those of the Motion Picture Association of America) pulled out of Pakistan since a legal market did not develop despite six years of effort. In the last year of MPAA's active anti-piracy program, the members ran over 700 criminal raids, with no deterrent effect or positive impact commercially.

### **Bright Spots Include Establishment of 'IP Authority' and Cooperation Against Book Piracy and End-User Piracy of Business Software**

One bright spot in 2002 was the announcement by the government of its decision to formulate an "Intellectual Property Authority;"<sup>14</sup> however, this group is not visible, has yet to be funded, and to date has not shown any concrete activities. Only time will tell if it will provide the kind of sustained enforcement, particularly against pirate optical disc production, to provide a deterrent to further infringements. It is hoped that this authority can supervise task forces all over Pakistan in the investigation and prosecution of intellectual property violations. IIPA also recommends that the IP Authority consider ways to ensure that only those judges who are

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<sup>13</sup> As noted at the outset of this report, in one instance in 2002, a Pakistani was caught in Karachi with pirated VCDs of motion pictures (produced in Pakistan), and 950 grams of heroin concealed in jewel boxes of some of the optical discs. The investigation revealed that, indeed, the delivery of both the pirated discs and the heroin was expected by a family member of one of the suspects. *IFPI Enforcement Bulletin*, Issue 16 (September 2002).

<sup>14</sup> The announcement of the establishment of the new Intellectual Property Authority was available at <http://www.dawn.com/2002/07/23/ibr11.htm>.

specifically trained in copyright handle such cases, or to consider the establishment of a specialized intellectual property court with judges dedicated to hear such cases.

The U.S. book publishing industry reports raids and convictions against pirate photocopy shops, as well as some book shops, including ones specializing in scientific, technical and medical books. U.S. publishers are pleased to be engaged in this raiding, but note that raiding and the small fines that result are not sustained such that it can provide a deterrent to further infringements.<sup>15</sup> The Business Software Alliance reports some useful cooperation from the Pakistani government in the fight against corporate end-user piracy of business software. Specifically, in October 2002, there were two raids against large end-users using BSA member software outside the scope of their licenses. In both cases, the raids were conducted on the basis of Anton Piller orders (*ex parte* civil search orders), a measure recently added to the Copyright Act.<sup>16</sup> IIPA commends the courts for their support in issuing the *ex parte* orders in order to secure evidence of end-user piracy. Such successes hopefully signal the possible enforcement to come in Pakistan.<sup>17</sup> Unfortunately, Pakistani courts have generally not followed through with adequate penalties against pirates.

## COPYRIGHT LAW AND RELATED ISSUES

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### Pakistan Must Pass and Implement an Effective Law to Curtail Pirate Optical Disc Production

Because of the dire nature of pirate optical disc production in Pakistan, and because exports from Pakistan are severely damaging foreign markets, in 2003, the Pakistani government must take steps to implement effective measures against “optical media” piracy.<sup>18</sup> In

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<sup>15</sup> These raids, which are largely privately arranged and financed by foreign publishers, are on bookshops in Karachi, Peshawar, Rawalpindi and Lahore using the Royal IPR Security Services. The raids have generated some publicity in the local papers. After a “conviction,” the pirate booksellers are often on the streets the next day. The government of Pakistan should work hard to invigorate the judiciary to mete out more deterrent justice against book pirates.

<sup>16</sup> One case was taken against Dollar Industries (Pvt) Limited, a leading company of Pakistan engaged in the business of making stationary items. A total of 48 personal computers were found at the location. Each was using a range of unlicensed Business Software Alliance member-company software. In the second case, Al-Karam Textiles was found to have 40 computers with a range of unlicensed software installed. In both cases, injunctions were issued against the companies to prevent further use of the unlicensed software. Both cases remain before the courts. These cases however, have not moved forward with any swift conclusion even after over three months, but IIPA commends the local High Court and the presiding Judges in the matter for their support, cooperation, and interim verdicts.

<sup>17</sup> For example, in 2002, there were eight raids on various software and computer resellers in Karachi in 2002, with seizures of more than 10,000 pirate units of software. All the cases remained pending in the courts as of February 2003. The early adjudication of IPR cases with penalties that create deterrence are necessary in Pakistan.

<sup>18</sup> The global copyright community has agreed that the key elements of an effective optical disc law include:

**1) Licensing of Facilities:** Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and “production parts” (including “stampers” and “masters”), including requirements like production take place only at the licensed premises, a license only be granted to one who has obtained “manufacturer’s code” (e.g., SID Code) for optical discs and production parts, licensee take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.

**2) Licensing of Export/Import of Materials:** Centralized licensing of export of optical discs, and import/export of production parts (including “stampers” and “masters”), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).

**3) Requirement to Apply Manufacturer’s Code:** Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer’s code, and to cause each optical disc and production part to be marked with manufacturer’s code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer’s codes

particular, the Pakistani government should introduce effective optical disc 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 polycarbonate), and compelling plants to use manufacturing codes, such as the Source Identification (SID) code, in order to successfully halt the production of pirate optical discs. Such regulations will give Pakistani authorities a needed tool 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.

## **Pakistan's Copyright Ordinance Provides Strong Measures on the Books, But Pakistan Government Has Not Fully Enforced the Law**

The Copyright Ordinance, 1962 (as last amended in 2000)<sup>19</sup> provides strong tools to fight piracy, including, for example, provisions enabling the Registrar to monitor exports, with inspections and seizures of pirated goods leaving Pakistan. Remaining problems in the ordinance include criminal fines that remain too low to deter piracy,<sup>20</sup> a TRIPS-incompatible

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(including making, possessing or adapting an optical disc mould for forging manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mould or any disc; selling a production part not marked with manufacturer's code, etc

**4) License Record-Keeping Requirements:** Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.

**5) Registration Requirement for Commercial Optical Disc Duplication:** Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.

**6) Plenary Inspection Authority:** Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.

**7) Search and Seizure Authority:** Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.

**8) Government Record-Keeping Requirements:** Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.

**9) Criminal Penalties for Violations:** Violation of any significant aspect of the regime is criminally punishable, including individual liability (fines and/or imprisonment).

**10) Possibility of Withholding, Suspending, or Revoking a License for Prior Copyright Infringement, Fraud in the Application Process, or Violation of the Optical Disc Law.**

**11) Possibility of Closure of a Plant.**

<sup>19</sup> The Copyright (Amendment) Ordinance, 2000, passed in September 2000, dealt with many of the TRIPS deficiencies noted in IIPA's 2000 Special 301 report, bringing Pakistan's law closer to compliance with TRIPS, and strengthening certain enforcement provisions. For example, the amendment provided for increased criminal penalties of 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.*). In addition, the amendment provided 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). As noted, the Business Software Alliance was able to obtain two such raids in 2002, a very positive sign. Third, the amendment broadened 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). This is an unusual remedy, but we are unaware of whether it has been employed to stop exports of pirated goods out of Pakistan. Certainly, this tool could be used to curtail the massive exodus of pirate optical discs that the industries are noting.

<sup>20</sup> Some industries have suggested that the minimum fine must be increased to PRs 500,000 (US\$8,300).

compulsory license to use published materials,<sup>21</sup> 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.

## **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 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 2002, the United States imported \$83.8 million of products from Pakistan without charging a duty (4.7% of Pakistan’s total imports into the U.S.).<sup>22</sup> 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). The WCT went into force on March 6, 2002, while the WPPT went into force on May 20, 2002. These treaties establish the framework for the protection of copyrighted works as they travel over the Internet, and without which content providers are unlikely to place their valuable works on the Internet, which will retard the development of electronic commerce on a global basis. These treaties also protect technological protection measures used by copyright owners to protect their works. The legal framework provided in the WIPO treaties is critical to combating Internet piracy. 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 accession to the WCT and WPPT, and swift deposit in Geneva.

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<sup>21</sup> The amendments in 2000 contained one change, in Section 36, that could devastate the publishing industry’s ability to exercise and enforce its rights in Pakistan. Specifically, the amendment contained 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 takes Pakistan out of compliance with its international treaty and convention obligations, and must be appropriately narrowed. 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.

<sup>22</sup> During 2001, the United States imported \$104.6 million worth of products into the United States without duty (4.7% of its total imports to the U.S.), according to U.S. government statistics.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# PARAGUAY

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA sadly notes that few elements of the 1998 Memorandum of Understanding (MOU) on intellectual property rights have been effectively implemented in Paraguay. IIPA recommends that Paraguay be placed on the Priority Watch List. In recent years, USTR has been monitoring Paraguay under Section 306 of the U.S. Trade Act of 1974.

**Overview of key problems:** Paraguay's 1998 Memorandum of Understanding (MOU) and Enforcement Action Plan should be renewed and remain in effect. Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. Piracy levels in Paraguay remain high, and estimated losses due to copyright piracy were \$212.7 million in 2002. Unfortunately, enforcement efforts taken by Paraguayan authorities continue to be ineffective in deterring widespread piracy there. While there has been some progress in Paraguay over the years, the copyright industries report several trends and problems which have undermined most progress to date. These issues include: (1) the explosion of new forms of piracy in a market already overwhelmed by piracy (of both the home-grown and transshipment varieties); (2) the involvement of organized crime factions in copyright piracy; (3) few criminal investigations, raids and prosecutions against copyright pirates; (4) a judiciary unwilling to issue deterrent sentences (with rare exceptions); and (5) a copyright law that hinders the application of deterrent sentences because it treats intellectual property violations as minor offenses.

**Actions which the government of Paraguay should take in 2003:** Actions to improve the piracy and enforcement situation should include—

- Renew the 1998 Memorandum of Understanding;
- Fully implement the provisions of the 1998 MOU and its accompanying Enforcement Action Plan (see detailed analysis on enforcement and legislative deficiencies, below);
- Improve border enforcement, including the interception and seizure of piratical goods as well as the inspection of blank optical disc media;
- Audit for tax evasion large scale importers of blank CD-Rs who are suspected suppliers to pirate organizations;
- Improve training for prosecutors and judges, with the objective result being that the Paraguayan system provides deterrence to copyright piracy;
- Extend the July 2003 sunset of the criminal code law that makes copyright infringement a "public" action;
- Address the problem of widespread street vendors offering pirate product;
- Legalize its installed software base—pursuant to Decree No. 1524, the Government had to ensure that all ministries eliminated any and all pirate copies of software by December 31, 1999;

- Amend the criminal code to increase the penalty, in cases of unauthorized reproduction of protected works, to a minimum of one year and a maximum of seven years in order to elevate the violations to major crimes. The current penalty of six months to three years for IPR violations prevents any effective deterrent sentences.

**PARAGUAY**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music <sup>2</sup>	204.4	99%	253.6	99%	200.0	90%	200.0	90%	280.0	90%
Motion Pictures	2.0	80%	2.0	80%	2.0	80%	2.0	80%	2.0	80%
Business Software Applications <sup>3</sup>	4.3	69%	3.5	72%	8.5	76%	6.7	83%	5.2	85%
Entertainment Software	NA	NA	NA	NA	9.7	99%	8.1	99%	8.4	99%
Books	2.0	NA	3.0	NA	3.0	NA	3.0	NA	2.5	NA
<b>TOTALS</b>	<b>212.7</b>		<b>262.1</b>		<b>223.2</b>		<b>219.8</b>		<b>298.1</b>	

## BILATERAL ENGAGEMENT ON IPR

### The 1998 Special 301 Investigation

Five 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 end of the investigation, 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

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> RIAA reports that its estimated piracy losses include both domestic piracy in Paraguay as well as estimated losses caused by transshipment.

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$11.5 million at 79% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

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. As a result, 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.<sup>4</sup> In the Special 301 context, USTR has been monitoring Paraguay’s implementation of the MOU under Section 306 of the 1974 Trade Act. However, now that the MOU has expired, there is in effect nothing to “monitor.” It is important that this MOU be renewed.

## Unfinished Business: The 1998 MOU and Enforcement Action Plan

The November 1998 MOU contains nine articles and an annex which comprises the “Enforcement Action Plan.”<sup>5</sup> 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, 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. IIPA and its members recommend that this agreement be renewed.

Although some of the specific action items listed in the MOU (and the Enforcement Action Plan) have been successfully completed by the Paraguayan authorities, most have been either completely disregarded or abandoned. Below is an illustrative list of several key MOU elements which the copyright industries believe the Paraguayan government has not implemented effectively—

- 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 also called “GAP” (*Grupo Anti-Pirateria*, or more 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 comprise 15 intelligence officers who were to perform investigations. Over three years have passed since the resolution was issued, but to date, the group has been formalized only on paper, not in practice. 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 any developments in the formation of this group. Since such an inter-institutional brigade (or any other Paraguayan enforcement agency, for that matter) is not even organized or functionally

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<sup>4</sup> For the first 11 months of 2002, \$11.5 million worth of Paraguayan goods (or 30% of Paraguay’s total imports to the U.S.) entered the U.S. under the duty-free GSP program, representing a 30.8% increase from the same period in 2001. For more information on Paraguay’s placement under Special 301, please see Appendices D and E of this report.

<sup>5</sup> The full text of the MOU is available on the U.S. Department of Commerce Website at <http://www.tcc.mac.doc.gov/cgi-bin/doiit.cgi?204:64:1:185>.

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. The streets of Asunción, Encarnación and, of course, Ciudad del Este, continue to be overrun with vendors selling pirate music and software.

- “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 supposed 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 violate 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. Regardless of the red channel system, much more improvement in border enforcement is needed. The Paraguayan border remains porous. More training of customs inspectors is urgently needed. Customs should also monitor the border on a 24-hour basis in order to deter shipments that pass through customs checkpoints late at night.
- 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. Although five prosecutors have been assigned to intellectual property violations and other economic crimes, only two dedicate most of their time to this area.
- 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. For example, the recording industry has been involved in 53 cases that reached sentencing in 2002, with none of them imposing jail time. Most of these cases involve major warehousing and distribution centers as well as one case of an illegal CD plant with two production lines. The cases produced confiscation of thousands of pirate CDs and millions of inlay cards, but deterrent sentences were not issued. The business software industry assisted the Prosecutor’s Office in prosecuting four cases that reached sentencing in 2002. The defendants in these four cases did not serve any time in jail because the courts imposed sentences of less than two years and fines, thus making the defendants eligible for the suspension of their sentences.
- 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 in some cases. 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. Both the recording industry and the business software industry report that they have obtained improvements in this area, and search orders are being issued within a few days.



- 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 started, and the terms of the decree have not been implemented in practice. Since 1998, few government agencies have taken any significant steps to legalize their installed software base. Some government agencies have signed legalization agreements with BSA but, to date, they have yet to fulfill the obligations they assumed under those legalization agreements.
- 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. This problem continues despite the goodwill of some people within governmental agencies to address the piracy problem.

**Additional developments:** In addition to the MOU, IIPA members report several additional developments on the IPR enforcement front:

- Customs agreement with the recording industry: In October 2002, the Ministry of the Economy signed a customs anti-piracy agreement with the recording industry that calls for, among other items: (a) training of customs officials by anti-piracy experts; (b) the exchange of information regarding pirate CDs and CD-Rs; (c) participation of the industry's anti-piracy personnel, as deemed necessary by Customs, in the identification and inspection of suspect product; and (d) the implementation of an importers register that will prevent ghost companies from importing pirate CDs or CD-Rs. The effective implementation of this agreement is viewed by the recording industry as a fundamental part of Paraguay's ability to deal with piracy, and in its ability to curtail Paraguay's participation as a major transshipment point for pirates. We urge the U.S. government to closely monitor Paraguay's performance.
- Criminal penalties: The current penalty of 6 months to three years for IPR violations prevents any effective deterrent sentences. IIPA and its members suggest increasing the penalty to a minimum of one year and a maximum of seven years in order to elevate the violations to major crimes.
- Raw materials: Paraguay should adopt criminal provisions for the act of knowingly supplying raw materials to pirates.
- Tariffs on blank CD-Rs: It is becoming obvious that the importation of 104 million CDRs in 2001 and another 100 million in 2002 for a market that may absorb no greater than 10 million units per year is a mechanism that supports other activities, among which is piracy of music and software. As a preventive measure, Paraguay may want to consider raising tariffs for the importation of CD-Rs.

- Optical disc law: Although only one blank CD-R plant exists in Paraguay, the potential exists for more manufacturers to set up lines locally. The Paraguayan government may want to consider implementing optical disc legislation to control the installation of new plants and licensed production.
- Destruction of suspected infringing materials: Amendments to Paraguayan laws and procedures should be made to require that all suspected pirated good be seized and not returned to the alleged owners until the status of the goods (as legitimate or piratical) can be determined with certainty. For example, the entertainment software industry reports that the return of pirated materials is a serious problem.
- Public vs. private action: The 1998 version of the Criminal Procedure Code stated that copyright infringement cases were “private” actions, and could only be brought by complaint of the right holder; the State could not take action *ex officio*. Under the MOU, the Republic of Paraguay agreed to amend the Criminal Code and the Criminal Procedures Code to make copyright piracy a “public” offense. This problem was temporarily resolved. In June 1999, the President signed into law an amendment to the criminal code which made copyright crimes public offenses, and, therefore, prosecutors were able to pursue these cases on their own initiative. Unfortunately, this law will sunset in July 2003 according to the interpretation of the Office of Implementation of the Criminal Procedure Code of the Supreme Court of Justice of the Republic of Paraguay. The Republic of Paraguay must provide a definitive solution to this problem to fulfill its obligations under the MOU.

## COPYRIGHT PIRACY IN PARAGUAY

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### Optical Media Piracy: Transshipment and CD-Rs

Paraguay continued to serve as a favored destination in 2002 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 also continued. Ciudad del Este businesses continue to boldly offer and sell obvious counterfeit optical media products from the gaming, music, software and video industries.

**Blank CD-Rs and CD-R burning**: The pirates have continued their strategic shift from pre-recorded OD product to importing blank recordable CD (CD-Rs) into Paraguay. In 2002, about 100 million units were imported, down slightly from the approximately 104 million units were in 2001, which was a significant increase from the 34 million units in 2000. Paraguay clearly does not have the market to absorb any of these amounts.

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-Rs. These “sprayed” plants serve Paraguayan, Argentine, Uruguayan and mostly Brazilian illegal CD-R duplicators.

**Local OD manufacture:** 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**

It is no secret that 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.

## **Domestic Piracy Remains Widespread in Paraguay**

The recording industry reports that piracy has wiped out the legitimate music market; the 2002 piracy level was 99%. As a result, estimated trade losses due to recording and music piracy in Paraguay were \$204.4 million in 2002 (slightly below 2001 levels due to devaluation); 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. Total legitimate sales in 2002 were approximately 200 thousand units when Paraguay, with significant local artist activity, has the potential to sell 20 million units. 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 business software industry reports two main problems. 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 since 1999, 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 \$4.3 million, with an estimated 69% piracy level in 2002. On a positive note, the BSA conducted a consumer protection campaign during May 2002 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 chips<sup>6</sup> from Taiwan. The videogame chips are assembled, along with other components, into completed counterfeit Nintendo videogame products. The industry continues to have some success working with local district attorneys and 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.

Annual losses to the U.S. motion picture industry due to audiovisual piracy in Paraguay are estimated at \$2 million in 2002. MPA initiated legal and commercial actions directed at the video store market in Asunción and has successfully reduced the incidence of piracy in that market through 2002, although video piracy remains high in peripheral areas and in rural areas—80% overall. Nevertheless, Paraguay remains a significant threat to other Latin American markets because of the large pirate transshipment operations in Ciudad del Este.

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<sup>6</sup> "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.

Within the country, video piracy continues to be the most significant piracy problem for the audio-visual industry. 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. MPA reports that the impact of Paraguay-based piracy on neighboring countries is far more troubling. There has been a renewal of illegal distribution and transshipment of pirate optical disc for export as contraband to neighboring markets such as Brazil and Argentina. In addition, Paraguay has long been a transshipment point for optical disc piracy (music, software and videogames), so as the market for DVDs grows in Latin America, Paraguay is likely to become the center for importation into South America of pirate DVDs as well.

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 2002 trade losses due to book piracy are \$2.0 million.

## **COPYRIGHT ENFORCEMENT IN PARAGUAY**

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As IIPA has stated before, 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, as much of this industry's losses is caused by infringing acts occurring within legitimate businesses and agencies. 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.

### **Police are generally helpful but only after industries' investigations.**

Even in 2002, the Paraguayan 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 the last two years 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 2002, the recording industry conducted 83 raids, which resulted in the seizure of over 1,494,087 units of infringing products (mostly music CDs) and the closure of 34 manufacturing facilities, most of the small to mid-sized CD-R replication facilities and 39 storage facilities of different sizes. Two major organized crime cases with international nexuses are currently under investigation. Shipments of contraband blank CD-Rs amounting to 18 million units, allegedly destined for the pirate market, were seized by Paraguayan authorities based on information provided by 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. Customs has been more cooperative (albeit it could help more); however, 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, during 2002, BSA conducted seven (7) civil end-user actions and assisted the Prosecutor’s Office in 17 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 and 2001. The majority of their merchandise was seized by the authorities. Most of the resellers raided would be open for business the following day, with a complete display of counterfeit software. Although BSA member companies have been filing criminal cases since 1999, few final decisions in any of these cases have ever been issued. There are two cases dated from 1999 that are still pending in the courts of Ciudad del Este.

The only actions the government has taken to combat video piracy have been a series of raids on video stores in Asunción, with no industry-coordinated action in Ciudad del Este. 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 five specialized IPR prosecutors in Paraguay, three in Asunción and two in Ciudad del Este. The prosecutors now have, temporarily, the ability to pursue copyright infringement cases as “public” actions, thanks to Law No. 1.444, 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. Also, suspicions of corruption continue to be part of the game, as the case in late December where one of the Ciudad del Este prosecutors released 1.5 million blank CDRs seized for contraband back into the hands of suspect importers.

The recording industry reported that in 2002, Paraguayan courts issued 53 criminal judgments against pirates of sound recordings. Sentences included imprisonment of 2.5 years but 24 were suspended, 20 became fines and the rest were benefited by probation. The recording industry initiated 48 actions but none included any type of preventive incarceration or effective jail sentences because of limitations in the current criminal code, it has proven impossible to obtain any type of deterrent-level sentences that involve jail time.

BSA reports that in 2002, the courts issued four convictions against resellers of illegal software. The defendants in these four cases did not serve any time in jail because the courts imposed sentences of less than two years and fines, thus making the defendants eligible for the suspension of their sentences. While these cases are steps in the right direction, the fact that the defendants received suspended sentences detracts from the deterrent effect that this news would otherwise have had. 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.

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

In 2002, BSA conducted seven (7) civil copyright infringement actions (compared to the 10 inspections conducted in 2001). 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 can take a minimum of 45 days to obtain a civil warrant search.

Litigating a case in the Civil Court in Paraguay could turn out to be a lengthy and risky 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. Sometimes decisions, in cases with strong evidence are uncertain. For instance, in a case decided in 2002, a panel of the Civil and Commercial Court of Appeals of Paraguay held that foreign copyright right holders must either have a domicile in Paraguay or post a security bond to seek damages in copyright infringement cases. In this case, BSA filed a civil *ex parte* measure against an end-user for alleged copyright infringement in 2001. The court issued the search order and BSA found extensive evidence that the raided company was using unlicensed software. BSA then filed a civil complaint seeking damages and the defendant moved to dismiss the case because the copyright right holders of the software infringed did not have a domicile in Paraguay. The court presiding the case denied the defendant's motion to dismiss. The defendant appealed, and the Civil and Commercial Court of Appeals of Paraguay revoked the district court's decision, holding that foreign copyright right-holders must either have a domicile in Paraguay or post a security bond to seek damages in copyright infringement cases. BSA has appealed the case to Supreme Court of Paraguay.

## **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. The border with Brazil is completely open today and *sacoleiros*, individuals who come to buy counterfeit products to later sell in Brazil, are flooding Ciudad del Este. The Paraguayan authorities have taken no steps to prevent this activity.

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 conducted an internal investigation to determine the whereabouts of the shipment; as of this filing date (February 2002), the investigation remains open and the shipment was never found.

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 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. Even though customs has cooperated more with the industry in recent months the problem of enormous amounts of blank CD-Rs being imported for piracy purposes continues. 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 program of constant monitoring for undervalued imports and tax evasion audits of suspected large-scale blank CD-R importers may be effective in reducing the large scale of the problem.

The entertainment software industry notes that pirates are attempting a new mode of shipping counterfeit products into the country; specifically, whether large shipments of counterfeit video game software, and component parts, can be shipped by air courier without detection. In May 2002, Nintendo attorneys succeeded in having the local district attorney seize about 90 counterfeit PC boards for *Game Boy* cartridges shipped through an air courier. The interception is important, as it may be indicative of how pirates are looking for new ways to bring pirated and counterfeit product into the country. The early detection may also serve to deter future attempts at shipments done in this fashion. An official investigation is underway against the importer.



# **COPYRIGHT LAW IN PARAGUAY**

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## **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. Back then, IIPA applauded 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**

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 reformed its criminal code 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. 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 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. The current penalty of 6 months to three years for IPR violations prevents any effective deterrent sentences. IIPA and its members suggest increasing these penalties in order to elevate them to major crimes.

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.

To mitigate these obstacles, APDIF/Paraguay has been working on a bill which calls for the following reforms:

- Increase criminal penalties for intellectual property rights violations to a minimum of 2 years and maximum of 8 years. Fines would be added to prison terms;
- Include knowingly supplying raw materials to pirate organizations as a punishable criminal offense;
- Provide penalties for violations of technical protection measures and rights management information;
- Ratify *ex officio* action for prosecution of intellectual property rights violations.

We encourage the Paraguayan government to support these amendments to create the necessary legal framework to fight piracy effectively.

## **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. 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 as soon as possible to meet its bilateral obligations under the MOU.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws

grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# PHILIPPINES

### EXECUTIVE SUMMARY<sup>1</sup>

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The Philippines should remain on the Priority Watch List. Despite enhanced enforcement during the last two quarters of the year, there has been little improvement in the piracy situation over the last year, while the optical disc draft legislation and the draft copyright law amendments remained stalled in Congress.

The Philippines was a perennial on the Watch List until 2001, when, due in large part to the worsening optical disc piracy problem, the Philippines was elevated to the Priority Watch List. In 2002, the Philippines remained on the Priority Watch List with an out-of-cycle review to evaluate progress on passage and implementation of an effective optical disc law.

Optical disc (CD, VCD, DVD, CD-ROM) piracy of copyright material (music, audio-visual, business software, videogames) decimates both the domestic market and markets outside the Philippines, and pirate optical disc production capacity in the Philippines has exploded as foreign pirate syndicates flee less hospitable jurisdictions. An effective optical disc law has not yet been passed nor effectively implemented. Piracy of business software (by corporate end users) and books (reprints and unauthorized photocopying) must be curtailed. The government of the Philippines should be commended for joining the WIPO “Internet” treaties and must now fully implement those treaties. The prosecutorial and court systems remain marred by delays and procedural hurdles.

Required Action for 2003:

#### Enforcement

- Maintain sustained enforcement raids, including, once optical disc regulations have passed, raids against unlicensed plants and against licensed plants with regard to license compliance, seizures and destruction/dismantling of and impounding illegal goods and equipment.
- Run coordinated sustained raiding, including against pirate book reprint facilities and photocopy shops, with follow-up monitoring of progress to prosecution.
- Clear backlogs of investigations and court cases; reinstate specialized IP prosecutors in the Department of Justice; and ensure that only expert judges handle copyright cases.

#### Legislation

- Pass an effective optical disc law to enable licensing and control over optical disc 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.
- Pass draft copyright law amendments to fully implement the WIPO “Internet” treaties, and avoid delay that may occur if copyright amendments are lumped into an omnibus IP bill.

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<sup>1</sup> For more details on Philippine’s Special 301 history, see IIPA “History” Appendix to this filing.

**PHILIPPINES**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	80%	28.0	80%	25.0	70%	18.0	65%	18.0	65%
Records & Music <sup>3</sup>	20.9	40%	23.9	36%	1.4	33%	2.0	20%	3.0	20%
Business Software Applications <sup>4</sup>	20.1	61%	19.9	63%	21.8	61%	26.7	70%	25.4	77%
Entertainment Software	NA	NA	NA	99%	41.0	98%	23.8	89%	24.7	90%
Books	45.0	NA	44.0	NA	44.0	NA	44.0	NA	39.0	NA
TOTALS	116.0		115.8 <sup>5</sup>		133.2		114.5		110.1	

## COPYRIGHT PIRACY IN THE PHILIPPINES

### Optical Disc Pirate Production for Export Remains a Deep Concern

Pirate optical disc (CD, VCD, DVD, CD-ROM) production capacity in the Philippines has exploded, as foreign pirate syndicates flee less hospitable jurisdictions. Underground pirate production plants are heavily dependent on Malaysian, Hong Kong and Taiwan-based organized crime groups for finance, management, technical assistance and the production of masters used to pirate CDs.<sup>6</sup> Porous borders in the Philippines continue to attract importers and exporters, further inundating already-pirate markets with unauthorized copyright materials.

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> 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.

<sup>4</sup> BSA 2002 loss estimates are preliminary. In IIPA's February 2002 Special 301 submission, BSA's loss and level figures for the Philippines of \$24.2 million and 65%, respectively, were also reported as preliminary. These figures were finalized in mid-2002 and are reflected above.

<sup>5</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in the Philippines were \$120.1 million. Because of the adjustment to reflect BSA's final loss statistics for the year 2001 (see footnote 4), estimated total losses to the U.S. copyright-based industries in the Philippines in 2000 are adjusted to \$115.8 million.

<sup>6</sup> 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 the Optical Disc Act in Malaysia. Replication orders and supplies

Currently, IIPA can verify the existence of nine optical disc plants having 23 production lines operating in the Philippines, with an estimated overall production capacity of 80.5 million discs per year, many multiples of any rational legitimate domestic demand for discs in the Philippines.<sup>7</sup> The result is massive exports of pirate copies of major U.S. companies' product. 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. A more recent problem is "burned" CD-R piracy; however, the quantity of such discs is still low compared to mass pirate optical discs produced in factories or imported into the Philippines from elsewhere in Asia.<sup>8</sup> Nonetheless, pirate "burned" CD-Rs, which used to exist in small retail establishments, now is becoming a greater commercial concern for the copyright industries.

## **Piracy in the Domestic Market Remains Common, Destroying Some Industry Sectors' Entire Legitimate Market in the Philippines**

Notwithstanding the insistence of some Philippine officials, including Congressional representatives, that the government is doing everything it can against piracy, pirate product and other piracy phenomenon (such as cable piracy, end-user piracy of software, which involves the illegal loading of business software onto a computer, etc.) remain ubiquitous. IIPA remains most concerned about the following problems:

- **Optical Disc Piracy Wipes Out the Legitimate Domestic Market.** The distribution and sale of unauthorized music CDs, video CDs (VCDs), movies on DVDs (on the rise), and CD-ROMs containing illegal copies of copyrighted materials (business software applications, entertainment software, movies, music, and reference materials) damage the potential legitimate domestic market for copyright owners. The sources of pirate optical discs include those produced in-country, large-scale imports of finished domestic and international products into the Philippines from elsewhere in Asia,<sup>9</sup> and "burned" CD-Rs.<sup>10</sup> Such materials include the latest run feature films not even released in the theaters, like *Lord of the Rings*:

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apparently originated from the parent company in Malaysia, and completed orders were then shipped back to Malaysia. Philippine authorities arrested several suspects, including six Malaysian national workers.

<sup>7</sup> More optical media lines may easily arrive in the Philippines, exacerbating the problem, in part because of lack of regulations dealing with the importation of optical media equipment. In 2001, for example, IIPA understands that at least 20 manufacturing lines entered the Philippines without Philippine Customs monitoring or notifying right holders concerned. The Bureau of Customs was apparently aware of only two illegal shipments of CD lines – one line which entered the Clark Economic Zone in 1998 which was released after the importer paid the taxes, and a 4-line shipment in November 2002 which the Bureau seized. Part of the reason for difficulty in detection is that pirates engage in 'technical smuggling' – mis-declaring the machines as "plastic extrusion machines" – or outright smuggling.

<sup>8</sup> 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.

<sup>9</sup> There are reports of pirate CDs/VCDs/DVDs being smuggled into the Philippines via the areas of Mindanao City and Ozamiz, Mindano, along with other contraband such as drugs, luxury cars, vegetables, and Vietnamese rice. Organized criminal syndicates make their money on the drugs, hence, they can afford to sell rice, vegetables, and pirate goods for almost no profit. In December 2002, a shipload of smuggled rice was intercepted by the Philippine Coast Guard. Pirate CDs of Filipino music repertoire made in Taiwan were seized. Many of the imported pirate CDs are suspected to be coming from Sabah, Malaysia.

<sup>10</sup> Pirate CD-Rs are now surfacing in greater quantities in the Philippines, and CD-R machines are now proliferating. In January 2003 alone, 165 CD-R "burners" were seized. A group of pirate operators are suspected to be operating several multiple-disc CD-R burners in different locations.

*The Two Towers*.<sup>11</sup> The market for movies is also hurt due to affordability of hardware for playing optical discs of motion pictures, creating a market for pirated discs of “pre-release” movies as well as previously released titles, which are now readily available.<sup>12</sup> The emergence of pirate DVDs into the Philippines marketplace in the last half of 2002 is also of significant concern, as it is widely believed that pirated DVDs are now being manufactured in-country. The price of pirated DVDs has noticeably been reduced and a new title now sells as low as P80 (US\$1.48) each. The entertainment software industry reports that piracy levels in the Philippines of console-based and PC videogames remain close to 99%. Pirate copies of entertainment software are available for as little as P35 each (US\$0.65). Pirate entertainment software can also be readily found at malls (where they are sold through some computer software shops) and flea-markets. Business software piracy also remains high in the Philippines, at 61% illegal in 2002. Infringing “videoke” (“karaoke” sing-a-long CDs with images) discs containing Filipino and international repertoire now sell for as low as P35 each (US\$0.65), while infringing audio CDs retail for as low as P20 (US\$0.37) to P35 (US\$0.65) per unit.

- **Cable Piracy Saps Cable Television Revenues.** Cable television piracy has emerged as the most serious problem for the U.S. audiovisual industry in the Philippines after optical disc piracy. Hundreds of cable systems,<sup>13</sup> especially those outside Manila, make unauthorized transmissions of new and recent Hollywood productions their standard fare, damaging the legitimate theatrical and home video markets.<sup>14</sup> Although cable systems outside Manila are 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) is responsible for monitoring the operations of licensed and non-licensed cable operators. However, NTC officials insist they have no jurisdiction over copyright violations, and that the responsibility for enforcement lies with the Intellectual Property Office (IPO), and neither agency has been particularly effective in addressing cable piracy. It should be noted, however, that towards the end of 2002, the current NTC Commissioner did issue “cease and desist” letters to pirate cable operators. It is unclear, however, if the effort is continuing or has had any significant effect. Most local

<sup>11</sup> See “US Calls on Philippines to Enforce Intellectual Property Rights,” Agence France Presse, Jan. 10, 2003. While the number of stalls changes from month to month, sources indicate that there are as many as 150 to 225 stalls in the Philippine market. Press reports in early 2003 indicate that raids are being carried out of street vendors, including confiscation of product, but that the vendors are “back in the business the following day with a vengeance.” However, rather than finding stalls openly selling pirated product, after the raiding, one encounters “someone holding a printed list of CD titles whispering ‘Sir CD?’ as you pass by.” Dave L. Llorito, “Intellectual Piracy a P9-billion Headache for Law Enforcers,” Manila Times, Jan. 3, 2003 (at <http://www.manilatimes.net/others/special/2003/jan/03/20030103spe1.html>).

<sup>12</sup> It is by and large the presence of pirate VCDs in the Philippines market that was the cause for the increase in the level of video piracy from 70% to 80% in 2001; video piracy levels remained a staggeringly high 80% in 2002.

<sup>13</sup> 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.

<sup>14</sup> 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.



industry representatives recommend that the NTC's charter be amended to include enforcement authority against intellectual property rights violations within its purview.<sup>15</sup>

- **End-User Software Piracy Remains the Most Serious Threat to the Business Software Industry in the Philippines.** Unauthorized loading and use of business software by corporations (for example, where one copy of software is purchased but then illegally loaded on many computers) remains a problem in the Philippines. IIPA and the Business Software Alliance appreciate the Philippine government's endorsements of BSA's public relations and educational campaigns to address the growing problem.<sup>16</sup> It is important that such efforts be backed by effective enforcement actions by the government in 2003.
- **Textbook Piracy, Pirate Photocopies and Illegal Reprints of Published Materials Continue Hurting U.S. Publishers.** The growing underground industry of illegally reproducing and distributing pirate textbooks in the Philippines has gotten out of control, and has made the Philippines one of the largest book piracy havens in Asia. Hundreds of copyshops, located in the University Belt (near Recto, Morayta and Dapitan Streets) readily accept orders for entire textbooks on a routine basis, and 'print-to-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, and attitudes among some university officials, and even professors (many of whom are authors themselves!) are truly appalling.<sup>17</sup> In addition, illegal reprints of books (made to look as much like the original as possible) are being churned out by pirates. In most instances, the government knows who the pirates are; they just fail to take the necessary action to put them out of business.<sup>18</sup> The Philippine government has also indicated that it is willing to crack down on any books still being printed under a repealed compulsory reprint license decrees (Presidential Decree No. 1203, which had allowed reprints of certain pre-1997 works without authorization under certain circumstances), but no deadline was ever put into

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<sup>15</sup> A cable regulatory bill has been under consideration for over five years, but lacks consensus by relevant industry groups to get it enacted. Meanwhile, NTC had an action plan as a stop-gap measure, including increased oversight of telecom and broadcast networks, including CATV, on a nationwide basis, through an intensification of regular inspections and monitoring, to determine network compliance with provisions on satellite program piracy. NTC's activities have proved to be ineffective due to budgetary constraints and lack of personnel.

<sup>16</sup> The Business Software Alliance's anti-piracy campaign, labeled "Go ICT, Stop Software Piracy Campaign," launched on March 15, 2002 received endorsements from 15 government and private sector agencies. The government also supported the BSA "Assistance in Software Auditing Program 2" (ASAP 2), which was a follow up to the first ASAP campaign launched in June 2001. More recently, BSA conducted a number of Software Asset Management (SAM) seminars in Manila, Subic, and Cebu. Philippine government attendance at such seminars indicates is that key decision makers recognize the problem of end-user piracy; nevertheless, the problem of end-user piracy has not been defeated, so it is vital for the government of the Philippines to redouble its efforts to address this damaging form of piracy in 2003.

<sup>17</sup> IIPA is aware of one instance several years ago in which a student was ridiculed by his law school professor for asking that the school ensure that a reference book authored by the student's father be purchased legally instead of pirated. Such instances are apparently not uncommon in the Philippines, and evidence the need for greater awareness of the need to respect copyright.

<sup>18</sup> For example, there continues to be rampant piracy of scientific, medical and technical (STM) books. Named pirates include MultiLinks, Alphamedocs and Busybooks, all of whom are well known to the government. In one case in 2000, an AAP member conducted a raid on a medical book pirate, but the pirate was back in business the next day. This open-and-shut piracy case has been in the litigation stage for several years. The owner of the MultiLinks store remains in business earning enormous profits while her case has dragged through the court system for nearly 3 years. Another phenomenon involved the pirates participating in medical conventions, displaying legal editions and selling pirate photocopies under the table. Arrests of such pirates in the past, e.g., in 2000 at the Philippines College of Physicians annual convention, have led to no convictions.

place by which time reprints under the old law had to be sold (and proof of the printing date is next to impossible). All compulsory reprint license lists should be immediately rescinded, the ongoing validity of any such license formally terminated, and existing stocks of reprinted books brought under the control of the legitimate publishers.

- **Video Piracy Adds Further Injury to the Hobbled Audiovisual Sector.** Videocassette retail piracy remains a significant problem in the Philippines. From January to August 2002, 239 video establishments were newly registered by the Video Regulatory Board (VRB), and 625 out of 2,916 licenses from the previous year were renewed, resulting in a total of 1,677 licensed video establishments and an undetermined number of unregistered and unlicensed video establishments. Virtually all unregistered outlets sell pirated product. In addition, recent enforcement activity indicates that large-scale pirate video duplication (often very low quality) and distribution operations are conducted in major population centers. These copies are released within days of the title's U.S. theatrical release at low prices, making them attractive in the Philippine market.

## COPYRIGHT ENFORCEMENT IN THE PHILIPPINES

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### 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

## PHILIPPINES CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS <sup>19</sup>
Number of raids conducted	259	3	35/3
Number of cases commenced	3	3	147/2
Number of defendants convicted (including guilty pleas)	0		
Acquittals and dismissals	0		
Number of cases Pending	3	8	
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	0		
Up to \$1,000	0		
\$1,000 to \$5,000	0		
Over \$5,000	0		
Total amount of fines levied (in US\$)	0		

## PHILIPPINES ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES
Number of raids/searches conducted	1,534
Number of administrative cases brought by agency	480
Number of defendants found liable (including admissions/pleas of guilt)	480
Ratio of convictions to the number of raids conducted	480:1,534 or 31%
Ratio of convictions to the number of cases brought	480:480 or 100%
Number of cases resulting in administrative fines	480
Total amount of fines levied	US\$10,000
US\$0-\$1,000	NA
\$1,001-\$5,000	NA
\$5,001-\$10,000	NA
\$10,000 and above	NA
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	Approx US\$10,000 in 480 cases but only US\$7,637 recovered.

## Raids Forthcoming, But Post-Raid Measures Largely Ineffective Due to Lack of Prioritization, Resources

Enforcement in the Philippines against pirate production facilities as well as against retail piracy largely remains marred by ineffective post-raid enforcement.<sup>20</sup> In 2003, the government of

<sup>19</sup> In 2002, 35 retail raids and 3 optical disc plant raids were run by the recording industry enforcement group; from those and earlier raids, 147 pirate retailer cases and 2 cases against pirate optical disc factories were commenced.

<sup>20</sup> In fact, raiding is so ineffectual in the Philippines that immediately after any raid, in which there is only confiscation of goods, fresh stocks are made available again at the same spot, with the pirate reseller often going right back into business after six in the evening.

the Philippines needs to continue stepping up with sustained period of inspections, raids and seizures against retail establishments, as well as against all optical disc and other plants, known or underground, suspected of engaging in pirate production. However, such raids will mean little if they are not followed by swift prosecutions leading to the imposition of deterrent penalties.

At present, copyright owners' attempts to enforce their rights in the Philippines continue to be bedeviled by problems, for example: leaks to a suspect that a raid is coming, resulting in obvious and avoidable loss of evidence;<sup>21</sup> 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);<sup>22</sup> sometimes even 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 to the pirates of infringing goods and machinery used to produce such goods.<sup>23</sup> These systemic failures to deliver effective enforcement are keys as to why piracy has been a thriving business throughout the Philippines.

Even those bodies, like the Video Regulatory Board (VRB), that understand the problem of piracy and how to address it, remain under-funded, thus frustrating even their best efforts. IIPA commends the Chairman of the VRB for his activities since his appointment in July 2002 by President Arroyo, including a number of high profile raids. Specifically, there were four raids against VCD labs/factories between January to August 2002, and from all raids in 2002, the VRB impounded over five million discs and videocassettes, and several replicating machine lines.<sup>24</sup> This compares favorably with seizures made in 2001 of 300,000 discs and five replicating machine lines, but does not come close to eradicating the rampant optical disc piracy problem. It is also heartening that both the National Bureau of Investigation and the Video Regulatory Board, under its new leadership, appear to be carrying out more retail raids in early 2003; however, the key will be whether those raids are followed up with deterrent enforcement.

Enforcement in the Philippines to address other piracy problems has been less successful. For example, while the National Bureau of Investigation (NBI) has been of

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<sup>21</sup> One raid against an optical media plant run in conjunction with the recording industry in November 2001 failed because of a leak. AAP members also note that pirates often shut down their pirate book operations and move after being informed of an impending raid.

<sup>22</sup> 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).

<sup>23</sup> Return of pirated copies and tools occurred in an August 2001 raid of an optical media plant, due to the challenge of the search warrant on purely technical grounds; replicating machinery, infringing music discs and stampers were returned. At least four more optical disc production lines in other cases have been released and returned due to the dismissal of cases or quashed of warrants. The U.S. book publishers report that warrants are so rigid that clearly infringing books are not seized in a raid, as well as machinery such as copy machines clearly used in the illegal activity.

<sup>24</sup> The National Bureau of Investigation claims that, "[f]rom January 2001 to the present, [it] was able to seize pirated and counterfeit goods with a total value of P2 billion [US\$37.1 million]." Rafael Ragos, head of NBI's intellectual property rights division, claims, "[w]e were able to confiscate 16 replicating machines, each worth P50 million [US\$927,000]." See Dave L. Llorito, *Intellectual Piracy a P9-billion Headache for Law Enforcers*, Manila Times, Jan. 3, 2003 (at <http://www.manilatimes.net/others/special/2003/jan/03/20030103spe1.html>).

assistance by investigating and successfully conducting several raids against end-user piracy of business software, such piracy remains low on its list of priorities, and cases are rarely initiated unless specific complaints are made by the right holders. The NBI has demonstrated a willingness to act on complaints filed by BSA, but only three such raids were carried out in 2001, and again in 2002.

Raiding statistics from 2002 indicate some sense of the need for enforcement bodies such as the VRB and NBI to coordinate their activities. Nonetheless, to date, despite some initial steps taken,<sup>25</sup> the government of the Philippines has failed to establish better coordination among investigative agencies, including the police, prosecutors, customs,<sup>26</sup> and courts, in raiding, investigating, prosecuting and seeking deterrent sentences from courts against egregious pirates.

## **Specialized IP Prosecutors Should be Reinstated in Order to Expedite Cases**

Even when a successful raid is run, leading to seizures of pirate product, as well as the tools and implements used in the production of piracy, inadequate prosecutorial resources, procedural bottlenecks, and endless delays mar the post-raid enforcement system. Defendants can delay prosecutions and keep straightforward piracy cases out of the courts by employing means by which evidence can be examined and re-examined, including an appeal process all the way to the office of the Secretary of Justice. One hopeful sign had been the recognition on the part of the Secretary of Justice of the need to put into place a specialized cadre of prosecutors at the Department of Justice (DOJ), who are familiar with and able to handle cases involving copyright piracy. Unfortunately, two orders in late 2000 essentially disbanded the specialized prosecutorial team, due to the limited number of prosecutors available to deal with the general case workload, and in 2002, most piracy cases were referred to regional prosecutors, who have less experience dealing with copyright cases than the DOJ prosecutors, resulting in those cases languishing indefinitely.<sup>27</sup> Despite numerous requests by the copyright industries, reinstatement of the specialized IP prosecutors has not occurred.

Copyright piracy cases handled by regional prosecutors are almost always doomed. For example, formal complaints investigated by these prosecutors take months to complete, and decisions to prosecute are subject to appeal to the office of the Secretary of Justice. A stark example of the problems with prosecutorial delays in the Philippines involves a case in which a

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<sup>25</sup> For example, the Intellectual Property Office (IPO) and the IP Coalition (including right holder groups) organized a general meeting in early 2002 to discuss possible plans of action for enforcement coordination.

<sup>26</sup> Little changed during 2002 to 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. The export problem in particular is considered likely to worsen as manufacturing activity continues to increase. The Bureau of Customs (BOC) has started to enforce laws relating to intellectual property rights and has conducted seizures at major seaports throughout the Philippines and at the international airport in Manila. Notwithstanding these commendable efforts, pirated products continue to enter the country in significant quantities.

<sup>27</sup> Two orders in 2001, Order No. 197 and Order No. 62, even further weakened effectiveness of prosecutors, since the government decided to give some of DOJ's prosecutorial powers to regional prosecutors, rather than being handled as "national" cases handled by DOJ itself. By the middle of 2001, right holders' objections resulted in DOJ agreeing to accept the filing of complaints, but as of 2002, DOJ would only handle a case itself if it was a matter of "national interest" (both VCD and end-user software piracy have been deemed *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.

retailer got caught in a raid in November 1995 with 2,800 units of unlicensed software. The Business Software Alliance received the DOJ's final decision not to prosecute in January 2001 – a full 62 months after the raid! A part of the reason for such delays is that the Department of Justice prosecutorial staff is under-manned, and those prosecutors are assigned to cases other than copyright. IIPA hopes a special prosecutorial task force to deal specifically with copyright will be reinstated, as any increase in the number of prosecutors and resources will likely increase the speed and efficiency of handling IPR complaints. The ideal would be for the DOJ to increase the number of prosecutors and introduce specialized training courses on IPR law and practice.

## **The Specialized IPR Courts Have Not Effectively Combated Piracy**

The troubling fact is that even if a case makes it to the prosecutor and evidence is garnered to bring the case to court, such cases enter a judicial system that is crippled by lack of expertise and by the weight of backlogged caseloads. Regardless of the fact that some cases may make it through the courts, the fact remains that not one optical disc plant owner has ever been convicted in the Philippines.<sup>28</sup> Because litigation usually drags on for years, sometimes five years or longer, many right holders prefer to settle cases out of court. And while the Supreme Court has designated certain courts to hear intellectual property rights cases,<sup>29</sup> and its operating guidelines allow for expeditious decisions, in practical terms, the designated courts do not exclusively hear intellectual property cases but cases involving all other matters as well, resulting in backlogged dockets that severely diminish the courts' efficiency. The result is that all aspects of a court case, from pre-trial procedures such as applications for search warrants, to applications for *ex parte* search orders (granted without the presence of the defendant), to adjudication of level of fines or damages, are fraught with delays and problems. Criminal prosecutions, when brought, have very long gestation periods and little deterrent effect on pirates, with most cases taking up to an average of six years to reach judgment.

Starting with the search warrant, applications in piracy cases are not necessarily heard by a designated IPR judge, even if one is sitting in the geographic jurisdiction in which the warrant is sought. The presiding judges are unfamiliar with laws relating to intellectual property rights, often requesting that right holders provide a copy of and explain the relevant law. In some instances, the judge fails to realize the urgency of the application, and lengthens the hearing on an application for a search warrant to several days. Similar problems plague applications for *ex parte* civil searches, now governed by the January 2002 Supreme Court "Rules on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights."<sup>30</sup>

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<sup>28</sup> IIPA notes with dismay that the accreditation of Discmaker, which was raided last October 2002 and found to be blatantly replicating pirate CDs and VCDs, has not yet been revoked, and an administrative hearing against Discmaker on the revocation of its license has not even occurred.

<sup>29</sup> 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, or are promoted or transferred, further weakening the effectiveness of these courts, and lessening any benefit gained out of training.

<sup>30</sup> A more detailed discussion of the Supreme Court "Rules on Search and Seizure in Civil Actions" (issued January 22, 2002) appears in the 2002 Special 301 report for the Philippines, available at <http://www.iipa.com/rbc/2002/2002SPEC301PHILIPPINES.pdf>. Essentially, the Rules give courts authority to issue *ex parte* civil search orders, thereby addressing a long-standing deficiency in the legal system in the Philippines. In that discussion, IIPA noted some fundamental issues that either were not addressed in the Rules, or for which the Rules as promulgated leave

Applicants have been required in practice to post unreasonably high cash bonds/surety bonds in favor of the defendant. IIPA supports the Supreme Court deriving a list of “independent commissioners” to conduct searches under the Rules.

Further, in copyright infringement cases in the Philippines, it is very difficult to recover damages if no amicable settlement is reached (because criminal and civil cases are consolidated), and many private complainants are so fed up by judicial delays that they sometimes do not present evidence in a civil case to allow the trial process to finish faster.

The primary vindication then that the private complainant aims for is the deterrent effect that may result from the publicity generated by a conviction. 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 e-commerce legislation, 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 more than 60 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 three cases with the prosecutions department and eight active criminal cases in court including one case on appeal.<sup>31</sup>

## **MARKET ACCESS ISSUES**

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### **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.<sup>32</sup> 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. Pending legislation (a “Convergence Bill”) may provide some relief, but consideration of this bill has progressed slowly and the draft contains many provisions that require further clarification.<sup>33</sup>

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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. Also, the requirement of a “strong” prima facie case may leave the threshold for obtaining provisional measures unreasonably high [Section 6(b)], which would implicate the Philippines’ TRIPS compliance. Further, right owners should not be held liable for improper actions by the authorities (Sections 9 and 21), 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. For further discussion, please see IIPA’s 2002 Special 301 report.

<sup>31</sup> 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.

<sup>32</sup> Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

<sup>33</sup> IIPA also understands that the bill contains foreign investment restrictions within certain sectors of the copyright industry.



## Restrictions on Advertising on Pay Television

Under Presidential Decree 1986, advertising on pay television is currently limited to 10 minutes per hour of programming. Provisions in various draft cable bills we have seen limiting advertising time to between 5 to 10 minutes per hour are among the strictest in the region.

## COPYRIGHT LAW AND RELATED ISSUES

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### Optical Disc Law Has Neither Been Passed Nor Implemented

An effective optical disc law in the Philippines will aim to weed out optical disc pirates, through robust licensing and controls over optical disc production, controls on imports of production equipment (including stampers and masters) and raw materials, as well as requirements to use unique source identifiers to track the loci of production.<sup>34</sup> Passage of an effective optical disc law alone will not suffice, however, without well-publicized enforcement of the law, including: enforcement against unregistered plants and against registered plants with regard to license terms compliance; seizure of illegal goods and equipment at plants, including the destruction of discs seized; and impoundment until prosecutions are successfully resolved. In last year's report, IIPA recognized that the government of the Philippines had been

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<sup>34</sup> The global copyright community has agreed that the key elements of an effective optical disc law include:

**1) Licensing of Facilities:** Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and "production parts" (including "stampers" and "masters"), including requirements like production take place only at the licensed premises, a license only be granted to one who has obtained "manufacturer's code" (e.g., SID Code) for optical discs and production parts, licensee take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.

**2) Licensing of Export/Import of Materials:** Centralized licensing of export of optical discs, and import/export of production parts (including "stampers" and "masters"), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).

**3) Requirement to Apply Manufacturer's Code:** Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer's code, and to cause each optical disc and production part to be marked with manufacturer's code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including making, possessing or adapting an optical disc mould for forging manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mould or any disc; selling a production part not marked with manufacturer's code, etc.).

**4) License Record Keeping Requirements:** Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.

**5) Registration Requirement for Commercial Optical Disc Duplication:** Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.

**6) Plenary Inspection Authority:** Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.

**7) Search and Seizure Authority:** Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.

**8) Government Record-Keeping Requirements:** Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.

**9) Criminal Penalties for Violations:** Violation of any significant aspect of the regime is criminally punishable, including individual liability (fines and/or imprisonment).

**10) Possibility of Withholding, Suspending, or Revoking a License for Prior Copyright Infringement, Fraud in the Application Process, or Violation of the Optical Disc Law.**

**11) Possibility of Closure of a Plant.**

considering enactment of a strong optical disc law. However, it is one year later, and we are deeply disappointed that, to date, no law has been passed by the Congress, nor implemented at the practical level. A very good House Bill passed its second reading before the House plenary on October 16, 2002, without any opposition or substantive debate.<sup>35</sup> The third and final reading was supposed to take place soon after Congress resumed on January 13, 2003, but this did not occur to our knowledge. It is imperative that the Senate follow the House's lead to pass a similar bill.

## **Electronic Commerce Act (2000) Provides Tools to Fight Copyright on the Internet**

While still a relatively minor 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,<sup>36</sup> 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)].<sup>37</sup> That Act, however, also contains one very troubling provision limiting liability of certain telecommunications service providers for, among other things, infringement of the exclusive rights of copyright owners that are carried out over their systems, but Section 30 of 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; some voluntary arrangements demonstrate promise that workable cooperation may ensue between right holders and telecommunication services in the Philippines. In 2002, the Business Software Alliance sent 21 takedown notices and had a 100% success rate with the ISPs in taking down the infringing materials.

The fundamental concern about the Act remains that it is premature to immunize service providers from liability for infringement of copyright when the exclusive rights of copyright owners have not yet clearly been spelled out in the Intellectual Property Code. While Section 33(b) of the Electronic Commerce Act makes violations of copyright in the digital environment criminal offenses, the basis for civil liability remains murky. It 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

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<sup>35</sup> The Bill as we know it successfully addresses key elements 1-4, 6-7, and 9-11 noted above. It does not expressly address the growing global problem of "burning" of content onto recordable optical discs, nor does it contain robust government record-keeping requirements.

<sup>36</sup> Republic Act No. 8792 (2000).

<sup>37</sup> 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\$1,854).

representing copyright owners. Other industries have been successful in cooperating with ISPs in addressing piracy on digital networks, albeit in a limited way.<sup>38</sup>

## **Philippines Passage of Copyright Law Amendments to Modernize Protections Stalled**

While IIPA was very hopeful to be able to report passage of Senate Bill 1704 and House Bill 3182, those bills have apparently stalled. Moreover, IPO may be considering the preparation of an “omnibus IP bill” covering copyrights, patents and trademarks. We believe this is a mistake, as it would slow the process considerably. The Philippine government should be commended for taking the necessary steps to accede to and deposit the WIPO “Internet” treaties, the WCT and WPPT. Those treaties went into force in the Philippines on October 4, 2002 and now should be fully implemented. Senate Bill 1704 and House Bill 3182 would have fully implemented TRIPS and the WIPO “Internet” treaties.<sup>39</sup>

## **Issuance of New Customs Administrative Order is Encouraging, But Enforcement On-the-Ground is Still Lacking**

On September 23, 2002, the Commissioner of Customs issued Customs Administrative Order No. 6-2002, intended to implement the Customs-related provisions of the TRIPS Agreement (Articles 51-60). This Order enhances Customs’ ability to seek border enforcement, including by providing a mechanism for the IPR owners to request Customs to issue an alert or hold order against the import of a consignment of suspected infringing goods, as well as through the establishment of an IP Unit at Customs dedicated to border enforcement. The provision allowing data- and intelligence-sharing with other enforcement agencies and the industry also has the capacity to greatly improve the effectiveness of enforcement operations. However, the Order should be enhanced to deal with enforcement against suspected infringing exports, and Customs officials should be given the power to arrest in addition to its other investigative powers.

## **Philippines to be Congratulated Upon Joining the WCT and WPPT**

The Philippines deposited its instruments of accession to both WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) on July 4. Both treaties entered into force as to the Philippines on October 4, 2002. This makes the Philippines the first country in Asia to accede to both treaties (Japan acceded to the WPPT on October 9, 2002). IIPA congratulates the Philippines on joining these treaties that form critical parts of the basic legal framework for healthy electronic commerce, and that positions it as a leader within the APEC and ASEAN communities in the adoption and

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<sup>38</sup> The recording industry, for example, sent two cease-and-desist letters in 2001 to Philippine ISPs with respect to infringing MP3 files. A positive response was received for one letter.

<sup>39</sup> A more detailed discussion of the contents of Senate Bill 1704 and House Bill 3182 appears in IIPA’s 2002 Special 301 report on the Philippines, which can be found at <http://www.iipa.com/rbc/2002/2002SPEC301PHILIPPINES.pdf>.

implementation of modern intellectual property regimes.<sup>40</sup> These treaties establish the framework for the protection of copyrighted works as they travel over the Internet, and without which, content providers are unlikely to place their valuable works on the Internet, which will retard the development of electronic commerce on a global basis. The legal framework provided in the WIPO treaties is also critical to combating Internet piracy. IIPA encourages the government of the Philippines to proceed to fully implement those treaties, which could be done easily through passage of Senate Bill 1704 and House Bill 3182.

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<sup>40</sup> Coming out of the October 2002 APEC Ministerial in Los Cabos, Mexico, was the "Statement to Implement APEC Policies on Trade and the Digital Economy" (Leaders' Statement), including the following statement regarding WIPO treaties ratification/implementation:

[APEC Member Economies] will ratify and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty as soon as possible. If an Economy is a non-Member of WIPO, it will implement the provisions of these treaties as soon as possible. For any Economy in the process of reviewing accession or implementation, it will commit to completing that review as soon as possible.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# POLAND

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Poland be elevated to the Special 301 Priority Watch List. The primary reasons for this elevation are widespread piracy and ineffective enforcement related to the Warsaw Stadium and the widespread optical disc piracy. Poland has wavered between the Watch List and the Priority Watch List over the past decade; during 2002, USTR was expected to conduct an out-of-cycle review on Poland's intellectual property rights practices, but the results of that review are not yet available.

**Overview of key problems:** Progress has not been made on deterring piracy and counterfeiting at the Dziesięciolecie Stadium (also known as the Warsaw Stadium). Although police and customs officials conduct daily raids at the stadium, few prosecutions are brought and court decisions with deterrent sentences are rarely imposed. The presence of organized criminal elements in the Stadium has magnified the problem, yet incredibly, both Polish federal and municipal officials are unwilling to take the necessary actions to close it down. These criminal enterprises, having gone largely unchallenged, are now leaving the confines of the Stadium and spreading their operations throughout the country. Meanwhile, optical disc piracy in Poland is becoming a major problem, even faster than the industries anticipated, with production capacity now far in excess of local demand. To address this problem, Poland should implement regulations on the production, distribution and export of optical media. Prosecutors and judges need to improve their performance by expeditiously moving cases forward and issuing deterrent sentences. Civil judges need to issue swift decisions (including *ex parte* search orders) in copyright infringement cases. Trade losses due to piracy in Poland were estimated to be \$491 million in 2002.

**Actions which the government of Poland should take in 2003:**

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority;
- Ban the sale of all optical media product containing copyrighted materials and hard-good copyrighted products in the bazaars and outdoor markets including the Warsaw Stadium;
- Conduct more raids in and around the Warsaw Stadium, and follow up with swift prosecutions;
- Use existing organized crime legislation to investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials;
- Improve border enforcement to halt the flow of pirate products, especially at the eastern borders (Belarus, Ukraine, Russia) by ensuring that sufficient resources (both technical and personnel) to Polish customs agencies are dedicated to this effort, and by substantially improving cooperation with the customs agencies in the neighboring countries;

- Pass regulations regarding optical disc production and distribution;
- Ensure that delays in prosecuting criminal cases and issuing *ex parte* search orders in civil litigation are minimized;
- Consult with rightsholders prior to and during any legislative efforts to amend the Law on Copyright and Neighboring Rights;
- Ratify the two WIPO 1996 treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) by immediately depositing Poland's instruments with WIPO, and fully implement the treaties into the Law on Copyright and Neighboring Rights;
- Provide full protection to U.S. and other foreign repertoire, and withdraw Poland's reservation to Article 12 of the Rome Convention;
- Conduct and support more training seminars for police, prosecutors, and judges on IP enforcement.

**POLAND**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002 <sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Entertainment Software	337.7	91%	115.8	90%	103.1	85%	70.9	60%	72.1	62%
Motion Pictures	25.0	30%	25.0	27%	25.0	25%	25.0	25%	25.0	25%
Records & Music	45.0	45%	37.0	30%	31.0	30%	22.0	40%	16.0	40%
Business Software Applications <sup>2</sup>	78.4	50%	77.1	53%	82.7	54%	130.0	60%	113.3	61%
Books	5.0	NA	6.5	NA	7.0	NA	7.5	NA	7.0	NA
<b>TOTALS</b>	<b>491.4</b>		<b>261.4</b>		<b>248.8</b>		<b>255.4</b>		<b>233.4</b>	

The U.S. Trade Representative (USTR), in his April 30, 2002 Special 301 decision, stated that “Poland has a substantive copyright piracy and trademark counterfeiting problem, the most glaring symbol of which is the Warsaw Stadium and the unauthorized retail activity that is carried on in those premises. . . . Poland’s enforcement efforts at the Stadium so far have been insufficient to halt the sale of pirated and counterfeit goods.” Furthermore, USTR

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$55.8 million at 49% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

indicated it would look to the Polish government taking actions against piracy and counterfeiting at the Stadium through unannounced and numerous raids against retailers that lead to prosecutions which “should be significant enough in number to stem the sale and distribution of pirated and counterfeit goods at the Stadium.” Finally, USTR said that it would look to Poland “to sustain an adequate and effective enforcement effort against IPR violators in order to establish a deterrent effect in Poland, including at the Stadium.” 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.<sup>3</sup> Finally, a Special 301 out-of-cycle review on Poland was scheduled for late 2002; there, IIPA recommended that Poland be elevated to the Special 301 Priority Watch List.<sup>4</sup>

## **COPYRIGHT PIRACY IN POLAND**

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### **Optical media piracy is growing and regulations must be adopted.**

**Domestic CD production:** Forensic examination has confirmed the production of pirated CDs in Poland. The current total capacity of Poland’s optical disc plants is estimated at 316 million discs per year. This includes the 293 million discs per-year capacity of the seven operational CD plants with 49 lines (of which four are adapted to DVD production) as well as the capacity of the new Thompson Multimedia plant with 10 DVD lines, with an annual production capacity of over 23 million discs. This clearly exceeds the legitimate demand in Poland.

With respect to enforcement efforts against plants involved in illicit production, there are currently six criminal proceedings against five CD plants in Poland, two of which were initiated against Silesia and Pomerania/General Group in 2001. Two of the six criminal cases (both against Selles plant, initiated in 2000 and 2002) are pending in the courts due to the notoriously slow Polish judicial system; the remaining four cases (Silesia, Pomerania/General Group, Digi Records, Yield) are still at the prosecutorial level. The Polish recording industry group ZPAV has requested that the National Police Headquarters investigate the incident in Silesia CD plant in Wroclaw, where one of the CD lines was moved out from the plant while it was under police custody. The Investigation Department of the National Police Headquarters has so far confirmed to the industry that the investigation “to determine the location of the equipment used for the CD production” is in process. The industry urges the police to speed up the investigation and clarify the situation as swiftly as possible.

**Imports of piratical optical media:** Pirated optical media products (CDs, DVDs, and CD-ROMs) include illegal sound recordings, audiovisual products, videogames and business software applications.

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

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<sup>3</sup> For the first 11 months of 2002, \$304 million worth of Polish goods (or 30.6% 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 14.9% from the same period in 2001.

<sup>4</sup> See 67 Fed. Reg. 63186 (Oct. 10, 2003); IIPA’s comments on the Poland 2002 OCR are posted on [www.iipa.com](http://www.iipa.com).

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.

The audiovisual industry reports that Polish pirates sell high-quality counterfeit cassettes and CD-ROMs to German consumers who purchase them at open markets along the Polish-German border. According to MPA, customs seizures indicate that the DVDs are being brought into Poland from the C.I.S. countries of the Ukraine, Belarus, and Russia. The most popular method of importation is through personal vehicles and passengers' luggage, but there is also evidence of hidden compartments in trains and trucks.

The entertainment software industry reports that almost all PC products are imported from Russia, with smaller amounts coming from Belarus. The Interactive Digital Software Association (IDSA) 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 pirated entertainment software is now wholly controlled by organized criminal enterprises (and more than likely a single syndicate) 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, including Germany.

In order to combat the OD problem, the Business Software Alliance (BSA), in conjunction with the International Federation of the Phonographic Industry (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. Both BSA and IFPI had reason to believe that the plant was cooperating with firms in the Czech Republic to produce the CDs. Unfortunately, BSA reports that the case was dismissed by the Polish prosecutors.

**Need for optical disc regulation:** Given the OD piracy problem, there is an urgent need for optical disc legislation; the unregulated and uncontrolled optical media production in Poland must be addressed. During the summer of 2002, the recording industry presented the Minister of Culture with detailed proposals on OD regulations, after discussions with the legal advisors in this ministry. IIPA also shared a model proposal with the U.S. embassy.

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; manufacturing licenses must require the listing of machinery and equipment and the raw materials used in the production of optical discs; (3) require import and export licenses and enable searches of these licensees; (4) require the plants to apply internationally recognized identifiers on the goods and machinery; to keep records of production, clearance of rights, destination of products, use of raw material; to notify changes in the stock of equipment; and to cooperate with the police upon inspection; (5) require plant inspections and in particular, "surprise" plant visits, including means for the rightholders' 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. To the best of our knowledge, there are no developments to report regarding the implementation of any optical media regulations. The industries look forward to working with Polish officials to achieve comprehensive OD legislation.



## **Piracy is rampant at the Warsaw 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 worsened during 2002. Organized crime elements are clearly 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 for those people attempting to enforce the law. Illegal immigrants, such as those from Armenia, are still the dominant group in the illegal optical disc trade there. The Stadium serves as a centralized distribution point for pirated optical media material. Pirated optical media products (CDs, CD-ROMs and DVDs) include illegal audio, software (of business applications and entertainment) and audiovisual material. The United States is not alone in complaining about this blatant piracy haven; the European Commission also has identified the Stadium as a problem.<sup>5</sup> The Polish government also acknowledged that the Dziesięciolecie Stadium is “a source and centre of all kinds of criminal offences committed in Warsaw.”<sup>6</sup> The question remains: what actions will the Polish government take to stop this stadium blight? Below is a discussion of the various industries’ particular problems with the Warsaw Stadium. (IIPA’s suggested actions to curb the problems at the Warsaw Stadium follow in the next section, on enforcement.)

### **Optical discs containing pirate materials found throughout the Warsaw Stadium:**

The Stadium exemplifies the convergence of serious optical disc piracy, organized crime involvement in distribution, and the result of weak border measures.

Huge amounts of pirate music CD imports (amounting to about 85% of the pirated music) come into Poland mainly from Ukraine, Lithuania and Russia. 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. 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. ZPAV reports that, in 2002, 282 raids (resulting in criminal cases) were conducted and 273,583 pirate recordings were seized in Warsaw alone. Raids at the Warsaw Stadium account for approximately 90% of these figures.

With respect to entertainment software piracy in Poland, there has been absolutely no improvement during 2002. 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 publisher’s member companies can be purchased at the Stadium, and thus this is the most significant source of pirate entertainment

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<sup>5</sup> See European Commission, 2002 Regular Report on Poland’s Progress Toward Accession, October 9, 2002 at pp. 61-62, available at [http://europa.eu.int/comm/enlargement/report2002/pl\\_en.pdf](http://europa.eu.int/comm/enlargement/report2002/pl_en.pdf).

<sup>6</sup> See Polish government document, “Report of the Committee for Counteracting Infringement of Copyright and Related Rights Concerning the Observance of Copyright and Related Rights in Poland,” dated March 8, 2002.

software in Poland and surrounding countries. Prices for these CD-ROMs range from less than \$1 to \$5 (for PlayStation® products), and include materials not yet released legitimately to the Polish market. Operations run by pirates have become increasingly sophisticated such that pirate entertainment software has been localized for the Polish consumer by the pirates *before* the legitimate distributor can place legitimate, localized products in the market. Criminal syndicates have now taken over not only distribution in the Stadium, but also the surrounding countryside. An IDSA member company reports that all of its pirated CD videogame software sold in Poland is priced exactly at PL20 (about US\$5) with absolutely no deviations—whether sold in the Stadium or other areas in Warsaw, Gdansk, Katowice or Poznan. This “uniform pricing” for pirate entertainment software is indicative of only one thing—that sales are controlled by organized criminal syndicates. The small CD-burning operations that once dominated the Stadium market have now been run out of business by these larger, more sophisticated criminal enterprises. More recently, the Vietnamese triads (those from the Vietnam/Cambodia/Laos region) have made a serious move to control pirate videogame product in the Stadium. There continue to be fights to control this piratical market.

The motion picture industry reports that the popularity of DVDs has caused a resurgence of piracy at the Warsaw Stadium markets. In the past, the only threat to the audiovisual industry posed by the Stadium involved poor quality videocassettes. Now the Stadium is one of the major venues used by pirates to distribute CD-ROMs and counterfeit DVDs professionally pressed in Russia. FOTA, the local audiovisual anti-piracy organization, estimates that 70% of all pirate DVDs coming into the country are being sold in the Stadium. In October 2002, FOTA raided the home of a well-known Ukrainian pirate that sold optical discs at the Stadium; over 2,000 pirate DVDs were seized. FOTA seized a total of 17,109 pirate DVDs in 2002 (compared to 481 pirate DVDs seized in 2001). They also seized over 30,000 CD-Rs containing movies.

The business software industry reports that Warsaw Stadium indeed harbors pirated and counterfeit business applications software. However, criminal cases coordinated by the Business Software Alliance (BSA) outside of the Stadium do not generally appear to be connected to organized crime elements associated with the illicit activities with the Stadium.

**Involvement by the municipal and state authorities with the stadium's ownership and operations:** The Polish government is directly involved with the Stadium; state owns the land on which the Stadium is situated. The Central Sports Center leases the land to a private company, DAMIS. Another local agency involved is the administration board of the Warszawa Praga Południe Communities; this group is part of the district that houses the Stadium and purportedly is also a party to the Stadium's lease. The Central Sports Center submitted DAMIS' 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 being liquidated). The Stadium's lease to DAMIS has been renewed. The Polish government's vested interest in the Stadium suggests one reason why no concrete, sustained and definitive action to close the Stadium or eradicate the trade in pirate copyrighted goods has taken place over the years.

In November 2001, ZPAV 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 of the police to determine the identity of the sellers (despite film documentation submitted together with the crime notifications). The issue of possible criminal liability of the above-mentioned institutions was not considered at all.

ZPAV has appealed the decision to discontinue proceedings in all cases. Once again, this experience clearly shows the weakness of the enforcement system.

## **Internet Piracy in Poland is Growing.**

Internet piracy is a steadily growing problem in Poland. It should be noted that, even though police action in fighting Internet piracy is not yet at a satisfactory level, the co-operation in this field is at least much better than in the fight against physical piracy in Poland, especially in the Warsaw Stadium.

The recording industry is doing everything within its power to tackle the problem. ZPAV continues to identify and take action against music sites making available unauthorized music files on the Internet. In 2002, 99 websites with 8,320 files were shut down following ZPAV's "cease and desist" letters. Also, in January 2002 one Napster-like service with approximately 45,580 files shared was closed down upon ZPAV's notification. In general, the ISPs' reactions have been prompt and effective. However, many Internet users turned to file sharing services such as KaZaA and Grokster, which are increasingly popular in Poland. ZPAV also informs the police about identified websites containing lists of tracks in MP3 format offered for further CD-R replication. The police focus on identifying offenders and securing evidence. As of September 2002, the police carried out eight raids aimed at website owners offering burned CD-Rs with music. In total, this site offered over 23,000 albums. In these cases criminal proceedings are pending.

MPA reports that Internet piracy for its products appears to be somewhat contained. FOTA has conducted many successful investigations and raids on Internet pirates in 2002. The police have been willing to assist FOTA in their activities. (This should be contrasted with the scenario involving the Stadium, where all IP industries have difficulty in mobilizing the police to organize raids.) The pirates mainly use the Internet for the sale of hard goods, in particular home-burned CD-ROMs. Unauthorized downloading of films currently is not currently a major issue due to the lack of high-speed access in Poland.

IDSA reports that while there is some Internet piracy of entertainment software in the country, the lack of broadband or high-speed access does not make this a significant problem at this time.

BSA reports that much of Internet piracy in Poland relates to websites offering illegal copies of software for download and resale, and other forms of piracy such as peer-to-peer file sharing are on the increase. However, Internet piracy does not appear to be as prevalent as it could be in such a developed market and the BSA is monitoring this rise in Internet use as a method of distributing illegal software to end users. In September 2002 the police conducted an Internet reseller raid in Wroclaw. The police seized 3,269 CDs and two computers loaded with illegal software and this demonstrates the police willing to action raids.

## **Piracy Continues Throughout Poland.**

**Recording industry:** The recording industry reports that the Warsaw Stadium remains a major source of pirated music product. According to information compiled by the recording industry, over 784,000 illegal copies of sound recordings have been seized, and 1,659 criminal proceedings were initiated in 2002. In addition, CD-R burning and Internet piracy continue to develop rapidly, reaching up to over 6% of all seized illegal sound carriers (around 33,000 CD-

Rs); a year ago this figure did not exceed 2.5%. The trio of ZPAV (the local recording industry group), local Internet service providers and police are working together in the fight against Internet piracy. During 2002, the recording industry learned that the annual capacity for optical disc production of 316 million discs was much greater than previously estimated. The estimated piracy levels for international/U.S. music repertoire is 45%; estimated trade losses due to piracy of sound recordings rose to \$45 million in 2002.

**Entertainment software:** The entertainment software industry suffers from widespread piracy in Poland, exacerbated by the organized crime elements involved in distribution of piratical products and the uncontrollable market that is the Warsaw Stadium. In fact, the IDSA reports that where it was once thought that videogame piracy controlled by the Russian syndicates was contained within the Stadium, the current situation has changed to include a much broader reach (as already mentioned in the preceding section on optical media piracy). Illegal material is produced in such countries (often in Russian) as Hungary, Ukraine and Poland, and distributed in a major cross-border exchange to a number of countries in the region. The predominant form of entertainment software piracy continues to be factory-produced silver CDs, most of which is manufactured in Russia, and is readily available throughout the country. Pirate CD entertainment software products are usually sold in plastic sleeves, with no manuals included. Interestingly, the local (legal) Polish distributors' names are usually stripped off the packaging, but the original publisher's name remains. IDSA reports that the level of pirated PC games has grown tremendously over the past year. There are also reports that pirate cartridge-based videogames manufactured in China and shipped through Hong Kong continue to be found in Poland. Finally, mini-stadiums are spreading throughout the country, controlled it appears by the same syndicates that now control the Warsaw Stadium; this makes enforcement efforts much tougher for copyright holders and police alike, a circumstance which could have been avoided if the Warsaw Stadium had been shut down a year ago. IDSA estimates that the overall value of pirated entertainment software products present in Poland was \$337.7 million in 2002, with an estimated piracy level of 91%.<sup>7</sup>

**Motion pictures:** The audiovisual piracy situation in Poland has changed significantly in the last two years. While videocassette piracy still exists, and will probably continue to exist for many years, the most significant audiovisual piracy problem facing Poland today is optical disc piracy. This market transformation toward pirate DVDs was not expected by either the government or the industry. Pirate discs, mainly home-burned CD-ROMs and Russian-made DVDs, have raised piracy rates to approximately 30%. The distribution of these pirate products is seriously affecting both the home video and theatrical markets. As reported above, FOTA's seizure totals for all of 2002 are over 17,000 pirate DVDs (compared to 481 pirate DVDs seized in 2001). At this time, FOTA claims that Russian pirate DVDs are the number one problem facing the motion picture industry. In July 2002, the industry, working with local law enforcement raided a street vendor known to be selling pirate Russian DVDs. The Warsaw vendor and a deliveryman were arrested and over 4,000 pirate DVDs (including *Spiderman*, *Harry Potter and the Sorcerer's Stone* and *Star Wars: Attack of the Clones*) containing subtitles in Polish, Czech, Hungarian, Icelandic, Dutch, Bulgarian, Indian, Turkish, Danish, Swedish, Finnish, Greek, Norwegian and Arabic were seized. These discs are generally entering the country in personal vehicles, trucks, and trains. A recent customs seizure on the Polish-Belarus border netted over 4,500 pirate DVDs containing the latest titles that were still being shown in Polish cinemas. MPAA reports that cross-border piracy with Germany continues to be a serious problem, with

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<sup>7</sup> IDSA has revised its methodology for deriving the value of pirate videogame products in-country. IDSA reports that the increase in the value of pirated videogame products in Poland appears to have increased significantly in 2002 primarily due to the methodological refinements which allowed it to more comprehensively evaluate the levels of piracy in the PC market, a market segment which rapidly grew during 2002.

high-quality counterfeit cassettes and CD-ROMs being sold to German consumers at open markets along the Polish-German border.

MPA also reports that the level of cable television piracy is estimated to be about 15%. The key issues are the illegal retransmission of encrypted programs and the use of pirate smart cards. Cable network operators often use illegal decoders and pirate cards themselves to distribute programs in their networks without license. However, changing the smart cards used by Canal Plus in Poland has had a substantial positive impact against piracy. Internet piracy can also be found throughout the country, although it is the Warsaw police who are the most advanced at conducting raids. For the audiovisual industry, Internet piracy in Poland is not a massive problem for the industry right now due to the efforts of FOTA. As reported above, the Internet is primarily used for the sale of hard goods through websites and networks, but several cases of illegal download offers have also been presented to Polish prosecutors. MPAA estimates that losses due to audiovisual piracy in Poland amounted to \$25 million in 2002.

The business software industry reports that piracy levels in Poland remain relatively high despite excellent police cooperation in recent years and throughout 2002. The biggest piracy and enforcement challenge faced by BSA continues to be the unauthorized copying and use of applications software within legitimate businesses (corporate end-user piracy). A case concluded in January 2002 in Poland highlighted that this form of piracy is evidenced also within large-scale businesses. To combat this piracy, BSA uses both criminal and civil actions predominantly relying on good police cooperation to carry out raids. Preliminary estimated U.S. trade losses due to business software piracy in Poland in 2002 were \$78.4 million, with 50% piracy level.

AAP reports that there is illegal 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 dropped slightly over the past year, to \$5.0 million in 2002.

## **COPYRIGHT ENFORCEMENT IN POLAND**

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Several major enforcement obstacles in Poland continue despite concerted efforts by industry anti-piracy actions. Many elements of Poland's enforcement regime remain 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. 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.

Regretfully, the activities of the Polish Intergovernmental Task Force for the Protection of Copyright and Related Rights, established in 2000, do not witness a genuine interest of the Polish government to effectively and rapidly tackle the rampant piracy in the country. The main noticeable achievement of the task force during its more than two years of existence is the delivery, in March 2002, of a general report on the intellectual property situation in Poland and a short action plan. Eventually, in January 2003, the task force invited all relevant law enforcement agencies and other government bodies involved in IPR protection to submit proposals on how to solve the piracy problem at the Warsaw Stadium. It should be noted that

the enforcement agencies involved in the occasional raids on the Stadium have indicated on several occasions in the past that they do not possess the required manpower and resources to carry out sustained and decisive anti-piracy actions at the Stadium. The majority of these agencies stressed that closure of the Stadium would be the only viable solution. Alternatively, the “second best” option would be to officially ban the sale of all copyright products (legitimate and pirate) in bazaars and outdoor markets, including the Stadium. This corresponds to a proposal recently submitted locally by the recording industry and long sought by IIPA. Clearly, the establishment of the task force is a positive step. However, this alone will not solve the massive piracy problem in Poland. The Polish government should, without any further delay, take substantially more effective concrete measures in its anti-piracy campaign.

## **Actions to be Taken at the Warsaw Stadium**

For years, 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. In particular, two actions are necessary:

- **Banning the sale of all optical media products and other copyrighted materials in and around the Warsaw Stadium (and in other bazaars and outdoor markets in the country):** A strict and easy way to stop the sale and distribution of pirated materials in the Stadium is to ban their trade. 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 and educational material) as well as other pirated product such as videos, DVDs 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. 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. Furthermore, the sale of all optical media products should be explicitly prohibited in the lease of the Stadium administration DAMIS.
- **Intensified raids in and through the stadium:** The Polish government should conduct series of enforcement actions, both in and through the Stadium. 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. In addition, pirates are notified of the police presence once a raid begins so that they can take evasive steps to hide their products. This warning system has made raids completely ineffective. 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.).

## Polish Police Run Raids, But Deterrence Lacking

In comparison to the lawlessness in the Stadium, there have been some positive copyright enforcement efforts outside the Stadium. The industries generally report that cooperation between enforcement agencies (police, customs) and the industries in anti-piracy raids and seizures of infringing goods continue to be positive, which has led to encouraging results outside Warsaw. The Polish police and customs have been undertaking joint operations for some time. However, the Polish judicial authorities have lagged in imposing deterrent penalties against pirates of copyrighted matter. Moreover, 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.

**Recording industry:** The local recording industry (ZPAV) reports that good relations with the enforcement agencies have led to more law enforcement activity and successful anti-piracy actions in cities other than Warsaw, such as, Kraków, Gorzów Wielkopolski, and key border towns: Biała Podlaska, Przemyśl. For example, the Łódź Customs House seized 56,000 pirate carriers in Radość near Warsaw, and the Kłodzko Border Guard raided a storage in Marki near Warsaw and found 30,000 illegal units meant for further distribution at the Stadium. During 2002, 1,659 criminal cases were initiated against distributors of pirate sound recordings. A total of 784,200 pirate units were seized (of which, 714,700 were CDs, 21,172 audiocassettes, and 32,851 CD-Rs) with a total value of approximately US\$5.9 million.

**Entertainment software:** 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. The continued lack of action against the pirate syndicates in the Stadium is giving these criminal groups the impetus to expand their operations throughout the country given that it is quite clear that the government is unwilling or unable to take action against them. IDSA believes that any progress in stemming rampant piracy in Poland can only be achieved by both the closure of the Stadium and police action against the criminal syndicates operating in the surrounding areas.

**Motion picture industry:** The motion picture industry reports that police enforcement initiatives in 2002 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. This positive working relationship resulted in 1,143 raids and in the filing of 1,103 legal actions. 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 the many training seminars FOTA has conducted over the last few years. Unfortunately, problems with Customs in 2002 caused the protection along the border to lapse. This lack of enforcement has had the direct result of allowing thousands of pirate DVDs to enter the country. Customs seizures severely dropped off in 2002 and it is hoped that the restructuring of the Customs department will address this problem.

With respect to broadcast piracy, the Broadcast Act has been in force since June 1993. The National Council for Radio and Television has granted broadcast and cable licenses, which are revocable for failure to comply with license provisions. MPAA reports that the Broadcast Law does not contain an explicit copyright compliance requirement, but Article 45 does provide that a cable operator's registration be revoked 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 National Council for Radio and Television should immediately revoke cable operators' registrations if they violate such a ban.

**Business software:** On a positive note, BSA notes that the Polish police are still among the most active in Europe in investigating cases of software piracy and in conducting *ex officio* raids. However, there has been little or no police action regarding the Stadium, which remains a major source of pirated business software in Warsaw. BSA participated in more than 150 raids organized by the police between January and August 2002. In that time period, almost 90 companies using illegal software were raided with 420 PCs seized, and more than 30 resellers and 27 persons illegally copying and distributing software were raided. This has resulted in the seizure of 25,000 CD-ROMs and detention of 114 individuals. The police have also conducted some high profile raids including one in January 2002 involving a well-known Polish company near Warsaw; the company is a part of an international corporation which manufactures electronic equipment based in Asia. The raid resulted in seizure of almost 70 PCs and involved illegal software of almost all the BSA members. In March 2002, as a result of efficient action by the Polish police, 1,500 copies of high quality counterfeited software of one BSA member were seized in Wrocław. The illegal CDs were to be sent to into the European Union and their value exceeded US\$100,000. In July 2002 the police raided two companies based in Tychy and Opole seizing numerous computers loaded with illegal software with a total value in excess of 70,000 USD. BSA reports that it has received exceptionally good cooperation from the Polish government in its education and marketing campaigns as well as in form of police enforcement against different types of piracy (End-User, HDL, CD-ROM and Internet), for which the Polish government should be commended.

## **Prosecutorial and Judicial Delays in Criminal Cases**

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 problems are systemic and can be found throughout the Polish courts. 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.

BSA reports that Polish prosecutors continue to permit piracy cases to languish at the prosecutorial stage, or permit them to be dropped altogether. These delays and dismissals may be the result of prosecutors' (and judges') demonstrated unfamiliarity with software piracy cases. BSA has managed to obtain only very few judgments in its software piracy cases and the fines and sentences imposed under these judgments have been insubstantial despite improvements in the law.

The recording industry notes a growing tendency of appointing independent experts to secure the proof of ownership even in simplest copyright cases, where neither the defendant nor his attorney calls for submission of additional evidence. In practice, the independent expert's opinion is identical to the one provided by the rights holders' representatives but substantially extends the proceedings in time and raises their cost. In some regions the police often decide not to instigate proceedings or limit the number of cases due to the fact that the costs of appointing independent experts are too high.

The motion picture and the recording industries believe 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. The more cases that are filed, the greater the backlog. The recording industry, ZPAV, reports 3,870 criminal cases are currently pending. For the motion picture industry, FOTA had over 2,700 cases pending in the criminal courts at the end of 2001. In 2002, FOTA filed over 1,100 new cases, but only 120 cases were resolved by the courts. The backlog has created a situation where cases are “lost” within the system and will probably never be closed.

## **Polish courts fail to apply deterrent sanctions**

A common problem experienced by all the copyright industries is the failure of the Polish judiciary to issue deterrent sentences in criminal copyright infringement cases.

The motion picture industry reports that the sentencing of defendants continues to be a major disappointment. Imprisonment has not generally been used as a deterrent measure, but in February 2002, a court did finally impose a one-year prison sentence on a pirate who had been operating in the Warsaw Stadium. This single sentence, however, was an anomaly, since all other convicted pirates received only suspended sentences. In 2002, FOTA secured 76 convictions, only one of which resulted in the imposition of a prison term. These weak sentences, combined with the excessive delays in bringing a case to trial, are proof of the ineffectiveness of the Polish judicial system to deter IP crime. While the majority of cases that actually see a courtroom do result in guilty verdicts, this is due more to the good preparatory work of the police than to the effectiveness of the judicial system itself.

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 US\$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 1,659 cases were initiated in 2002. According to available data, over US\$12,000 in penalties to be paid by the infringing parties (distributors of pirate products) had been adjudged to ZPAV (the injured party) in 2002. 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. In December 2002 the Regional Prosecutor in Gdynia filed charges against Pomerania Optical Disc for infringing the rights of Polish and international phonographic producers and causing them over US\$4 million of damages.

The business software industry continues to be concerned about weak judgments and delays in the legal process. BSA is not aware of any criminal judgments resulting from the 129 criminal end-user raids undertaken by the police during 2002. A number of BSA current 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, BSA reports that they usually result in fines of between US\$0 (zero) and \$1,000.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS POLAND IN 2002			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	1143	129	1659
Led by Police		129	1428
Led by Customs		0	174
Number of cases commenced	1103	129	1659
Number of defendants convicted (including guilty pleas)	76	17	36
Acquittals and Dismissals	44	61	137
Number of Cases Pending	3663	300	1466
Total number of cases resulting in jail time	1	5	36
Suspended Prison Terms	75	5	
Maximum 6 months		5	1
Over 6 months		0	8
Over 1 year		0	27
Total Suspended Prison Terms		5	36
Prison Terms Served (not suspended)	1	0	0
Maximum 6 months		0	0
Over 6 months	1	0	0
Over 1 year		0	0
Total Prison Terms Served (not suspended)		0	0
Number of cases resulting in criminal fines	75	6	33
Up to \$1,000		6	27
\$1,000 to \$5,000		0	6
Over \$5,000		0	0
Total amount of fines levied		~US\$1000	US\$12,611

## Border measures must be strengthened to reduce piratical imports.

The influx of pirate product into Poland and insufficient activities to stop this massive illegal import on the border, as discussed above, is a serious matter, which requires immediate improvement. Central Board of Customs and its IPR Coordination Center were closed on April 1, 2002. This closure created major uncertainty as to which entity within customs is responsible for coordinating IPR matters. The responsibilities of the Central Board of Customs were transferred directly to the Ministry of Finance. There are three separate bodies within the Ministry of Finance responsible for IPR issues:

- A central IPR body in the Customs Department of the Ministry of Finance (currently employing 2 persons), which is responsible for shaping customs IPR protection policy and cooperation with rights holders;
- A task force of 17 coordinators in the respective customs houses who are responsible for coordinating customs control activities in their respective territories;
- An IPR protection unit at the Warsaw Customs House, appointed to deal with specific individual cases instigated on the basis of the TRIPS procedure.

Furthermore, the Customs Service has acknowledged that restructuring caused significant confusion regarding the competences in the respective customs bodies.

The top priority for the Polish government must be to clamp down on the massive number of illegal imports of musical recordings, business and entertainment software, and audiovisual products. 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 rightsholders. 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.

Unfortunately, local customs offices have become less active and the number of seizures has been falling. Due to the increasingly high numbers of pirate products (mostly optical media) entering Poland, this customs reorganization remains a cause for serious concern. 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 on every level.

## **Enforce Organized Crime Legislation Against Pirates**

Poland already has legislation to fight organized crime (regulated in Article 258 of the Criminal Code) and this reportedly also extends to copyright infringements. The Polish government must make the political decision to stop organized crime in the Warsaw Stadium, and also in other pirate street markets in Wroclaw, Krakow, Katowice, Szczecin and other locations. The organized crime elements are becoming more entrenched, making enforcement almost impossible. Enforcement authorities must take steps to initiate actions under these additional criminal remedies. IIPA hopes that the U.S. government will take greater steps to assist Polish officials in law enforcement efforts against organized crime elements, and particularly as that affects copyright piracy in Poland, under the rubric of the U.S.-Poland Letter of Agreement on law enforcement coordination, signed on November 13, 2002.<sup>8</sup>

## **Civil Copyright Litigation**

**Civil ex parte Measures:** As IIPA and BSA have noted before, 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. 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. BSA did not carry out any civil actions in Poland during 2002.

**Delays in civil cases:** The problems in the Polish judicial system are so pervasive that it can take up to five years for a civil copyright infringement case to be heard

**Failure to assess deterrent damages:** BSA reports that the Polish courts fail to impose deterrent damages in civil cases, which historically involve business software end-user

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<sup>8</sup> U.S. State Department Fact Sheet, “U.S.-Poland Letter of Agreement,” Nov. 13, 2002, available at <http://www.state.gov/r/pa/prs/ps/2002/15090pf.htm>. The value of this assistance package, to be administered by the State Department’s Bureau of International Narcotics and Law Enforcement Affairs, is \$1.3 million, and contains projects in the following areas: anti-corruption curriculum development; combating international organized crime; courtroom security; support for the financial intelligence unit; and police modernization and training.

piracy cases. 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.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

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A brief summary of recent copyright legislative developments in Poland is important in order to identify key issues related to successes, problems and/or omissions in selected legal and enforcement mechanisms that impact anti-piracy efforts and commercial market development.

### **The 1994 Copyright Act, As Amended Through 2000**

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. 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 copyright reforms required by TRIPS during the four-year transition. Thus, before the 2000 copyright law amendments, several key features of the Polish IPR regime were not compatible with the TRIPS obligations, specifically: (1) the point of attachment for the protection of foreign sound recordings (TRIPS Articles 3 and 14) had to be clarified; (2) express protection for pre-1974 (foreign) sound recordings, in line with TRIPS Article 14.6, needed to be afforded; and (3) the law did not appear to permit civil *ex parte* searches, a particularly useful tool used by the software industry (and a TRIPS requirement). Poland missed its TRIPS implementation deadline of January 1, 2000 because no such copyright legislation was adopted.

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 a separate non-controversial bill, thus ensuring its adoption. These 2000 amendments went forward to correcting many of the TRIPS deficiencies in Poland's copyright law. 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;
- 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 only the 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 to be effective;

- Permitted collecting societies, as injured parties, the standing to file a criminal complaint for copyright infringement. However, the relevant provision leaves doubt as to whether the police and public prosecution services will take action *ex officio* for all criminal offences under the copyright act. Given the importance of the issue a further clarification is necessary.
- Added a neighboring right (25-year term) for publishers who for the first time publish or disseminate an unpublished public domain work. Also added 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.

Unfortunately, there were three important problems and/or omissions in the 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 rightsholders’ choices of how to receive payment and ensuring that residuals are the only way to get paid. This amendment was not required by Poland’s international obligations and is very likely to affect the audiovisual market adversely.
- The availability of civil *ex parte* measures was not clarified in the law.
- No amendments were made to narrow the overbroad exceptions regarding library use and anthologies in the Polish copyright law.

## 2002 Amendments to the Copyright Law

In order to more fully implement the various European Union Directives, the Polish government in 2002 undertook to amend its copyright law again. Local copyright industries did their best to improve the various provisions of the bill (especially regarding WIPO treaties’ implementation *vis-à-vis* the EU Directives) and limit potentially damaging proposals. The amendments were passed in December 2002 (Law No. 197, 1662) and entered into effect on January 1, 2003. Here is a brief overview of selected provisions; the law:

- Amended and expanded the rights for holders of neighboring rights, including performers and producers of sound recordings. For example, producers of sound recordings are afforded exclusive rights of reproduction, introduction into circulation, rental and lending, and making available to the public. However, the reproduction right as provided for phonogram producers is flawed and needs further amendments. Furthermore, producers of sound recordings receive only a right of remuneration in the cases of broadcasting, retransmission or communication to the public (see Article 94). Poland should be encouraged to give performing artists and producers of sound recordings an exclusive right of public communication, instead of merely a claim for remuneration.
- Expanded the exclusive rights for authors of works to include broadcasting, retransmission, communication to the public, making available to the public, rental, and lending (defined in Article 6; note that Poland continues to have a broad economic right to “use and exploit” works remains in Article 17).
- Article 79 was amended to provide that damages are available for those who remove or circumvent a technological protection measure (TPMs) controlling access, reproduction

or dissemination of a work (these damages also apply to producers of sound recording, *mutatis mutandis* by Article 101). Unfortunately, no further amendments appear to have been made regarding TPMs; IIPA and its members have long urged that the Polish law should include an explicit prohibition (along with associated criminal and civil liability) for the manufacture, importation, sale, distribution, or other trafficking in circumventing devices or services that are aimed at circumventing TPMs.

- Addressed the current private copying levy (in Article 20) which applies to manufacturers and imports of blank media, tape recordings/video recordings and “similar” devices, and photocopies/scanners/similar reprographic equipment. The amendments require that the levies now are to be paid to and collected by collecting societies which are to act in the interests of authors, performers, producers of phonograms and videograms, and publishers. The amendments also explicitly state the various percentages to be paid to the various groups based on the fees collected from the sale of the various devices and media.

Reports indicate that more copyright legislation may be considered during 2003, with the goal being that provisions on collective managements may be amended yet again. As a general point, it is essential to provide a clear framework allowing for successful arrangements driven by the rightsholders involved. Over-regulation and in particular imposition of tariffs have to be avoided. This situation must be closely monitored. The amendment process must be made as transparent as possible.

## **Further Amendments to the Copyright Law Still Needed**

Despite of the recent amendments to the copyright law, it is not up to the level to provide satisfactory protection to the rightsholders. Below is the short overview of the needed amendments:

- In addition to the basic expansion of the rights of the neighboring rights holders, it is crucial to broaden the definitions of the reproduction right for phonogram producers and performers in order to comply with the international standards. The limitation to “by a particular technique” has to be removed and the scope of the right has to include the elements of: (a) direct and indirect reproduction; (b) temporary and permanent reproduction; (c) by any means and in any form; and (d) in whole or in part.
- Poland should be encouraged to give performing artists and phonogram producers an exclusive right of public communication, instead of merely a claim for remuneration; this is critical in the Internet age. Market developments indicate that the future “delivery” of recorded music will increasingly be accomplished through the licensing of music services rather than the sale of physical products, and non-interactive transmissions will compete with on-demand communications for listener loyalty. Both interactive and non-interactive services must operate under market principles. To achieve this, it is essential that rightsholders, like producers of sound recordings, enjoy exclusive rights, and not merely rights to claim remuneration.
- One of the main obstacles to effective enforcement is created by cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rightsholders. The cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights enables defendants to delay judicial proceedings, and in some cases even escape justice, even when it is clear from the outset that the plaintiff owns the

copyright or neighboring rights in question. This issue has become particularly problematic now that hundreds of thousands of different infringing optical discs (CDs, CD-ROMs, VCDs, DVDs) are regularly seized during raids. Poland should introduce a presumption of ownership for phonogram producers.

- It should be clarified that police and public prosecution services take action *ex officio* in respect to all criminal offenses provided under the copyright act. In particular it should be clear from the text of the copyright act that *ex officio* applies in cases where otherwise rightsholders can initiate criminal proceedings.

## **Ratification and Deposit of the Two WIPO Treaties**

Poland has not yet acceded to the two 1996 WIPO treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty); prompt accession is a priority for the copyright industries. On January 10, 2003, the Sejm (lower house of the Polish Parliament) passed a law, which authorizes the President of Poland to ratify the WPPT. The law is now in the Senate and will then be forwarded to the President for his signature. No reservations have been made. WCT is now undergoing consultations in the parliamentary commissions. As mentioned above, Poland's 2000 amendments to its copyright law did address some of the WIPO treaties' issues (expanding scope of exclusive rights), but further amendments will be required (e.g., in the area of technological protection measures) to implement the treaties effectively.

## **Withdrawal of Poland's Reservation to 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. and other foreign nationals with respect to rights connected to broadcasting. 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 the recording industry'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. The local recording industry association, ZPAV, reports that there is no political will within the government to withdraw this reservation in the near future.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# RUSSIAN FEDERATION

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that the Russian Federation remain on the Priority Watch List in 2003<sup>1</sup> and that a short out-of-cycle review be undertaken as well. IIPA also recommends that the United States government suspend Russia's duty-free trade benefits that it enjoys under the Generalized System of Preferences (GSP) program. We make these recommendations because Russia's copyright piracy problem is one of the most serious of any country in the world. Overall copyright industry losses exceed \$1 billion per year—totaling \$6 billion in losses for the past six years with no end in sight. Russia's law and enforcement regime is not in compliance with the 1992 Bilateral NTR Trade Agreement even though Russia agreed to implement it by December 31, 1992—now 10 years later; nor is Russia in compliance with the Berne Convention (as a member since 1995). Last, Russia should be prevented from accession into the World Trade Organization until its copyright regime, now far short, is brought into compliance with the WTO TRIPS obligations.

**Overview of key problems:** The three problems of the highest priority in Russia are: (1) the explosive growth of illegal optical media plants run by organized crime syndicates with widespread distribution networks—Russia is now one of the world's largest producers and distributors of illegal optical media material; (2) lax enforcement, in particular, the lack of deterrence in the Russian criminal enforcement system to address persistent commercial piracy; and (3) the need for critical legal reforms.

**Actions to be taken by the government of Russia:** The most urgent problem that must be addressed by the Russian government is the widespread production and distribution of optical media produced in Russia and distributed throughout the world. The steps that need to be taken by the government of Russia are:

- Immediately closing the illegal plants using existing law (especially by withdrawing licenses for plants operating on government property), and adopting a comprehensive optical media regulatory and enforcement scheme;
- Enacting and enforcing effective border measures to stop the export and import of illegal material (Russia is also a major transshipment point for illegal product);
- Significantly improving criminal investigations and raids against pirates engaged in commercial distribution (and administrative procedures against street piracy);
- Directing prosecutors to bring cases swiftly and especially aimed at major commercial pirates; getting the courts to impose deterrent criminal penalties;
- Making the necessary legal reforms in the copyright law, criminal code, criminal procedure code, and administrative code detailed in this report, to facilitate stronger and more effective enforcement compatible with WTO TRIPS and the WIPO digital treaties.

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<sup>1</sup>For a history of Russia's involvement in the Special 301 process, see Appendix E.



**RUSSIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Motion Pictures</b>	250.0	80%	250.0	80%	250.0	90%	250.0	90%	312.0	85%
<b>Records &amp; Music</b>	371.9	66%	285.0	64%	250.0	70%	200.0	70%	170.0	75%
<b>Business Software Applications<sup>3</sup></b>	93.9	87%	90.6	87%	89.0	88%	134.5	89%	196.1	92%
<b>Entertainment Software</b>	NA	90%	173.6	90%	NA	94%	241.1	95%	240.8	97%
<b>Books</b>	40.0	NA	48.0	NA	48.0	NA	48.0	NA	45.0	NA
<b>TOTALS</b>	755.8		847.2		637.0		873.6		963.9	

## **COPYRIGHT PIRACY IN RUSSIA**

### **Illegal Optical Media Production and Distribution**

By far the greatest threat to the copyright sector in Russia is the manufacturing, distribution, and sale of pirated optical media products (music CDs, videogames, VCDs and, increasingly DVDs) from Russia's growing number of unregulated optical disc plants. Russia's 26 known CD plants, including at least 5 DVD (that is, audiovisual) lines, are wreaking havoc on the Russian domestic market. The number and the overall capacity of these plants has more than doubled in the past two years, from 12 plants in 2000 to 26 in 2002. In addition, illegal discs are being exported from Russia into neighboring countries and throughout Europe and other parts of the world (such as Israel), disrupting markets everywhere.

To combat this problem, optical media plants must be properly licensed and regulated to stem the flow of illegal materials. In March 2002, IIPA proposed a series of detailed proven legislative and regulatory steps to combat this problem. These materials were presented to the government of Russia by the U.S. government; in addition, IIPA presented these materials to

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$92.7 million at 83% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

ROSPATENT copyright experts. Russia has as yet taken no steps to adopt these legislative and regulatory provisions (outlined later in this report). IIPA urges the government of Russia to work with the international copyright industries to adopt comprehensive regulations and enforcement provisions that have worked successfully in other countries to stop this form of piracy.

Russia's present manufacturing capacity of CD plants is estimated at 300 million units per annum and bears no relationship to present legitimate demand—probably close to 18 million units. In just the past year, at least six new plants came on-line. It was only a few years ago that Russia's production eclipsed the production capacity of the region's then worst offender, Ukraine. This was caused in part by some of the Ukrainian plants migrating to Russia. But in larger part, the explosive growth in Russia has been the result of the criminal syndicates operating in Russia expanding their operations, in the absence of any deterrence. The Russian optical media problem is one of both domestic production as well as lax border enforcement resulting in the receipt and distribution of product from Asian countries (Malaysia, Thailand, Hong Kong, Macau, etc.) and, to a lesser degree, Ukraine. Russia remains a major destination and transshipment point for pirate optical media product from these other markets.

There are currently at least four DVD plants in Russia, of which two plants (Repli Master and Russobit) are in Moscow. The recording industry (International Federation of the Phonographic Industry, IFPI) reports that ten new CD plants opened in 2002 and four of the existing plants increased their production capabilities. During 2002, five new production lines were acquired to add to the existing manufacturing capacity (namely, two lines at the Urals Electronic Plant, one line at RMG Company, one line at Ruphon and one line at Astico-Center).

As a corollary to the adoption of comprehensive optical media regulations and enforcement provisions, Russia must significantly improve the lax border enforcement that permits the easy trafficking of illegal material into and out of Russia.

In 2001, Russia adopted a general plant licensing law ("On Licensing Separate Activities" effective February 1, 2002). In June 2002 "Reproduction Licensing Regulations" were adopted. Although these laws and regulations fall far short of the legal reforms needed for effective optical disc regulation, they could be used immediately to close some of the illegal optical disc plants, while more comprehensive laws are adopted. The laws/regulations require production facilities to be licensed by the Ministry of Press and Information. The pirates unsuccessfully challenged the regulations in the Russian courts. The Ministry of Press then began to implement the regulations (including the issuance of licenses and inspections of inspect replication facilities) for compliance. The motion picture industry reports that a number of pirate VHS labs have been discovered and the ministry has refused to issue a license to one of the known DVD plants with a history of pirate activity. The Inspection Commission recently inspected some CD plants and one of them was caught engaging in piratical production. Unfortunately, most of the copyright industries report that the laws have not yet been used to close or properly regulate the plants producing illegal CDs.

In addition, some of the optical disc plants are located on property owned by the government (in fact, eight CD plants and one DVD plant are on premises limited to special enterprises by the government). At a minimum in 2003, the government of Russia should take immediate steps to ensure that all known optical media plants operating on government-owned property are not producing illegal materials which would otherwise implicate the government directly in copyright infringements, and must close those plants that are operating illegally.

While awaiting adoption of proper optical media regulations and enforcement provisions, the copyright industries have had to rely on raids and seizures of pirate optical media product. Although the industries can report some successful raids and seizures, these activities have not resulted in any appreciable reduction in the amount of pirate optical disc product being produced in Russia. Pirate manufacture continues unabated and the pirates are being more entrenched. What is required is commitment by the Russian government to take action against the organized criminal enterprises that operate in the country. Copyright owners on their own cannot face down such groups but require the help of governments particularly in this area of law enforcement. With profits rivaling those made through the distribution of illegal drugs, it will require a similar commitment by governments to clean up criminal syndicates running piracy operations.

## **Raids and Seizures in 2002**

As in past years, the copyright industries reported raiding by the police and the municipal authorities, but still without the necessary follow-up by prosecutors and the courts. More disappointing, Russia has continuously failed to use its existing criminal law provisions to impose deterrent penalties.

In October 2002, the Russian cabinet agreed to establish an Interministerial Commission to combat piracy. The commission, it was announced, would be headed by the Prime Minister (this duty has now fallen to Press and Information Minister Lesin as “acting” head) and authorized to issue instructions to all the Russian enforcement bodies, including the Federal Security Service (FSB), the Organized Crime Police, and Customs. This has been a long-standing request by IIPA and its members and is a welcome development. It is hoped the Commission will focus not just on stepped up raiding and seizure activity but on the imposition of deterrent penalties especially directed at organized crime syndicates. It was immediately reported that there would be a greater willingness on the part of the police to assist in raids, and even, for the first time, cooperation by the FSB with raids.

After the announcement in October, there was a reported increase in raids, but these were directed at retail outlets, kiosks and street markets. Now only three months later, IIPA members already report a drop-off in activity. It should be further noted that street raids are, by themselves, meaningless unless parallel investigations are also run on the organizations behind these operations (either directing or supplying the street outlets). Unless action is taken against the organized criminal enterprises producing the large quantities of pirate material, running street raids will not be sufficient to clear the markets of Russia.

The pattern of successful raids without successful prosecutions (with the exceptions noted) has been a recurring problem for years. There was one notable exception, albeit three years, after the raid. In 1999 a CD plant, Disk Press MSK, located in the Moscow region was raided. The plant’s production capacity was then about five million units annually. At the time, 100,000 CDs and 500 stampers were seized from the plant’s premises, and the plant’s equipment was seized. Unfortunately, several of those arrested were not charged with crimes, even though there was ample evidence of the involvement of a “criminal gang.” However, on June 18, 2002, two defendants who controlled the organized crime group were sentenced to four years for various offenses, including smuggling of counterfeit CDs, tax evasion and copyright (and neighboring rights) violations. The general director of the plant was sentenced to two years imprisonment as well.

There were, as noted some successful raids and seizures in 2002. It is hoped that these will lead to successful and meaningful prosecutions in 2003.

On November 13, 2002, the film industry's anti-piracy organization, RAPO seized over 72,000 pirate DVDs in a major raid on a warehouse and packing facility in Moscow (which also contained CDs and videos—in total 250,000 copies were seized). The raid followed a two-month-long investigation conducted by RAPO in co-operation with the Organized Crime Police. The warehouse is located on a large defense complex (a research Institute called "Precision Instruments"). In order to gain access to the premises, RAPO had to secure the cooperation and attendance of officers from a special police department in the Ministry of Interior that is charged with guarding Russian defense facilities. At the time of the raid, there were 15 women in the facility packing discs into plastic DVD boxes. The raid also netted over one million high-quality printed sleeves and thousands of DVD cases. Following the raid, the police wanted to leave the pirate product behind and to seal the building, but RAPO feared that the pirates would remove the product overnight. RAPO eventually secured permission to move the product to the premises of a local RAPO member, where it could be securely guarded. On the following day, RAPO discovered a second premise within the same defense complex and seized 44,000 additional pirate discs (and over 60,000 sleeves), bringing the total number of discs seized in this one operation to over 116,000. The same company implicated in the earlier raid operated the second facility. In total in 2002, RAPO reported seizing over 226,000 pirate discs from DVD distributors and retailers.

On November 25, 2002 RAPO and the police conducted a raid on a clandestine optical disc plant in Korolov near Moscow and seized a dual-purpose CD and DVD line. The raid also uncovered a warehouse containing over 500,000 pirate CDs. In another raid in 2002 in Warsaw, Poland, the local anti-piracy organization seized over 4,000 Russian-made DVDs of current title feature films. The DVDs were English-language with subtitling in over 14 other language choices, but not including Russian. Thus the pirates in Russia are clearly producing material for export into other markets. The MPAA's anti-piracy programs in countries across Central and Eastern Europe and elsewhere have been seizing Russian, made pirate DVDs in 2002. The local Russian market has now become so saturated with pirate DVDs that the pirates have resorted to selling them on the streets by the kilo. Sales of legitimate DVDs in Russia have fallen back to 1999 levels despite a large increase in the number of households with DVD players.

Pirate DVDs are being sold everywhere, at street markets, in kiosks and retail stores and over the Internet. Some films are available on pirate DVD even before their theatrical release in the U.S. The pirate DVDs are very professionally produced and contain subtitles in many European languages.

In a raid in the city of Samara in September, RAPO and local police seized 25,000 pirate DVDs, 25,000 MPEG-4 CD-Rs, 20,000 VCDs and 95,000 videocassettes. The raid was conducted on a videocassette and packaging lab located in a warehouse, as well as against two associated retail stores.

In the past year, RAPO has been able to move some criminal cases forward. On September 2, 2002 the criminal court in Rostov-on-Don sentenced two videocassette pirates to prison, with one defendant receiving a two-and-a-half year sentence, and the other receiving a two-year sentence. Neither sentence was suspended by the court and both defendants are currently in prison. The Russian courts typically refuse to jail defendants for copyright crimes and if a sentence is imposed, it is usually suspended. The fact that the men were sent to prison

is a good sign and the length of their incarceration provides some hope that the judges are finally beginning to take IP crimes seriously. Despite these successes, however, prosecutors continue to regard copyright offenses as minor crimes and on far too many occasions dismiss cases, citing a lack of public interest. Such decisions discourage the prosecution of other defendants by police and prosecutors.

In 2002, the recording industry (IFPI) assisted in the investigation, and in raids and seizures on a number of suspected producers and distributors of illegal recorded material. Many of these investigations, and raids and seizures, were undertaken with the Public Prosecutor's Office. The following is a brief summary of some of the music industries' actions against replication plants, including raids and seizures on plants and warehouses in 2002.

After a two-year investigation, the criminal case against the Synograph CD replication plant is still ongoing (there were several meetings between IFPI and the General Prosecutor's Office). The investigation revealed a total of 140 titles found to have been replicated illegally: Counterfeit CDs from that plant were traced to Finland, Poland, Bulgaria, Romania and the U.S. In another case, evidence continued to be collected (some seized by Israeli police) of pirate product from the Bars Media replication plant in Kazan, Tatarstan. The plant was raided in August 2002 by the police; they also raided a warehouse and four distribution outlets connected to the plant (a total of 6,940 pirate CDs were seized). After the raid, the Kazan Prosecutor's Office initiated a criminal case that is ongoing. In another case, there were two raids undertaken in 2002 (November and December) by Ministry of Interior authorities (and IFPI) against the ZZMT replication plant. In those raids, a total of 234,493 discs with music, games, software, and film copies were discovered; 85,014 of these were counterfeit musical CDs. In all, a total of 88,158 discs (including 42,125 musical CDs) were seized and the rest were sealed on the premises. The Prosecutor's Office is initiating a criminal case.

In another case, the CD replication plant Tine-Invest Replication Plant, situated in the city of Korolev was investigated. At the Komposit factory (part of the Tine-Invest operation) CD replication equipment was discovered along with 23,860 illegal CDs and 47 stampers—all were seized. The investigation revealed two clandestine CD wholesale warehouses in Moscow—including one at a scientific institute under a special security (i.e., government) regime. After two raids by the police in November 2002 the equipment was shut down (and the entire plant personnel disappeared). As a result of this investigation a warehouse in Moscow containing 562,956 CDs and 600 inlays were seized. A criminal case has been initiated.

In an October 2002 raid, 41,700 CDs were seized; of these 30,000 were determined to belong to the De Luxe Company. In January, a raid on a wholesale warehouse of the Park Line Service Company resulted in the seizure of 63,500 CDs. The investigation revealed that the company was supplying small wholesale customers in Moscow and other Russian cities. A criminal case was commenced against the managing director of the company, but he only received a suspended sentence.

In October, the Moscow City Police (with IFPI cooperation) raided a company selling music material over the Internet. The operation resulted in the seizure of 7,000 infringing CDs. The director of the company (the Landy Star Company) was charged with administrative violations with possible sanctions of fines and confiscation pending.

The business software industry reports that in 2002, 42 police raids against CD-ROM resellers were undertaken, but only one of those cases was considered a "large-scale" raid. In that case, about 800,000 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 have greatly diminished due to the dangerous conditions that exist because organized criminal elements control videogame piracy in Russia. There are now believed to be four main criminal syndicates controlling piracy operations of entertainment software in Russia. These syndicates have attached “logos” or “brand” names to their illegal product and localize their product for competitive advantage. While all Nintendo Game Boy® products and Xbox entertainment software still continue to be imported from Asia, the Russian syndicates now produce 100% of videogame software for PCs and 40% of PlayStation® 2 software. These criminal syndicates are extremely powerful, controlling not only the illegal distribution networks in Russia but also in the surrounding countries. It is widely believed that the Russian groups control piracy operations in Eastern Europe, particularly the Polish market.

RASPA, the Russian anti-piracy organization for the entertainment software industry, continues to conduct raids on behalf of the Interactive Digital Software Association (IDSA) member companies, but these are mostly seizures of street market inventory. IDSA believes that the Russian government must take action against the organized criminal syndicates that run these piracy operations. The massive over production is destroying not only the Russian market, but markets in surrounding countries.

## **High Piracy Levels and Other Problems**

Very high estimated piracy levels in all copyright sectors accompany massive losses. The piracy levels reported by the copyright industries are as follows: The recording industry is at 66%; the motion picture industry is at 80%; the software industry is at 87% 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.<sup>4</sup>

These high piracy levels are costing the Russian economy millions of dollars in lost jobs and lost taxes. For example, the motion picture industry estimates lost tax revenues on DVDs and videos in Russia was \$131 million last year. A few years ago, the software industry estimated that if levels of piracy could be reduced to regional norms (that is, realistic levels), ten of thousands of jobs and several hundred million dollars in tax revenues would be realized from that sector alone.

But instead of creating jobs, Russia is losing them. That's because the powerful and organized criminal syndicates that control much of the pirate market in Russia are becoming entrenched. The only solution is for Russian authorities to use the criminal justice system to impose deterrent penalties. Instead, Russia continues to mete out low penalties 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 if Russia ever hopes to generate legitimate income, taxes and jobs from the copyright sector.

RAPO now believes that most of the pirate DVD material available on the market is being produced in Russia. Organized criminal gangs control most of the duplication and initial

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<sup>4</sup> 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.

distribution of pirate videos and DVDs. 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).

Two years ago, the infamous Gorbushka outdoor market was closed. Up until its closure it had been the major source of pirated material in Moscow, with many distribution hubs located in the vicinity. Once Gorbushka was closed, the market was 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 remains a problem in 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 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.

The recording industry reports that the closure of the former Gorbushka market resulted in the migration of illegal sales moving to the nearby building of the Rubin Trade Center (La-La Park), where most of the dealers sell pirate audio products. Last year, the Moscow city government pledged to clean up La-La Park and to regulate the sale of only legal product there, but that never happened. However, the administration of the market recently proposed to the Moscow Regional office and the National Federation of Phonogram Producers (NFPP) to develop joint measures to fight piracy there.

Audiocassette piracy levels remain very high (at about 61.5%) despite 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, in 2002 the volume of counterfeit cassette sales decreased by approximately two million copies. Out of a total of 152 million counterfeit cassettes sold in Russia in 2002, 86.3 million were international repertoire, which is 7.7 million less than in 2001. 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—sometimes including up to ten standard CDs. This has contributed to the increase in CD production and distribution. It is estimated that over 2.7 million counterfeit CDs with MP3 music were sold in Russia in 2002 (compared to one million such CDs 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. Total piracy losses for the recording industry in 2002 were estimated to be \$371.9 million.

The motion picture industry reported losses of \$250 million in 2002.

The level of piracy for entertainment software is at 90% of the market. The PC format is 100% pirate. Russian syndicates also control 100% of the production of PlayStation® games. IDSA reports that 60% of the pirate PlayStation® 2 software available on the market is imported from Asia, while the remaining 40% is produced in the country and localized. All Microsoft Xbox

and Nintendo Game Boy products continue to be imported from Asia, particularly China. There are currently 5,500 Internet cafes in the country, few of which are licensed. The retail markets in St. Petersburg and Vladivostok are all full of pirate videogame product.

The business software industry reports losses of \$93.9 million in 2002 (these are preliminary figures; final figures will be available later in 2003). The preliminary piracy level was estimated to be 87%.

Book piracy continues to flourish in the difficult Russian economy, although increased licensing of legitimate product resulted in some improvement in the piracy rates. While bestsellers were the target of the pirates in the 1990s, they have now turned to reference works and textbooks, a large market in Russia. Unlicensed imports of pirated reprints from the Ukraine and Belarus, 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 2002 were \$40 million.

## **COPYRIGHT ENFORCEMENT**

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### **Criminal Enforcement**

The only way to combat the organized crime syndicates is by effective criminal enforcement. Unfortunately, the criminal enforcement system in Russia is the weakest link in the Russian copyright regime. This deficiency has resulted in the extraordinarily high piracy levels and trade losses. The federal police and the IP unit in the Ministry of the Interior have generally been cooperative in running raids against major pirates (although the Unit “R” has had IPR enforcement jurisdiction taken from it). At the retail level, however, anti-piracy actions must be conducted by municipal authorities and in these cases pirates are subject to administrative, not criminal, remedies.

Three years ago, to assist in combating piracy, an Alliance for IP Protection was formed. It combined the forces of IFPI Moscow, RAPO, BSA and RASPA—thus combining the representatives of the recording, motion picture software and videogame industries. To date, the activities of this organization have been limited to training activities.

The film industry reported over 2,600 raids in 2002, resulting in the seizure of over 226,000 pirate DVDs and over 1.1 million pirate videocassettes.

The recording industry reported 209 seizures and raids in 2002, seizing a total of 949,000 CDs, 211,000 cassette tapes, 38,000 CD-ROMs, 600,000 inlays, 53 audiocassette recording devices, and eleven computers. The estimated value of the seized equipment is \$14.8 million. As in years past, many cases were later dismissed or were turned into administrative cases with *de minimis* fines.



In 2002, the business software industry assisted with 42 police raids against the CD-ROM resellers, resulting in 12 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 2002.

In addition the business software industry obtained three criminal convictions against computer shops selling computers with illegal software installed onto the hard discs (HDL piracy). Unfortunately, such court rulings have been extremely rare. In fact, a large number of cases were simply terminated by prosecutors on the notion that there was no proof of "grave harm." This clearly shows that the threshold in the criminal code is a hindrance to effective enforcement. Despite the fact that the police conducted a few raids against companies using illegal software in their business activities, no criminal cases were initiated against any of the individuals responsible.

Through RASPA, some IDSA member companies have continued to conduct raids in Russia. However, there are no statistics available at this time as to the number of raids.

**CRIMINAL COPYRIGHT  
ENFORCEMENT STATISTICS  
2002**

<b>ACTIONS</b>	<b>MPA</b>	<b>IFPI</b>	<b>BSA</b>
Number of Raids conducted	712	209	69
Number of indictments filed	322	863	NA
Number of defendants convicted (including guilty pleas)	71	249	23
Ratio of convictions to the number of raids conducted	9.9%	61.5%	NA
Ratio of convictions to the number of indictments	22%	39.4%	NA
Total number of cases resulting in jail time		1	
1 to 12 months	26		15
13 to 24 months	21	1	
25 to 36 months	11		
37 to 60 months	4		
Over 61 months	1		
Number of cases resulting in criminal fines	34	NA	8
Total amount of fines levied	NA		
US\$0-\$1,000	11		8
\$1,001-\$5,000	10		
\$5,001-\$10,000	6		
\$10,000 and above	7		
Total amount of restitution ordered) in how many cases (e.g. \$XXX in Y cases)	\$3,280,000	\$9,200,000 (863)	\$120,000 (10)

As in past years, these results are disappointing and will not succeed in significantly reducing piracy levels in Russia. Any reductions that do 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

As in past years, 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. As in past years, the recording industry and the motion picture industry report that administrative raids have been positive; RAPO reported that it is able to average nearly 30 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\$22). 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. The recording industry reported that though the law makes those liable who distribute material, the sources and channels of illegal material are rarely pursued. In lieu, most administrative actions against shop owners and sellers pay on average \$60 to \$90.

### ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS 2002

ACTIONS	MPA	IFPI	BSA
Number of raids/searches conducted	1919	209	12
Number of administrative cases brought by agency	1594	345	12
Number of defendants found liable (including admissions/pleas of guilt)	1484	345	9
Ratio of convictions to the number of raids conducted	77.3%	65.7%	%
Ratio of convictions to the number of cases brought	93.1%	92.2%	%
Number of cases resulting in administrative fines	1201	294	9
Total amount of fines levied	\$26,270	\$4704	
US\$0-\$1,000	1201	294	9
\$1,001-\$5,000			
\$5,001-\$10,000			
\$10,000 and above			
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	NA	NA	

## Civil Enforcement

In 2002, 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. As a result, several significant cases were won against software system builders installing illegal copies of business software onto sold computers as well as corporate end-users that used illegal copies of software in their business operations. However, deficiencies in the copyright law still make it very difficult to apply civil remedies in end-user piracy cases.

Other industries report that Russia judges (for example at an IPR seminar in March 2001) note their opposition to giving standing to foreign non-governmental organizations to represent copyright owners, and to granting national treatment to foreign persons, in Russian

courts. In short, the government of Russia must train its judges to respect foreign rightsholders as is required under international treaties, and to take IPR cases seriously.

As the following chart shows, the motion picture industry reported six cases that were commenced as the result of civil raids and searches -- and all six cases were dropped before judgment.

**CIVIL COPYRIGHT  
ENFORCEMENT STATISTICS  
2002**

<b>ACTIONS</b>	<b>MPA</b>	<b>BSA</b>
Number of civil raids/searches conducted	6	NA
Post Search Action		
Cases Dropped	6	
Cases Settled		
Cases Adjudicated		
Value of loss as determined by Court (\$USD)	\$	
Judgment Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)		
US\$0-\$1,000		
\$1,001-\$5,000		
\$5,001-\$10,000		
\$10,001-\$20,000		
\$20,001-\$50,000		
\$50,001-\$100,000		
\$100,000 and above		
Settlement Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)		\$

## **IIPA Enforcement Objectives and Benchmarks**

For over five years, IIPA has outlined a series of benchmarks that the U.S. government has provided to the Russian government on improvements needed in Russia's enforcement system. With one exception, these have not been implemented. Last year, the Russian cabinet did agree to establish an interministerial committee on enforcement (although it is not clear, as IIPA has requested, that this would be a permanent, instead of an *ad hoc*, committee. IIPA urges the government of Russia to take these steps, including a number of structural and political ones—they would go a long way toward the implementation of an effective enforcement regime in Russia:

- **The President and the Prime Minister should issue a decree or internal directive making copyright enforcement a high priority (tasking the Public Prosecutor's Office to vigorously prosecute copyright offenses).**
- **The Supreme Court and Supreme Arbitration Court should issue an explanatory instruction to the lower courts concerning copyright enforcement to treat infringements of copyright and neighboring rights as serious crimes.**
- **The interministerial task force should become a permanent committee with the authority to adopt a binding enforcement plan to coordinate nationwide**

**enforcement of copyright and neighboring right violations with all relevant agencies.**

- **Enforcement (police and customs) and prosecutorial pools should be established in each major city and region. Investigating organized criminal syndicates should become a primary enforcement goal.**
- **A plan should be formulated and commenced for the training of judges, prosecutors, magistrates, and police as a regular part of ongoing enforcement efforts.**

## **GENERALIZED SYSTEM OF PREFERENCES (GSP) PROGRAM**

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Even with piracy rates and losses among the highest in the world, Russia receives trade benefits from the U.S. government. That is why in August 2000 IIPA filed a petition, accepted by the U.S. government in 2001, to examine whether Russia should continue to be eligible to receive duty-free trade benefits under the Generalized System of Preferences program. That petition is still pending (hearings were held in March 2001); the U.S. government now must decide whether to fully or partially suspend GSP benefits for Russia. For the first 11 months of 2002, Russia exported goods valued at over \$340 million to the U.S., which received preferential duty-free treatment under the GSP program (in calendar year 2001, Russia exported \$378 million of such goods). While Russia was receiving these benefits, losses to U.S. industries from copyright piracy in Russia in 2002 amounted to the hundreds of millions of dollars.

IIPA recommends that these benefits be suspended as soon as possible to force Russia to improve its copyright enforcement regime.

## **DEFICIENCIES IN THE RUSSIAN LEGAL REGIME**

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### **Overview of Legal Reforms**

There are a number of critical legal reforms that Russia must undertake to improve copyright protection and enforcement, as well as to ensure accession into the World Trade Organization. These reforms include the need to adopt:

- Proper optical media regulations to address (with criminal sanctions) the protection and distribution of optical discs and the equipment and machinery used to produce them;
- Amendments to the copyright law to fix a number of deficiencies and to make it WTO TRIPS and WIPO digital treaty compatible—in particular the protection for preexisting foreign works and sound recordings;
- 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);
- Amendments to the Criminal Code (the problems with Art. 146 "grave harm" provision);
- Amendments to strengthen the implementation of the Administrative Code;

- Amendments to the Customs Code (to provide *ex officio* seizure authority).

The threat of deleterious amendments in the Russian Civil Code pertaining to IPR protection remains; the Russian government must not allow any such amendments to be adopted.

A detailed discussion of each of the proposed legal reforms (including the necessary changes to the Copyright Act, and the problems related to the draft Civil Code) follows.

## Optical Media Regulations

There are reportedly at least 26 CD plants in Russia; at least 5 plants can produce DVD material with the rest focused on musical CD and CD-ROM (of business and entertainment software) materials. Two licensing laws, and one set of regulations, have been enacted in this area of law in the past two years. But neither law, nor the regulations, resulted in effective action undertaken against the illegal plants. The two laws enacted were: (1) a law signed by President Yeltsin in 1998, requiring any plant manufacturing audio or video product on CD to obtain an operating license—unfortunately, that law failed to extend to all copyrightable subject matter, and has not been used adequately even against those products it does cover; and (2) a law adopted in 2001, intended to further improve enforcement against local optical disc plants. That law, “On Licensing Separate Activities” required that production facilities had to be licensed by the Ministry of Press and Information effective February 1, 2002. In June 2002 “Reproduction Licensing Regulations” were adopted—but these too have only recently (and not yet effectively) been utilized.

The government of Russia must use its existing authority to withdraw the licenses of illegal plants and thus stop their production, especially those plants operating on government soil.

In addition, 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. The proposals below were presented by IIPA and, formally, by the U.S. government to the government of Russia in 2002. Since the size and scope of the optical media problem has doubled in size in the past two years, Russia must act quickly.

The elements of an effective optical media regulatory and enforcement plan that Russia must adopt (including criminal enforcement sanctions) are as follows:

- 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. Currently, CD-ROMs containing software are not subject to the licensing regulations—they should be included.
- 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 (stampers) 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 rightholders in its discretion. These requirements create the transparency that 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 permitted. Inspections conducted by or with participation of experts (e.g., by right holder organizations) should also be provided for 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 of 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 include:

- Title verification requirements, under which producers of optical discs must take steps to ensure that the relevant rights for certain products have been cleared with relevant representatives of right holders before beginning production;
- Imposition of controls similar to those outlined above on the importation and/or exportation of certain finished optical disc products (in addition to production equipment and raw materials).

## Copyright Law Amendments

Since the passage of the copyright law in 1993, IIPA, its members, and the international copyright community have been anticipating amendments to fix (and now to update) that law. It is hoped that in 2003, these efforts will prove successful. Certainly, a positive development of the past several 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, and in particular on the copyright law amendments.

On October 16, 2002, amendments to the Copyright Law passed a first reading in the Duma; a second reading is expected in 2003. Several dozen amendments, many of them very deleterious, were circulated in late 2002 for possible consideration as part of that second reading. The failure to adopt stronger protections and to cure the key copyright law deficiencies, foremost being the failure to protect preexisting works and sound recordings, will otherwise delay Russia's accession into the World Trade Organization. IIPA urges the government of Russia and the Russian Duma to adopt a WTO TRIPS and WIPO digital treaties compatible law, and to defeat amendments aimed at weakening the copyright regime.

The draft copyright amendments that passed the first reading in October includes provisions aimed at correcting the problem pertaining to the protection for pre-existing works and sound recordings. The draft law also intends to make other changes, most notably adding provisions directed at implementing the WIPO digital treaties. A brief set of IIPA comments on this law is provided below which, except where noted, are positive features. In sum, the draft law includes:

- Protection for a minimum of 50 years for pre-existing works and sound recordings. There remains some concern that the provision is not as clearly worded as it could be and might cause confusion; the wording should be fixed so it is completely consistent with the Berne and WTO TRIPS obligations. In addition, any amendments to weaken this proposal with, for example, the inclusion of a transition period for selling off previously unprotected material should be defeated;
- A new "making available" right for works and phonograms (as well as a right of "public communication"). Missing from the draft are necessary amendments to the definition of "broadcasting" and "communication to the public" that are consistent with and necessary for compliance with the WIPO digital treaties.
- An extension of the term of protection for works to life plus 70 years (or 70 years from publication). A key deficiency in the draft is its failure to extend the term for phonograms beyond the existing 50 years;
- Improvements pertaining to the limited exception for the decompilation of computer programs to make the provisions compatible with international norms;
- Provisions for technological protection measures (TPMs) and rights management information (RMI), both WIPO digital treaties requirements;

- Provisions to clarify rental rights. One troubling development is a proposed provision that would narrow the rental rights granted to copyright holders with respect to computer programs.

Provisions in the copyright law as adopted in the first reading that are of concern to the IIPA and its members are: (1) the definition of the reproduction of a phonogram is too limited and inadequate; (2) the failure to clarify the protection for temporary copies (for works and sound recordings); (3) the failure to provide a clear exclusive making available right for and the failure to limit statutory licenses applying to the rights of producers of sound recordings; (4) new provisions giving collecting societies even more power and interests; (5) the failure to rectify the scope of the existing private copying levy in the digital environment to ensure that the private copying exception is limited to analog copying by a natural person for their own private non-commercial purpose and does not apply to digital copying; (6) the failure to narrow certain overbroad exceptions (including “personal use”) to the rights of authors and producers of sound recordings and (7) a new provision requiring the verification of notices by collecting societies to terminate Internet infringements—this will, if adopted, create a serious obstacle to the effective fight against Internet piracy.

Also, the draft in its present form fails to provide presumptions of ownership for the benefit of phonogram producers. This is a provision that is sorely needed given the extent of piracy and the difficulties in enforcing rights in court.

While most of the revisions are positive steps, it is hoped that the U.S. government will continue to engage the government of Russia to ensure that the law passes both quickly and with provisions that repair all substantive deficiencies to the Bilateral NTR Trade Agreement, WTO TRIPS and the WIPO digital treaties.

## **Criminal Procedure and Criminal Code Amendments**

Amendments to the criminal procedure code entered into force on July 1, 2002, but they failed to provide the key missing ingredient—to provide police with *ex officio* authority.

Amendments to the criminal code, especially Article 146, were considered in 2002, and a (revised) second reading took place on February 5, 2003. But the amendments have not yet been enacted. The earlier proposed amendment to Article 146 would have weakened, and not strengthened the criminal code—IIPA and the U.S. government communicated the concerns about this proposal and it was fortunate the provisions did not pass. IIPA understands that developments in February 2003, prior to the (revised) second reading, may have restored some of the stronger provisions back into the draft Article 146.

The history of the Criminal Code and Criminal Procedure Code reform is as follows. In 1996, amendments to the Criminal Procedure Code (CPC) were adopted, but these turned out to create more problems rather than solutions for the copyright industries. The amendments were supposed to be technical amendments to align the CPC with the 1996 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 limited copyright enforcement because prosecutors have fewer resources than police



and because copyright enforcement became dependent on the different priority given to infringement by each district's prosecutor. The latter change shifted copyright infringement complaints to the copyright owners, thus limiting the number of cases that would commence, especially outside of Moscow (where copyright owners do not have representatives). These amendments must be reversed. Unfortunately, these changes were ignored in the 2001 amendments adopted to the CPC, effective July 1, 2002.

The history of the Article 146 Criminal Code provision is as follows. 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 US\$600 to US\$1,200) 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.

In 2001, President Putin sent the Duma 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, was consistent with industry proposals, but the threshold amount remained is too high. The proposal would have defined two thresholds: a "grand-amount offense" (200 times minimum wage) and a "gross-amount offense" (500 times minimum wage). The punishment for convictions would have increased for up to 3 to 6 years imprisonment for "gross-amount offenses." IIPA recommended that these thresholds be further lowered to a fixed but reasonable amount (starting, for example, at 50 times the minimum wage) to improve criminal enforcement.

In 2002, a proposal to "fix" the Article 146 "grave harm" problem was adopted in a first and then a second reading in the Duma. Unfortunately, last-minute changes to the provision would have further and significantly weakened, not strengthened, the provision. The proposal would have lowered the threshold to 100 (not 50) times the minimum wage. But it would have used the basis for the calculation as the price of the pirated products rather than the price of the legal products raising the threshold to an unreasonably high level thus leaving most cases outside of the scope of criminal sanctions. Plus, it failed to explicitly mention the purchase, transportation and storage of pirate products as crimes—another major shortcoming. Luckily, through the intervention of the U.S. government and copyright industries and pro-copyright officials in Russia, this provision was not adopted. A revised provision was put forward and another second reading considered by the Duma on February 5, 2003. But passage of the revised (and improved) version remains uncertain.

Article 146 must be amended to define the standard of "significant damage"/"grave harm" as follows: The standard must be defined to cover all cases in which the retail value of the pirated works exceeds a minimum amount. IIPA has been 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—this is what should be adopted.

There are three other criminal code/criminal procedure code amendments that need to be adopted.

First, the government of Russia should introduce and the Duma should adopt amendments to add specific substantive and procedural provisions to the criminal code and criminal procedure code that 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 in 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.

Second, the government of Russia should introduce and the Duma should adopt amendments to increase the 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 the low fines as a cost of doing business. These amendments must provide for increased penalties for copyright infringement. For several years the Duma has considered but not adopted amendments to increase the maximum jail term to seven years and to make copyright infringement a “most serious crime”; adoption of these amendments would likely trigger special attention by the enforcement authorities.

Third, the government of Russia should introduce and the Duma should adopt amendments to the Criminal Procedure Code to return jurisdiction over criminal violations to the police authorities from the prosecutors. The 1996 amendment to the Criminal Procedure Code was a serious setback to copyright enforcement. The 1995 amendments put criminal violations under police jurisdiction. The 1996 amendments returned jurisdiction to the prosecutors and the police no longer could 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 a few years ago a proposal to delete from Article 27 of the Criminal Procedure Code, effective at the time, the reference to copyright crimes was considered it was not adopted. Such a useful

amendment would result in the repeal of a requirement that a private complaint be filed before a criminal case could begin.

Unfortunately, the 2001 CPC amendments ignored this important change as well as the needed revision to Article 126 of the CPC, which allows actions once taken directly by the police not to be subject to prosecutorial authorization. The U.S. government must continue to press for passage of these changes.

## **Civil Procedure Code Amendments**

For several years, IIPA has mentioned the need to revise the Civil Procedure Code and the Arbitration Procedure Code (or the copyright law) to provide *ex parte* search authority. This authority is critical to the software industry in particular for effective enforcement.

In 2002, Russia adopted a new Civil Procedure Code that went into effect on February 1, 2003. While the code regulates the procedures for initiating and examining civil cases including disputes pertaining to copyright and neighboring rights infringements, the proper civil *ex parte* search procedures were not included in this new law. Russia's accession to the WTO requires (in Article 50 of the WTO TRIPs Agreement) that the law provide rightholders with the opportunity to obtain civil *ex parte* search orders against suspected infringers. Effective as of September 1, 2002, the newly amended Arbitration Procedures Code in Article 72 introduced new civil *ex parte* search provisions. This is a very encouraging development, especially welcomed by the software industry. However, it remains to be seen how the new provisions will work in practice (expected in 2003), because the article has not yet been tested.

## **Customs Code Amendments**

The Russian 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 WTO TRIPs. Imports of pirate optical media product continue from Eastern Europe (especially from the Czech Republic), from other countries of the CIS with production capacity (i.e., Ukraine), and from Asia.

Over two years ago the State Customs Committee began work on a draft new Customs Code with the assistance of the Ministry of Economic Development and Trade. While it was expected that the Customs Code might be adopted in 2002 it was not completed. The U.S. government should insist that Russia make these necessary changes before can accede to the WTO so that Russia will have a fully TRIPs-compatible Customs Code in force.

## **Code of Administrative Misdemeanors**

A new Code on Administrative Misdemeanors was adopted in December 2001 and went into force on July 1, 2002. Pursuant to this code, it is now 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 very limited because it falls under the competence of underqualified municipal police.

## Civil Code

The effort to include detailed copyright provisions as part of comprehensive civil code reform remains a continuing threat to strong IPR protection. For over 10 years, opponents of strong copyright protection have threatened to “redo” and weaken the copyright law with provisions in the Civil Code. The Copyright Law should remain self-standing, and nothing in the Civil Code should undermine that detailed law.

The current draft amendments to the Civil Code separated the IPR provisions into Part IV of the Civil Code. The government of Russia must prevent an attack on copyright protection by the inclusion of amendments in the Civil Code to weaken prevailing copyright protections. If the Russian Duma insists that Civil Code reform pertaining to IPR is necessary, it should ensure that (1) a bare minimal number of provisions are adopted; (2) that any such provisions provide “skeletal” protections and that it clearly state that the copyright law continues to be the prevailing law and that the latter provide the details of IPR protection and enforcement; and that (3) it provide clear instructions to courts and prosecutors that the copyright law is the prevailing law to avoid judicial confusion or any weakening of the existing copyright system. If adopted by the “anti” copyright forces, the extensive and undermining Civil Code IPR amendments would create significant ambiguities and risks, as courts would attempt to determine which of two competing and inconsistent laws governs. This would only further undermine Russia’s already faulty enforcement regime.

Throughout 2002, there was much parliamentary maneuvering pertaining to the IPR provisions within the Civil Code. IIPA urges the Russian government to send strong signals to the Duma that it will not accept weakening amendments to the copyright regime and will veto any such provisions if they do prevail in the Duma. To do otherwise will mean the adoption of provisions incompatible with the Bilateral NTR Trade Agreement, Berne, and WTO TRIPS.

## Other Concerns: Stamp Tax and the Tax on Video Rental Profits

One issue of concern 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.

One lingering question is whether or not the new registration stamp/mark is mandatory, because the law is not clear. For most industries the question is only theoretical because in practice most of the copyright industries continue to purchase the stamp/marks out of fear of retaliation. For the past year there was discussion within 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 right holders is under consideration as well.

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 was excluded from this law, and video rentals became 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. It was hoped that this would help the video market's growth in Russia, but the growth of DVD piracy has, for the most part, overwhelmed the legitimate market for rentals.

This is unfortunate because 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 last year 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, there is continued hope that the rental market can expand, especially if DVD (and video) piracy can be contained.

## **WIPO Treaties; Electronic Commerce; Notice and Takedown Procedures**

In late 2002, Russia considered but then decided not to accede to the WIPO digital treaties (WCT and WPPT). It is hoped that in 2003, the Russian government will accede and that, in addition to the other legal reforms, Russia will adopt legislation that fully implements both of these digital treaties. Some of the implementation provisions are part of the Copyright Law that passed its first reading in 2002. Complete implementation is critical to Russia's future in the new world of e-commerce.

IIPA also understands that a federal draft law "On Electronic Trade" submitted to the Duma in November 2000 may be considered in 2003. 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).

A particularly troublesome provision in the draft Copyright Law is Article 48 which would, among other things, make "notice and takedown" procedures subject to verification and confirmation by collective management organizations. This will be a very counterproductive measure, if adopted. As the U.S. experience has shown, notice and takedown, when undertaken by copyright owners directly to on-line service providers and host sites works very efficiently and effectively. The use of an intermediary—a collective management organization—will significantly bog the process down in time delays, and ministerial hurdles that will totally undermine the effectiveness and the purpose of "notice and takedown"—to have a fast, efficient and fair process. Individual copyright owners need to maintain the right to enforce their rights directly and that is why the proposed new Article 48.2 must be deleted.

## **Rome Accession and Article 16 Reservation**

On December 20, 2002, Russia completed its accession papers for membership in the Rome Convention, due to be effective in 2003. Although the United States is not a member of the Rome Convention, IIPA is very troubled by Russia's decision to make an exception to its national treatment obligations and adopt the reservations permitted by Article 16 of the Rome Convention. In short, this reservation will mean that American record producers and performers will be denied broadcasting remunerations even though the U.S. is a member of the WPPT (and

even after Russia accedes to that treaty). This is a very unfortunate and short-sighted decision by the government of Russia and one that IIPA hopes will be reversed. As an example, the United States copyright law does not deny the digital transmission right to foreign sound recording producers, and will not deny this right to Russian sound recording producers even after Russia's unilateral decision regarding the Rome Convention. Russia should be encouraged to abandon this one-sided discrimination against U.S. repertoire and should accept broad national treatment obligations.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# SOUTH AFRICA

### EXECUTIVE SUMMARY<sup>1</sup>

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South Africa should be placed on the Priority Watch List. Perhaps no country in the world has had a greater increase in audiovisual piracy levels in the last year than South Africa. Imports of pirated copies of motion picture DVDs, often of movies which have not even been released anywhere in the world, flood the South African market. Devotion of adequate resources to fight piracy remains lacking. In addition, the motion picture industry has found that corruption exists within South African Customs, which needs to be addressed immediately.

South Africa was placed on the Watch List in 1998 in recognition of certain copyright problems, particularly for the software industry, and was retained there in 1999. In late 1999, as the result of a health initiative related to pharmaceutical patents, USTR decided to remove South Africa from the Special 301 lists. It has been off all lists since that time.

The invasion of pirate DVDs started in November 2001 and shows no signs of stopping. Meanwhile, piracy of other IIPA members' product in South Africa continues to cost the country jobs, tax revenues, and the possibility of developing its creative community. Pirated videogames and illegally photocopied books continue to flood the market. The courts continue to give low priority to copyright infringement cases, and although prosecutors are becoming more active and more cases have proceeded to court, the number of convictions remains low, and penalties remain non-deterrent. The business software industry continues to receive some good cooperation from the police in 2002 in achieving raids, accompanied by some self-help measures.

Required actions for 2003:

#### Enforcement Coordination

- Continue coordinating enforcement through the special IPR enforcement unit, and step up enforcement efforts against piracy by all agencies in South Africa.
- Invigorate South African Customs to seize pirated goods as they enter the country.
- Crack down on the issue of corruption to guarantee that all officers and officials are operating in an ethical manner.
- Implement and enforce the Counterfeit Goods Act against commercial piracy (including passage of needed technical amendments to facilitate better enforcement).
- Ensure the effectiveness of the judicial system either by allowing for quicker dispositions or by creating a separate commercial court to handle intellectual property cases.
- Foster the imposition of deterrent sentences by the courts in copyright cases.

#### Legislative Challenges

- Provide TRIPS-compatible evidentiary presumptions in the law, including clear presumptions of copyright subsistence and ownership.

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<sup>1</sup> For more details on South Africa's Special 301 history, see IIPA's "History" Appendix to this filing.

- Provide that *ex parte* civil search (Anton Piller) orders are easier to obtain and enforce in line with TRIPS Articles 41 and 50.
- Ensure the passage of amendments to bring the copyright law into compliance with TRIPS (including by providing stronger legal deterrents to copyright infringement, criminalizing corporate end-user piracy, providing for pre-established civil damages, etc.).
- Extend copyright protection to the digital environment through ratification and implementation of the WIPO "Internet" treaties.

**SOUTH AFRICA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures <sup>3</sup>	30.0	30%	12.0	15%	12.0	10%	12.0	10%	12.0	16%
Records & Music	NA	25%	NA	NA	11.0	13%	NA	NA	12.0	40%
Business Software Applications <sup>4</sup>	NA	35%	32.7	38%	44.2	45%	68.4	47%	74.9	49%
Entertainment Software	NA	NA	26.1	57%	22.4	70%	NA	NA	22.2	NA
Books <sup>5</sup>	14.0	NA	19.0	NA	21.0	NA	20.0	NA	21.0	NA
TOTALS <sup>6</sup>	44.0		89.8		110.6		100.4		142.1	

## COPYRIGHT PIRACY IN SOUTH AFRICA

South Africa became one of the world's largest breeding grounds for DVD retail piracy in 2002. The piracy level for optical discs grew to command a whopping 35-40% of the market, when in the past audio-visual piracy had remained relatively stable at approximately 10-15%. The alarming losses in legitimate revenues, plus the obvious growth in pirate resellers importing the pirated materials from Asia and elsewhere, demand an immediate response. The following

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> The piracy level reported in 2002 is a composite rate. The videocassette piracy rate was 15% of the market in 2002, and the optical disc piracy rate grew to 35-40% in 2002.

<sup>4</sup> BSA's estimated piracy losses for 2002 are not available, and the estimated piracy level for 2002 is preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, the preliminary losses and levels due to piracy of business software for 2001 were reported as \$67.5 million and 55%, respectively; those figures were finalized in mid-2002, and are reflected above. BSA's trade loss estimates reported in the chart represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study, which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> In 2001, total piracy of published materials has gone up in South Africa, but losses appear lower due to devaluation of the South African Rand at that time.

<sup>6</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in South Africa were \$124.6 million. Because of the adjustment to reflect BSA's final 2001 statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in South Africa in 2001 are adjusted to \$89.8 million.



snapshot describes the types of piracy causing the most egregious harm to U.S. companies trying to do business in South Africa:

- **Optical Disc Retail Piracy, Imported from South and Southeast Asia:** As noted, the retail markets are now flooded with professionally pressed pirate DVDs,<sup>7</sup> often of films not yet released in theaters or video stores.<sup>8</sup> The amount of profits that can be realized by pirates through counterfeit DVDs is high. As a result, DVD piracy attracts very serious and dangerous criminals. In addition, the retail markets for business software, sound recordings, CD-ROMs of published materials, and movies in other formats (mainly VCD), remain largely pirate.<sup>9</sup> Much of the pirate product continues to be imported from countries in Asia including Thailand and Malaysia.<sup>10</sup> Increasingly, couriers from Pakistan bring into South Africa what are thought to be Pakistani-produced optical discs of music and movies. Most pirate product is distributed through flea markets and street vendors, who are becoming increasingly organized and violent.<sup>11</sup> For the entertainment software industry, much of the pirated product is being distributed through flea markets, kiosks and other informal traders. Other than Game Boy entertainment software, which continues to be shipped out of China, virtually all pirated videogame product is being shipped from Malaysia. There are small CD-R “burning” operations in South Africa but the market is still largely overrun by imported silver discs
- **Book Piracy:** Book publishers continue to experience piracy of their materials in South Africa. Photocopy piracy of whole books/high-priced reference books on university and *technikon* campuses occurs in South Africa, but indications are that this phenomenon has declined slightly in the past two years, and that educational institutions are becoming more copyright-conscious. Some “India-only” reprints, as well as commercial offset copies, from India or Pakistan, continue to surface in South Africa.
- **Corporate End-User Piracy of Business Software:** A large number of South African companies use unlicensed computer software. In one campaign, the Business Software Alliance learned that 600 companies with over 60,000 computers were using unlicensed software. To its credit, the South African government has been helpful in offering its

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<sup>7</sup> In 2001, SAFACT (the local anti-piracy organization acting on behalf of the Motion Picture Association and others) seized approximately 6,000 pirate DVDs. However, in 2002, SAFACT seized 81,321 pirate DVDs, representing an increase of over 1200%. SAFACT currently estimates that over 50,000 pirate DVDs entered the country every month in 2002.

<sup>8</sup> Good-quality pirate DVD copies of the movie, *Men in Black II*, were seized at Johannesburg airport on June 26, 2002. The movie was not due for release in the United States until July 3, 2002, and it was not scheduled for release in South Africa until the beginning of August. Obviously, this kind of piracy not only impacts the home entertainment sector, but also directly harms the theatrical market in South Africa.

<sup>9</sup> 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. Last year, SAFACT seized over 40,000 pirate video games in different formats.

<sup>10</sup> In 2002, the majority of pirate discs came into the country in passenger luggage.

<sup>11</sup> SAFACT has identified several highly organized distribution rings that are responsible for spreading pirate product throughout South Africa. These networks are prepared to use violence, and are sworn to secrecy regarding those in charge of the operation. The result is that even if a street vendor is caught, it is virtually impossible to get cooperation in terms of information needed by the authorities in order to capture organized criminals behind these pirate importation/distribution networks. Because of the dire nature of the situation, even legal retail stores are reportedly considering stocking pirate DVDs in order to stay in business. Approximately 10% of previously “clean” retail stores have now begun to stock pirate DVDs. SAFACT states that this is a response by retailers in competition with the pirates. More stores are threatening to also carry pirate product if the situation is not controlled.

assistance in support of BSA's efforts to legalize software usage. Many government municipalities have participated in the "BSA Truce Campaign," started in January 2002, a program during which a company can legalize its software without fear of legal action. As a result, several companies audited their offices and legalized their software in 2002.

- **Internet Piracy:** There has been a marked increase in Internet piracy over the past three years in South Africa. As Internet penetration increases, the problem of Internet piracy increases as well. Internet piracy encountered thus far is mostly through advertisement or online auction sites of pirate goods that are then sold and mailed through physical mail. This includes sales of pirate VCDs, DVDs, and CD-ROMs. Streaming and downloadable media is less of an option at this time in South Africa as connections consist mostly of 56kbps modems, and it still takes too long and is too cumbersome a procedure to download larger files in South Africa.
- **Audiocassette Piracy of Music:** The recording and music industries continue to be hampered by pirate imported audiocassettes from nearby countries such as Mozambique, Tanzania and Malawi.

## COPYRIGHT ENFORCEMENT IN SOUTH AFRICA

### CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 1999

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS <sup>12</sup>
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

<sup>12</sup> 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 small maximum fine of R1,500 (US\$179) per offense, whereas the copyright law provides for a R5,000 (US\$595) maximum fine per article.

### CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	BUSINESS APPLICATION S SOFTWARE	MOTION PICTURES <sup>13</sup>	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

### CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	BUSINESS APPLICATION S SOFTWARE	MOTION PICTURES <sup>14</sup>
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		

<sup>13</sup> For motion picture industry statistics, the figures in parentheses relate to raids, cases, etc., against piracy of console-based videogames.

<sup>14</sup> Id.

## SOUTH AFRICA CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of raids conducted	117(84)	16 +1
Number of cases commenced	103(44)	2
Number of defendants convicted (including guilty pleas)	5(5)	
Acquittals and dismissals	41(9)	
Number of cases Pending	504	3
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		
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	8	
\$1,000 to \$5,000	2	
Over \$5,000		
Total amount of fines levied (in US\$)		

## SOUTH AFRICA CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES
Number of civil raids conducted	N/A
Post-search action	134
Cases pending	87
Cases dropped	
Cases settled or adjudicated	21
Value of loss as determined by right holder (\$USD)	
Settlement/judgment amount (\$USD)	

Enforcement in South Africa is generally under the purview of the Department of Trade and Industry, the South African Police Services (SAPS), and South African Customs, with other agencies supplementing enforcement efforts.<sup>15</sup> For example, the Inland Revenue Services is now informed of all raids on private homes in order to raise more funds for government efforts, and the South African Publications Board works to keep unauthorized parallel imports of motion pictures off the streets.<sup>16</sup> The Department of Trade and Industry, to its credit, has established a

<sup>15</sup> The special unit attached to the Department of Justice, which enforces the Proceeds of Crimes Act, is an example of a South African government agency that could contribute to the fight against piracy. This unit focuses on criminal syndicates and is empowered to attach all assets owned by syndicate members, unless those members can prove that the property was accumulated through legal means. These cases are usually reserved for very high profile matters but there was talk in 2002 of including intellectual property offenses. IIPA would welcome this additional tool in the fight against piracy in South Africa, which has become an increasingly organized criminal endeavor.

<sup>16</sup> Unauthorized parallel imports arrive in South Africa well in advance of video release and, at times, of theatrical release. Pirate product sourced from these materials appears in street markets. There is no direct protection for local

special IPR investigative unit that now works with a special unit of SAPS called the “Scorpions,” as well as with Customs officials. Unfortunately, enforcement remains marred by the inadequate allocation of resources to get the DTI special enforcement unit running effectively, occasional lack of expertise among SAPS (mostly due to attrition of well-qualified officers), corruption among some Customs officials, an overburdened criminal court system (with inadequate understanding among prosecutors and judges of the severity of the crime of piracy), and some remaining structural problems.

## **Government and Self-Help Groups Carry Out Some Raids in 2002, But...**

While enforcement agencies in South Africa are faced with severe personnel shortages (some of them self-inflicted because of attrition of well-trained and well-placed police officers),<sup>17</sup> liaison with the Police Services remained generally satisfactory in 2002. The establishment of a special investigation unit in the Department of Trade and Industry will hopefully ensure better enforcement in 2003. Nonetheless, raids remained relatively sparse in South Africa, and post-raid results were exceedingly slow to come by.<sup>18</sup> For example, in 2001, an Internet piracy syndicate (importing personal computer CD-ROM games from Malaysia and advertising them for sale on their website) was referred to the SAPS special investigative unit (the “Scorpions”). Unfortunately, this case has been pending for over two years and is still pending. BSA has been somewhat successful in resolving some cases taken against retail pirates. There were two actions of importance. The first involved a hard disk loading case, which was settled post raid. Fifty-six unauthorized products were found at the raid, worth more than US\$10,000. Sales generated through the use of the illegal products were not calculated. The second case involved an action against a retail seller of pirate product. The reseller advertised over the Internet some 97 products for sale, with a value estimated at over \$74,000. During the raid, 43 unauthorized products were found, worth an estimated value of over \$21,000. This case has progressed to a higher court. At present, the case is moving smoothly and efficiently through the court. It is worth noting that the prosecutor handling this case has had specialized training in copyright enforcement cases. Unfortunately, the Scorpions are generally reserved for investigations of the most serious cases, particularly those involving corruption and organized crime. As such they are typically unavailable to assist in the majority of anti-piracy activities.

Overwhelmed by high rates of violent crime, the South African authorities have committed only limited resources to the fight against piracy. As a result, the motion picture,

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distributors under the copyright law, so the motion picture industry has had to employ the publication certification process to seek relief. Through that process, the South African Publications Board (SAPB), acting under the Film and Publications Act, can seize and impose administrative fines on those who place product on the market without required certification. Fraudulent documentation is, however, an enforcement challenge for the SAPB. Local industry has managed to secure amendments to the Film and Publications Act making it compulsory to prove distribution rights to the Publications Board, which could be helpful.

<sup>17</sup> A significant problem is that many police officers have been newly assigned to the detective branches and lack experience and training in copyright issues. They have nonetheless been receptive to regular training sessions given by industry.

<sup>18</sup> In one of the more impressive raids in 2002, SAPS seized counterfeit DVDs and pornographic material from stalls at the “Montana Traders” flea market north of Pretoria. A total of 985 counterfeit DVDs and 50 pornographic DVDs were reportedly seized. The raid also yielded 249 counterfeit PlayStation® cartridges. Two arrests were made as a result of this case. This particular market was raided multiple times in 2002 and there were several arrests as a result. Unfortunately the slow criminal justice system has meant that many of these cases are still floundering on the court docket with no resolution in sight.

music, and entertainment software industries have had to resort to privately-funded bodies to assist them in training government enforcers and fighting piracy themselves. The South African Federation Against Copyright Theft (SAFACT) was given special powers by the South African government to pursue video piracy cases and performs 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 pirates of videogame product.<sup>19</sup> The recording industry has established a local program to conduct training and assist in enforcement. Two enforcement actions in late 2002 indicate at once the dire nature of the piracy situation in South Africa, particularly DVD piracy which is wiping out the legitimate market, and also the unfortunate reliance on private industry to enforce copyright.<sup>20</sup>

### **... Some Structural Barriers Deny Enforcement to Right Holders**

The damaging growth of DVD piracy in 2002 demands an invigorated response from South Africa's Customs service, in the form of mass seizures of pirate/unauthorized imports at the borders. Unfortunately, IIPA is becoming increasingly concerned by documented accounts of Customs officers allowing counterfeit product into the country after a pirate pays duties. IIPA understands that Customs officers only seized pirate DVD product in 2002 when armed airport police officers were present at the arrivals terminal. Such actual and potential for corruption among Customs officers is a major problem and is greatly inhibiting border enforcement efforts. The issue of corruption is one for which every law enforcement authority in South Africa should have concern, since it means good and upstanding officers' efforts within Customs are tarnished, while good enforcement cooperation among other agencies is rendered meaningless in the face of corrupt practices by some Customs officers. The South African government should make every effort to crack down on corrupt enforcement officials and to ensure that its law enforcement authorities operate only in a lawful manner. By contrast, an entertainment software company reports satisfactory cooperation with South African Customs. The Customs authorities have reportedly been helpful to that company's efforts at intercepting infringing videogame products before they are released into the market.

The most astonishing example of Customs corruption occurred in June 2002, when SAFACT received information about two individuals arriving in Johannesburg Airport with

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<sup>19</sup> In 2002, SAFACT took part in 184 raids, of which at least 63% related to the motion picture industry. Reported seizures include 8,496 pirate videocassettes, 3,170 pirate VCDs, 81,323 pirate DVDs, as well as 41,939 counterfeit PlayStation® games. Unfortunately, there are still reports of clearly pirated goods being returned to the infringers in certain instances.

<sup>20</sup> International norms require the government of South Africa to provide a system that has procedures in place that are adequate and effective to fight piracy (of all kinds of copyrighted works, not just those for which an industry concerned has come forward to provide self-help), and remedies that provide a deterrent to further infringements. On November 11, 2002, SAFACT, working with local narcotics and commercial police officers, conducted a raid on a private home, seizing 10,300 pirate DVDs. The house was being used as a storage warehouse by one of South Africa's biggest known pirate networks. Also seized in the raid were computers and business documents. The man arrested claimed he was a "manager" but he was in fact renting the home from the owner, a well-known pirate raided numerous times by SAFACT in the past. Also found in the raid were 1,500 pirate copies of PlayStation games, the films *XXX*, *Minority Report*, and *K-19: The Widowmaker*. All of the discs seized in the raid were sourced from Asia. In September 2002, couriers from Pakistan regularly attempting to bring in counterfeit product as a springboard to distributing elsewhere in Southern Africa were caught by the recording industry working with Customs Anti-Smuggling Team at Johannesburg International Airport, leading to the seizure of 12,000 CDs, DVDs, and VCDs. The discs were packed in suitcases which themselves were packed in a second larger suitcase. Collaboration with various airlines is being established, and links are being found to transshipped goods found in countries like Mozambique. All shipments thus far have included as-yet unreleased titles in South Africa. The recording industry trained Customs officials in Johannesburg and Capetown in 2002, who are now reportedly checking shipments carefully.

approximately 4,000 pirate DVDs. This information was communicated to Customs, including the names of the suspected pirates (who were well-known to SAFACT from previous incidents), the flight number, and estimated arrival time. Airport police were also called in to watch the proceedings. The Customs officer stopped the individuals and found over 3,000 pirate DVDs. The officers then requested that the individuals pay the tax on the items and then let the pirates leave the terminal with the pirate DVDs. Numerous complaints were filed with the Customs Office after this incident including signed statements from the police officer that witnessed the event, yet nothing was done to correct the situation. Such blatant malfeasance undermines any credibility the government of South Africa has to fighting piracy.

## **Court System Remains Overburdened, and Courts Mete Out Non-Deterrent Sentences**

South African prosecutors, magistrates and criminal courts continue to give low priority to copyright infringement cases. It is difficult to move cases along at a reasonable pace, as magistrates are reluctant to hear matters and are therefore likely to grant postponements, increasing costs of litigation, risking harm to the evidence, and generally leaving pirates to engage in illegal activities. 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 three years or even longer.<sup>21</sup> Part of the problem seems to be a lack of experience with copyright related cases, so IIPA member companies redoubled efforts in 2002 to offer training to prosecutors in an effort to address these issues. This inability to prosecute and finalize criminal cases has the effect of fostering recidivism, because, as criminal cases move along at a glacial pace, offenders keep getting caught (sometimes three or four times) for the same offense before the first case gets anywhere near a court.<sup>22</sup> If and when the first offence is prosecuted, the justice system appears totally ineffective at deterring piracy, resulting in paltry fines that do not 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. IIPA fears that little will change unless prosecutors and judges accept that piracy is a serious crime that deserves deterrent sentences.

One positive proposal over the past couple of years has been the establishment of specialized intellectual property courts to deal only with commercial crimes; such courts might be helpful in ensuring swifter judicial enforcement and harsher remedies being meted out to

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<sup>21</sup> 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 the 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.

<sup>22</sup> One bright spot in 2001 involved increased cooperation/communication with prosecutors, and as a result, a slight increase in the number of cases going to court. The business software industry reported 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 (US\$1,190). 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 2002 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.

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, although this court only hears criminal cases, and has heard very few cases thus far.

## **Counterfeit Goods Act Working Better Than in Previous Years; Still, No Deterrent Penalties**

The Counterfeit Goods Act (CGA), which provides for fairly hefty penalties for dealing in counterfeit goods (defined broadly to include many pirated copies of copyrighted materials), entered into force in 1999.<sup>23</sup> The first complaint under this Act was lodged in late 2001, and the government has begun the process of implementing the Act by appointing 22 inspectors and setting aside ten depots to store the goods seized under the CGA (an improvement over the three depots set aside in 2001). At present, the only geographic location lacking a storage depot is East London. Another centralized depot would be beneficial to anti-piracy efforts. Amendments to the CGA passed in October 2001 reportedly removed the requirement of having to apply to the High Court for confirmation of raids carried out under the authority of a search warrant. The government has been made aware of the industry's desire for swift implementation of the amendment.<sup>24</sup> For the motion picture industry, most enforcement actions taken in 2002 were under the CGA.<sup>25</sup> However, very few cases have actually been decided under the Act, and the few cases that have been resolved have resulted in only minimum fines and penalties. At the end of 2002, SAFACT received its first conviction under the Act, although, unfortunately, the fine was ridiculously low and thus failed to have any deterrent effect. Reportedly, the Cape Town Attorney General has been forthcoming in his willingness to cooperate regarding prosecutions under the CGA, although little practical assistance has been given to right holders by his office to date.

## **Burdensome Procedures Hinder Enforcement in South Africa**

South Africa made no progress in addressing several other procedural hurdles to copyright enforcement in 2002.

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.<sup>26</sup> These problems force plaintiffs to spend inordinate

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<sup>23</sup> Under the Counterfeit Goods Act, copyright pirates charged with trading in counterfeit goods face penalties of R5,000 (US\$595) per infringing item or, alternatively, a prison term of up to three years per infringing article.

<sup>24</sup> Inspectors appointed under the auspices of the Legal Services unit of the SAPS enlisted industry to conduct in 2000 (one training session in October), 2001 (in six major cities during April, May, and June 2001), and November 2002 (30 officials). Training was geared toward the Department of Trade and Industry inspectors, as well as the vast majority of SAPS commercial crime branch officers, prosecutors, customs officials and depot managers. Over 500 officials in total attended the trainings.

<sup>25</sup> In a case that is both hopeful and somewhat disturbing, a man was arrested in August 2002 under the Counterfeit Goods Act by members of the SAPS commercial branch at Johannesburg International Airport, for smuggling 2,490 counterfeit DVD films, believed to be destined for local flea markets from Singapore. Disturbingly, the defendant was released on R6,000 (US\$714) bail and his case is still pending. During this time he has remained out on bail. See *Alleged DVD Piracy, Man To Appear*, South African Press Association (SAPA), Sept. 10 2002.

<sup>26</sup> South Africa provides these presumptions for motion pictures and videogames through a title registration system, but that system is impractical, unnecessarily complex and expensive.



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 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. For example, an *ex parte* raid in Italy tends to cost about US\$10,000 to \$15,000. Raids in Greece cost approximately US\$5,000. 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 to be used under that Act. IIPA is hopeful that the courts will grant Anton Pillers more readily under Section 11 of the Act.

The Counterfeit Goods Act requires that the complaining party pay for storage of seized goods in the depots. This has placed an extreme financial burden on the anti-piracy organizations. The complaining party must not only pay rather high fees for the use of the depots, but they also must pay a fee each time the defendant wishes to view the evidence. Several defense attorneys have latched onto this issue as a means of increasing the cost of the investigation. In addition, the storage costs continue to accumulate while the case is languishing in the court system. Private parties have to pay for space in the depots on cases that are taking more than two years to decide.

## **Enforcement Against End-User Piracy**

End-user piracy (unauthorized use of software in a business) causes the greatest damage of any form of piracy to business software companies, and in 2002, the business software industry continued its fight against this detrimental form of piracy in South Africa.<sup>27</sup> In 2002, the Business Software Alliance reached settlements with 14 pirate end-users, a positive indication that businesses are beginning to realize they may not use unlicensed software. In 2002, the BSA conducted a campaign (which is ongoing) to encourage legal use of software in

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<sup>27</sup> For example, in 2001, the business software industry conducted a "Truth or Dare" campaign, in which it learned of over 600 companies having over 60,000 desktops that used unauthorized business software.

the business community, sending 27,000 letters to businesses, and launching a television advertising campaign (starting in September 2002 and running several hundred times) encouraging businesses to contact BSA for assistance in legalizing their software usage.<sup>28</sup> BSA plans to visit 2,000 companies in 2003, to ensure that legal software is being used and to advise on software asset management (SAM) policies.

## **Government Software Management**

Ensuring government use of only licensed software is also a major priority of the business software industry, since governments set important examples for the community at large – both as enforcers of copyright, but also as proper users of copyrighted materials in the digital age. If governments do not use technology properly, the private sector is unlikely to feel obligated to do so. The South African government made some important steps forward in tackling end-user piracy in the government in 2002. In particular, many South African municipalities took a leadership role by licensing their own use of computer software. In the “Municipalities Truce Campaign 2002,” over 90 government municipalities registered and sought advice regarding software licensing. To date, eight of the municipalities have legalized their software usage entirely and many more are in the process of becoming licensed.

However, progress remains piecemeal, with no official support from the central South African government. The South African government, on a national basis, needs to swiftly implement a systematic software asset management (SAM) 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 encourages the State Information Technology Agency (SITA) to implement policies to ensure that there is proper allocation for legal software in all information technology infrastructure contracts. As an agency responsible for technology growth and use within the South African government, SITA of any agency should understand the impact of government on technology use and management throughout society.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **IIPA Pleased with Passage of “Electronic Communications and Transactions Act No. 25 (2002)”**

IIPA commends the South African government for passage of the “Electronic Communications and Transactions Act No. 25 (2002). The Act accomplishes important goals for the digital age, namely:

- The Act includes broad cyber-crime provisions that, by their terms, would appear to protect copyright owners against the circumvention of technological measures used by them to protect “data” (defined broadly as “electronic representations of information in any form,” which appears to include works) from unauthorized access and/or unauthorized exercise of exclusive rights under copyright. Some adjustments IIPA proposed in comments submitted

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<sup>28</sup> See *Developers Take Steps to Eradicate Piracy*, Business Day/All Africa Global Media via COMTEX (Johannesburg), Sept. 12, 2002 (discussing launch of campaign against “firms using software without licenses”).

to the government of South Africa were taken, for which we are greatly appreciative.<sup>29</sup> Some other proposed adjustments were not taken, however, that would have brought these provisions closer to full compliance with the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), which require countries to prohibit the circumvention of technological protection measures used by right holders to protect their works from unauthorized access or exercise of rights.<sup>30</sup>

- IIPA also notes that, while not required in order to implement the WIPO treaties, the government of South Africa enacted provisions relating to the liability of service providers. IIPA is heartened that the Act provides incentives for service providers to cooperate with right holders in combating illegal activities occurring over their services, including the provision of a notification process for certain services provided by an ISP (“hosting” or “caching”) leading to quick removal of the infringing content, and apparent injunctive relief. IIPA proposed two chief changes,<sup>31</sup> and IIPA is heartened that the government of South Africa accepted IIPA’s proposed change so that right holders are not asked to “indemnify service providers” for actions taken by them under the statute (including the removal of infringing materials as enacted of third parties upon the notification of a right holder).<sup>32</sup> As IIPA suggested, the Act provides that service providers are not liable for wrongful takedown in response to a notification of unlawful activity made,<sup>33</sup> and deters wrongful takedowns by imposing potential liability on those giving notices.<sup>34</sup>

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<sup>29</sup> For example, in IIPA’s “Comments Regarding the Draft Electronic Communications and Transactions Bill (2002),” submitted to the South African government on May 7, 2002, IIPA noted that “components of circumvention devices or component code (i.e., algorithms) of circumvention computer programs do not appear to be expressly covered.” The South African government took IIPA’s suggestion, adding to final Section 86(3) the words “or a component” to ensure that the prohibition on circumvention devices goes to the component level.

<sup>30</sup> For example, the standard for determining whether a device etc. falls under the statute is whether it “is designed primarily” for a circumvention purpose. In order to meet the WIPO treaties’ requirement that protection be adequate and effective, indirect methods of proof should be included in addition to the purpose of the design. IIPA proposed allowing other methods of proof such as “*whether a device etc. has only a limited commercially significant purpose other than to circumvent, or whether the device etc. is marketed in such a way as to reveal its circumvention purpose.*” In addition, IIPA noted the importance of civil and administrative relief, in addition to the criminal relief provided by the Act as finalized. In particular, injunctive relief is essential to stop circumvention when and where it occurs, especially in the fast-moving world of electronic commerce. Finally, IIPA made some comments regarding the requisite *mens rea* for the offense of circumvention, but no changes were made, leaving in place an apparent “actual knowledge” test for the act of circumvention in Section 86(1).

<sup>31</sup> One concern involved the description of “mere conduit,” of which the language “providing access to or for operating facilities for information systems or storage of data messages” appeared to us to potentially cover certain acts of hosting, albeit unintentionally. The government of South Africa did not take IIPA’s suggested changes to ensure the narrow scope of the limitation. IIPA seeks clarification that the “mere conduit” limitation is not intended to absolve an ISP that stores or hosts “data,” whether its own or that of a third party. The second concern involved the requirement in the Bill that right holders “indemnify service providers” for actions taken by them under the statute (including the removal of infringing materials of third parties upon the notification of a right holder). See *infra*.

<sup>32</sup> Electronic Communications and Transactions Bill (2002), § 81(i).

<sup>33</sup> This change promotes cooperation between right holders and ISPs in that it ensures that service providers will act promptly in response to notifications, as they will not fear liability.

<sup>34</sup> This change is the best way to ensure that the notification and takedown system operates efficiently and effectively, and specifically deters wrongful takedowns by imposing potential liability on those giving notices. By contrast, the draft requirement that right holders indemnify ISPs, a blanket indemnification of service providers, does nothing to further these goals.

In the IIPA's comments to the government of South Africa in May 2002, IIPA also commented on the new "Domain Name Authority" authorized under the Act. IIPA noted two key issues of interest to the copyright community: 1) the availability of basic registrant data, including correct contact information, so that copyright owners (and, to the extent they cooperate in investigations, service providers) can investigate illegal activities and rightfully exercise their rights in the online environment; and 2) the availability of an international dispute resolution process. Unfortunately, neither issue was addressed, leaving it unclear (and generally within the power of the Minister of Communications to decide) whether registrars are required to supply key registrant data (like "WHOIS" data in regard to global top-level domains), and whether the Uniform Dispute Resolution Procedures (UDRP) will be adopted to settle disputes arising out of competing claims to domain names. IIPA looks forward to reviewing draft regulations from the Minister, and recommends unfettered access to WHOIS-type data as well as adoption of UDRP-like dispute settlement provisions (or preferably, the adoption of the UDRP for the domain .za).

## South Africa's Law Still Violates TRIPS

The South African Copyright Act (No. 98 of 1978) remains TRIPS-deficient in several respects.<sup>35</sup> 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. That Bill was apparently taken off the table, and it is unclear at this time what the government's intentions are with respect to legislative amendments. The government of South Africa should immediately press for passage of necessary amendments to comply with TRIPS, by enacting legislation mirroring that which was introduced in June 2000. In addition, the government of South Africa should include provisions necessary to fully implement the WCT and WPPT, so that it may proceed to ratify those treaties.

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).<sup>36</sup>
- Failure to expressly criminalize end-user piracy (i.e., unauthorized use of copyrighted works in a business setting) (TRIPS Article 61).<sup>37</sup>

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<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> "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 licenses. It enables management to avoid paying for needed software tools,

- Some overly broad exceptions to protection (TRIPS Articles 9.1, 13).<sup>38</sup>
- 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.

## **IIPA Notes Passage of the Copyright Amendment Act 2002 and the Performers’ Protection Amendment Act 2002**

Two laws went into force in 2002: the “Copyright Amendment Act 2002”; and the “Performers’ Protection Amendment Act 2002.” The Copyright Amendment Act 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 some Internet transmissions), and a “right to play the sound recording in public.” However, a new Section 9A was passed that provides, “[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 could essentially amount in practice to a compulsory license as to broadcasts, diffusions, and public “play[ing]” of a sound recording (since it does not appear to permit the producer of sound recordings to freely negotiate individually in the absence of an agreement), and would be inconsistent with Article 14 of the WIPO Performances and Phonograms Treaty if broadcasts, diffusions, and public “play[ing]” of a sound recording were interpreted to include webcasting or other communications effected through wires (including in particular on demand transmissions

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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\$1,905) and/or imprisonment for up to one year.

<sup>38</sup> 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.

through computer networks). The Performers' Protection Amendment Bill provides analogous provisions as to performers' rights.

The government of South Africa must clarify that these provisions provide producers of phonograms and performers 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, would be inadequate. It is an issue of the foremost importance that right holders 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.

## **Copyright and Regional Trade Negotiations**

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. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Southern Africa Customs Union (SACU) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global one. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in any FTA with South Africa or with SACU should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should:

- Be TRIPS-plus;
- Include and clarify, on a technologically neutral basis, the obligations in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT); and
- Include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities.

South Africa currently fails to comply with the TRIPS enforcement obligations, both on their face (i.e., in the legislation) and in practice, and many of the changes discussed in this report will be the basis for changes required in South Africa's law to implement any FTA with the United States. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

## **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 \$490.3 million of products into the United States without duty during the first 11 months of 2002 (representing 12.8% of its total imports into the U.S.).<sup>39</sup> 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.

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<sup>39</sup> In 2001, \$506 million worth of South Africa's imports to the United States benefited from the GSP program, accounting for 11.4% of its total imports to the U.S.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# SOUTH KOREA

### EXECUTIVE SUMMARY<sup>1</sup>

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**Special 301 recommendation:** IIPA recommends that South Korea be placed on the Priority Watch List for 2003, and that an out-of-cycle review be held during the year to consider whether sufficient progress has been made to justify a change in this ranking.

**Overview of key problems:** Korea leads the world in broadband penetration, and its citizens are among the most Internet-savvy in the world; yet its digital marketplace in copyrighted works is plagued by piracy and much of its legal infrastructure is outmoded for a world of e-commerce. In addition, piracy levels are excessively high across the board, causing an estimated \$572 million of losses to U.S. copyright owners in 2002. Korea made incremental progress during the year in its enforcement efforts against piracy of business software applications by corporate and institutional end-users, but this progress must be sustained, and greater transparency achieved. An old form of audio-visual piracy, enabled by the submission of false licensing documentation to censorship authorities, re-emerged in 2002 after Korea unilaterally abandoned the effective preventive system it had put in place almost a decade earlier. In the absence of strong government leadership, the book piracy situation continues to deteriorate, and video piracy continues unabated despite vigorous enforcement efforts by the government.

**Actions to be taken in 2003:**

- Enact Copyright Act amendments to align the law with global minimum standards contained in the WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT) (this requires substantial revision to the amendments now pending before the National Assembly);
- Continue to improve the Computer Program Protection Act, and its implementing decree, to achieve WCT compliance, and a workable framework for getting the cooperation of service providers in fighting online piracy;
- Enact new laws to restore the effectiveness of Korea's efforts to prevent pirates from entering the audio-visual market using false licensing documentation;
- Build on recent progress in enforcement against end-user piracy of business software applications, by sustaining a high volume of criminal actions against corporate end-user piracy, improving transparency and cooperation with industry, and enacting legislation to give police powers to the Standing Inspection Team;
- Speak out at the ministerial level against widespread book piracy, especially on and around the nation's university campuses, and revive enforcement efforts against this perennial problem;
- Phase out the screen quotas that unjustifiably constrain the access of U.S. producers to the theatrical exhibition market.

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<sup>1</sup> 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: 1998 – 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	27.0	25%	25.0	25%	20.0	20%	20.0	20%	20.0	20%
Records & Music	6.9	20%	4.0	14%	7.0	19%	10.0	20%	10.0	15%
Business Software Applications <sup>3</sup>	121.4	50%	100.4	48%	177.2	56%	118.9	50%	115.7	64%
Entertainment Software	381.0	36%	487.7	63%	157.0	90%	119.0	63%	122.1	65%
Books	36.0	NA	35.0	NA	39.0	NA	39.0	NA	35.0	NA
TOTALS	572.3		652.1		400.2		306.9		302.8	

## KOREA MUST RESPOND TO THE CHALLENGES OF DIGITAL AND ONLINE PIRACY

Korea's society and economy continue to embrace the Internet at a record-setting pace. More than 25 million Koreans—some 58 percent of the total population—regularly surf the Web.<sup>4</sup> Even more remarkable is the rapidly increasing level of access by Korean homes and businesses to high-speed, broadband Internet connections, the huge digital pipes that facilitate transfer of big files containing copyrighted works such as software, videogames, sound recordings and audio-visual material. Broadband access, unknown in Korea until 1998, last year surpassed 10 million subscribers.<sup>5</sup> According to the OECD, as of mid-2002 there were 19 broadband subscribers per 100 inhabitants in Korea, nearly double the broadband penetration rate of any other country in the world.<sup>6</sup> In 2001, 55 percent of Korean households enjoyed broadband access, a figure that has undoubtedly increased since then.<sup>7</sup> Furthermore, as a rule

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$134.2 million at 47% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>4</sup> Seoul Now!, "Korea leads Broadband Internet service market," Nov. 18, 2002, viewed at [http://www.onnuryet.co.kr/SITE/data/html\\_dir/2002/11/18/20021118005.php](http://www.onnuryet.co.kr/SITE/data/html_dir/2002/11/18/20021118005.php) on January 20, 2003.

<sup>5</sup> Id.

<sup>6</sup> "Broadband Access for Business," paper of the OECD Working Party on Telecommunication and Information Services Policies, OECD Paper DSTI/ICCP/TISP(2002)3/FINAL (Dec. 4, 2002), figure 3. For comparison, the broadband penetration rate in the U.S. in June 2002 was under 6 percent, less than one-third the Korean rate. Id.

<sup>7</sup> Yi, "A Critical Look at Cyber Korea: Quantity v. Quality," in Korea Economic Institute, *Cooperation and Reform on the Korean Peninsula* (Washington, D.C.: 2002), at 62.

Koreans use this technology to consume copyrighted materials far more avidly than most other Internet users. For example, while 20-30% of online Americans use the Internet for games and entertainment, almost 80% of Korean Internet users report online consumption of audio and video, almost 53% play games on line, and 41% are engaged in file transfer.<sup>8</sup>

Based on these statistics, Korea should be leading the way as an online marketplace for materials protected by copyright. Unfortunately, the reality is otherwise. The bulk of the traffic in copyrighted works online in Korea is unauthorized. Indicative of the volume of online piracy in Korea is the fact that its leading peer-to-peer service for infringing transfer of music files, Soribada (the so-called “Korean Napster”) claimed 8 million subscribers before it was shut down last year, a figure roughly equal to the number of Korean households with broadband access.<sup>9</sup> Online piracy is a growing feature of the rapidly changing landscape of Korean piracy, which 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. Korea must respond.

The experience of the recording industry may be instructive. Audiocassette piracy remains a huge problem: Over 600,000 pirate cassettes were seized in 2002, according to the Recording Industry Association of America (RIAA). But nearly all of these involved local Korean repertoire. Pirate international recordings make up a much higher percentage of the 143,000 units seized in digital formats: conventional CD and CD-R. Indeed, beginning in 2001, commercially produced pirate CD-Rs have overtaken CDs and now account for 70% of digital product seized. 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 (US\$5.00). 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 offering pirate sound recordings in MP3 format.<sup>10</sup> 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. Government enforcement efforts fall far short of grappling with the problem: The Ministry of Culture and Tourism (MOCT) set up an online enforcement team in 2002, but it lacks the resources and the legal tools to take effective action. Unauthorized home production of CD-Rs is also on the rise. The RIAA-estimated piracy rate in Korea of 20%, and its estimate of \$6.9 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.

The entertainment software sector provides further evidence of these piracy trends. Internet downloading is the source for the most widespread form of piracy of games in formats to be played on personal computers. Online pirate games are accessed via broadband

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<sup>8</sup> Id. Conversely, while 94% of online Americans use the Internet for e-mail, the comparable figure for Koreans is 12%.

<sup>9</sup> Russell, “Korean Labels Force File-Sharing Service to Close,” *Billboard* (Aug. 17, 2002), at 43; Yi, *op. cit.*

<sup>10</sup> Even after the shutdown of Soribada, some 1000 P2P sites in Korea reportedly traffic in pirate sound recordings. Yang, “Music-sharing Web site faces shutdown,” *Korea Herald* (July 13, 2002).

connections, and the downloaded material is used as masters for “burn-to-order” operations using CD-R writers. These “burn-to-order” operations, usually carried out by small businesses, are now widespread throughout the country. 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. The unauthorized use of entertainment software by some Internet cafes (called “PC baannngs”) is also becoming a significant problem. Overall, the Interactive Digital Software Association (IDSA) estimates the value of pirate product in the market (valued at pirate retail prices) at \$381 million, based on an estimated piracy rate of 36%.<sup>11</sup>

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 some important progress on the enforcement front in 2002, with more active and more transparent enforcement against the piracy of business software applications, but it will need to increase its efforts in order to respond comprehensively to the enforcement challenge. But major aspects of Korea’s copyright law structure have failed to keep pace with the transformation of its market resulting from digitization and high-speed access to the Internet. Overhauling these outmoded laws should be a top priority for Korea in its efforts to integrate more closely into the global e-commerce marketplace.

## **LAW REFORM: MORE MODERNIZATION OF LEGAL TOOLS IS NEEDED**

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Efforts continue to be made, of course, to deal with the changing nature of digital copyright piracy within the confines of current Korean law. The shutdown of Soribada was significant, but it required more than a year of litigation; the precedential impact of the court’s decision to issue an injunction against Soribada is uncertain; and neither the infringement case brought by Korean record labels nor the criminal case against Soribada’s operators have yet been finally resolved. Furthermore, a “Soribada 2” service is now up and running, apparently because it falls outside the scope of the injunction issued in the original case. Thus, further time-consuming and expensive litigation will evidently be required. The Soribada situation provides further evidence that the current legal framework is inadequate to deal effectively with new forms of piracy and provides an insufficient basis for enforcement either by the government or private parties.

Under Korea’s unusual bifurcated statutory system, to make the needed updates will require amendments to both the Copyright Act of Korea (CAK) and to the Computer Program Protection Act (CPPA). In 2002, Korea continued to modernize the CPPA but made no forward progress toward bringing the CAK into line with current international minimum standards.

### **Copyright Act Amendments and Implementation**

Throughout the past year, extensive amendments to the CAK were pending before Korea’s National Assembly, which did not act on the proposal. In the version of the legislation reviewed by IIPA in late 2001, the CAK amendments lacked key elements that Korea must include in its law in order to respond comprehensively to the challenges that face it. The most glaring of these omissions is the failure to accord to the producers of sound recordings

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<sup>11</sup> IDSA’s estimate of 2002 piracy levels reflects more comprehensive data collection than in previous years. Its estimate of the 2002 value of pirate product in the market reflects the relatively high street prices for pirate entertainment software in Korea.

exclusive rights over the online dissemination of their recorded music. As the world's leader in broadband penetration, and as a market in which online piracy of sound recordings is already widespread and growing, Korea should have been among the first countries in the world to implement this critical feature of the WIPO Performances and Phonograms Treaty (WPPT). Instead, it now lags behind its neighbors, as well as its peers in global e-commerce, in providing the legal tools needed to promote the healthy growth of the digital marketplace.

The Korean government should be strongly encouraged to move now to modify the CAK amendments to provide that the exclusive transmission right accorded to works under Article 18-2 of the CAK also applies to sound recordings. Additionally, Article 67 should be amended to recognize that sound recording producers have an exclusive right of transmission with respect to their recordings. These steps would underscore Korea's commitment to combat the worsening problem of online piracy of sound recordings and to give the legitimate market for digital delivery of sound recordings 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.

The lack of exclusive rights for record producers to control digital transmissions, and the current discriminatory regime under which U.S. record producers and performers are denied any rights under Korean law with respect to broadcasting or other communications, are also creating other problems. MOCT has already taken one action under the existing CAK that gives rise to concern: it has approved the establishment of a new collecting society for remuneration paid by broadcasters to record producers, and there are indications that this society may be empowered to handle licensing for online distribution of recordings. Foreign producers do not participate in the society currently (since they are not entitled to remuneration from broadcasters), so any expansion of the society's authority to cover on-line transmissions would be unacceptable and highly prejudicial to U.S. entities. This situation also increases the urgency of establishing by law the producer's exclusive right to control transmission of their sound recordings, free of any requirement for compulsory licensing or collective management.

The current amendments do address two important topics for the first time in the CAK. 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 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 before enactment.

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. Until these changes are made, Korea will not have brought its TPM provisions into compliance with the global minimum standards embodied in the WIPO Copyright Treaty (WCT) and the WPPT.

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.

The service provider liability statutory provisions should be redrafted before the CAK amendments are enacted, and should conform to the greatest extent possible with those recently enacted in amendments to the CPPA (see discussion below). While the CPPA provisions also need further clarification, they still provide a useful model for a coherent and consistent statutory system for giving service providers incentives to cooperate with copyright owners in dealing with online piracy of all kinds of materials protected by copyright. If the redrafting cannot be achieved before enactment, then the ambiguities surrounding these critical provisions should be resolved in implementing regulations: the Korean government should be urged to do so and to dramatically increase the openness of the process by which it drafts such regulations.

Other provisions that should be incorporated into a modified CAK amendment package include the following:

- 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, the United States, and other countries, 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.
- 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 1953-56, and to other works from WTO member countries whose authors died in 1953-56. These steps should be taken without excessive transition periods,<sup>12</sup> and without disturbing other, noncopyright laws and regulations that are used to combat piracy of this older subject matter.<sup>13</sup>

- 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.

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<sup>12</sup> 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.)

<sup>13</sup> 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.

## CPPA Amendments

The modernization of the CPPA to meet current challenges as well as to comply with new global norms continued on an incremental basis in 2002. A CPPA amendment was signed into law on December 30, 2002 and will take effect on July 1, 2003.

Until now, no provision of the CPPA specifically addressed the problem of service provider liability for infringement of copyright in computer programs taking place over their networks. The new amendments fill this gap by adding two new articles to the statute. Article 34-2 provides the basic framework for a “notice and takedown” system apparently similar to that created under U.S. law in 1998. New Article 34-3 provides that a service provider that “prohibits or stops the reproduction or transmission of a program with the knowledge that the rights of the program copyright owner . . . are being infringed” can have its liability “reduced or exempted.” This provision contains a number of significant ambiguities which need to be clarified. These include, how far will the liability be “reduced,” and in what circumstances it would be “exempted”? will injunctive relief remain available, even in cases in which the “reduction or exemption” applies? and, most fundamentally, what liability will an uncooperative service provider face if it fails to take action after receiving notice of infringement.

The implementing decree for the CPPA amendments could be crucial in resolving these questions, as well as in fleshing out the notice and takedown system created in skeletal form by the new provisions. The implementing decree should also make it clear that the newly created administrative procedure under which the Korean Ministry of Information and Communications (MOIC) or its delegate can order a service provider to take down infringing material is a voluntary supplement to, not a substitute for, copyright enforcement against online piracy, and that it is distinct from the notice and takedown procedure created by the statute. The U.S. should urge MOIC to adopt a transparent process for crafting this decree, and to give serious consideration to the extensive experience of the United States, in which a notice and takedown statute has been in place for over four years.

Unlike the CAK, the CPPA contains provisions (enacted in 1999 and 2000) on protection of TPMs used in connection with computer programs. While these provisions avoid several of the pitfalls found in the CAK amendments, 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. IIPA is pleased to report that proposed amendments that would have weakened the CPPA's TPM provisions were omitted from the bill that ultimately passed the National Assembly.

Despite the incremental progress toward improvement of the CPPA, significant gaps remain. One of the most critical involves 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 within the CPPA 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 important, 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.

In addition, 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 to right holders;
- The requirement for registration of exclusive licenses should be eliminated.

As noted above, prompt enactment of the CAK and CPPA amendments outlined above would also have the benefit of bringing Korea into compliance with the WCT and WPPT and thus of facilitating Korea’s speedy accession to these two treaties, both of which have already come into force without Korea’s membership. 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. 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 2003, and to depositing its instruments of accession to both treaties with WIPO as soon as possible.

## **THE RESURGENCE OF AUDIO-VISUAL PIRACY BY FALSE LICENSEES MUST BE STEMMED**

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Last year saw a resurgence of a serious piracy problem in Korea which had been under control for years: Pirates asked for, and received, censorship approvals and classification ratings for audio-visual works in which they had no rights, but for which they submitted fraudulent licensing documentation. The result has been significant losses in licensing revenues to U.S. audio-visual producers and the disruption of the legitimate Korean audio-visual market.

The fraudulent licensing problem for imported audio-visual titles is not a new problem in Korea. In the mid-1980s, it was so prevalent that it became one of the reasons for the initiation of a Section 301 action against Korea by the U.S. government. In the 1986 settlement of that case, the Korean government explicitly promised to deny permission for the exploitation of audio-visual (and other) works in Korea “in the absence of a valid license or contract which establishes that the [exploitation] would not infringe a U.S. copyright.” It took several years, but



by the early 1990s an effective system to fulfill this bilateral obligation had been put into operation. Under this system, representatives of the U.S. motion picture industry had ready access to the documentation submitted by purported Korean licensees in support of ratings requests for U.S. titles. Where the underlying licensing documentation appeared fraudulent, the censorship and ratings agency—the Performance Ethics Committee—would withhold further action on the application. As a result, by 1995 IIPA was able to report that the problem of audio-visual piracy based on false licensing documentation had been “virtually eliminated.”

However, in late 2001, the Korean government unilaterally and abruptly broke this well-functioning system. The Performance Ethics Committee was abolished, and its duties transferred to a private sector body, the Korea Media Rating Board (KMRB). The KMRB discontinued the policy of access to documentation on titles submitted for classification. Instead, only limited information about titles submitted to the KMRB was available, only on the KMRB website, and only in Korean, even for U.S. titles. Furthermore, and most troubling, KMRB disclaimed any legal authority to deny approval and classification on the grounds of false licensing documentation, a power that its predecessor had exercised *de facto* for many years. Even if the legitimate copyright owner (or its licensee) submitted documentary proof that the applicant had no rights in the title, KMRB claimed it was powerless to do more than to delay issuance of its approval for a few weeks.

Not surprisingly, this change has led to a resurgence of this form of audio-visual piracy in the Korean market. Over the past year, numerous U.S. titles were submitted to the KMRB for classification by parties having no legitimate rights to distribute them in Korea. DVDs and VHS tapes of a number of these titles are now being distributed in the Korean market without any compensation to the legitimate right holders, whose only recourse is lengthy and expensive litigation. Not only have these titles become unmarketable by legitimate distributors, but such competition from pirates is also driving down the license fees that other U.S. titles can command in the Korean market, to the detriment of major studios and independent U.S. producers alike.

After urgent consultations with the U.S. government throughout 2002, the KMRB has agreed to institute some interim reforms, such as making data on submissions of audio-visual titles available online in the original language of the film as well as in Korean, and formalizing the process by which the legitimate right holder can obtain at least a temporary stay of KMRB processing based on false licenses. IIPA urges the U.S. government to monitor the situation closely and to insist on the full and timely implementation of these interim measures. More significantly, however, the Korean government has acknowledged that the system needs to be fixed and has committed to introducing legislation by mid-2003 to make the necessary changes. The U.S. government should hold the Koreans strictly to this deadline, and should also insist that the system created by the new legislation (and any non-legislative change required under Korean law) contain the following features:

- Empower the KMRB or another entity to effectively reject an application for classification of a title whenever the applicant is unable to demonstrate its standing as a licensed distributor, including when challenged by the relevant industry representative, as outlined below;
- Ensure that a U.S. producer (or its licensee) is able to learn in a timely manner complete details about submitted applications, including the name and contact information of the applicant;
- Enable U.S. right holders to quickly and efficiently (and without imposing unnecessary formalities or documentation requirements) freeze processing on

the suspect application and shift the burden of proof to the applicant to demonstrate its *bona fides*;

- Empower KMRB or another agency to de-register audio-visual titles that are later discovered to have been classified based on false licensing documentation, and to effectively clear the market of these pirate copies.

The U.S. government should use appropriate means to encourage rapid enactment of new legislation and prompt implementation of the new system meeting these criteria. Only in this fashion can the Korean government remedy what is currently a clear and unjustified violation of its 1986 bilateral obligation to the U.S.

## **BUSINESS SOFTWARE ENFORCEMENT: PROGRESS NEEDS TO BE SUSTAINED AND TRANSPARENCY IMPROVED**

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The Business Software Alliance (BSA) estimates that piracy of business software applications in Korea inflicted losses totaling \$121.4 million on U.S. companies in 2002, reflecting a piracy rate of 50%. 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.

Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years. In early 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." Within weeks, the government began a massive crackdown on piracy in government agencies, educational institutions, and corporations. But after conducting more than 2000 investigations during an eight-week "special enforcement period," enforcement activity subsided rapidly, and the software industry was left largely in the dark about the results of the campaign. A second special enforcement period promised for the fall of 2001 never materialized. A lack of cooperation with industry, and resistance to calls for transparency, undermined the practical value of the enforcement effort, as did its episodic nature.

In its 2002 Special 301 submission, IIPA called for a "fundamental revamping" of Korea's enforcement system against end-user piracy. There has been some progress toward that end. Notably, the Korean government maintained a steadier, more consistent level of enforcement, with a total of about 1200 criminal end user raids carried out during the first ten months of the year by police (about 980) and prosecutors (about 220), an average of 120 per month. However, most of these raids were carried out against small businesses. More attention should be paid to larger targets. The government also established a "Standing Inspection Team" (SIT) under the direction of the MOIC in which the Software Property-Rights Council (SPC), the local software industry association, participates. In recent months, the SIT conducted an average of 20-30 investigations per week and found evidence of piracy in about 60% of them. SIT searches for unauthorized copies of around 1000 different programs, including those of BSA member companies. However, the SIT system still lacks adequate transparency, and it is very difficult to determine the fate of cases referred by SIT to prosecutors. Moreover, the SIT investigations are carried out with prior notice to the targets, which limits their effectiveness.

## **BOOK PIRACY: GOVERNMENT LEADERSHIP NEEDED TO PREVENT FURTHER MARKET DETERIORATION**

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The deteriorating piracy situation faced by U.S. book publishers over the past few years continued in 2002. The losses to U.S. publishers inflicted by book piracy in the Korean market in 2002 are estimated by the Association of American Publishers (AAP) at \$36 million.

The 2001 Han Shin case, which began with one of the largest anti-piracy raids in book publishing history, led to a nationally publicized prosecution, and culminated in a one-year prison sentence for the principal pirate, increasingly appears to have been an aberration. While the trade book piracy in the Han Shin case was flagrant, it was also atypical. The more usual target of Korean book piracy is a scientific, technical or medical text that is reprinted in a counterfeit version, or a college textbook subject to massive unauthorized photocopying and binding on or near a college campus. All too often, Korean police and prosecutors react to such cases with indifference, and very few cases appear even to reach the stage of active prosecution, much less to result in the imposition of deterrent sentences.

Pirated editions of U.S. books reference books, 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. Enforcement outside the Seoul area is virtually non-existent, and in Seoul it is becoming increasingly rare.

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. Indeed, chancellors of some campuses refuse entry to the publishers' copyright investigators. Student unions openly endorse pirate copy shops, silence professors who try to discourage use of pirated texts, and issue threats against copyright owners who seek to assert their rights. On- and off-campus pirate copy shops have formed networks which share intelligence about enforcement activities and circulate instructional materials on avoiding detection.

It is long past time for the Minister of Education to speak out against this widespread and well-entrenched lawlessness on Korean university campuses. The ministry should issue a directive to chancellors to cooperate in copyright enforcement activities on campus and to speak out against piracy.

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 a reliable 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.

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.

In August 2002, the National Assembly enacted the Publication and Printing Business Promotion Act, which comes into force in February 2003. The legislation gives MOCT administrative authority to inspect any business establishment, order any “illegally copied publications” to be disposed of, and levy fines of up to KW 3 million (US\$2500) for disobedience of such an order. The law also provides for the involvement of private sector entities in the enforcement process. Whether this new law will provide any practical benefit to U.S. publishers remains to be seen. The act also revises the procedure for obtaining censorship approval of foreign publications. The U.S. government should monitor implementation of this new law, including the impact of these censorship provisions on the access of U.S. publishers to the Korean market.

## **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 2002 are estimated by the Motion Picture Association (MPA) to have increased to \$27 million, reflecting a video piracy rate of 25%, about double the rate observed five years earlier.

The VHS videocassette remains the locus of video piracy in South Korea. 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 smaller pirate duplication facilities detected in earlier years seem to be expanding, although recently there is evidence that large-scale duplicators are dispersing their facilities to evade detection.

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.

## **MARKET ACCESS: SCREEN QUOTAS AND OTHER BARRIERS SHOULD BE PHASED OUT**

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For 37 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 continue to do well at the box office and enjoyed a healthy share of the Korean theatrical market in 2002, approaching 50% according to Korean government estimates and press reports.<sup>14</sup> 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

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<sup>14</sup> See Soh, "Despite Losses, Domestic Films Take 47 Pct. Of Box Offices Last Year," *Korea Herald*, January 14, 2003.

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.

Other quotas impede access for U.S. audio-visual product in the Korean market and should be dismantled. A Presidential Decree issued pursuant to the Korean Broadcast Law 2000 sets local content requirements for specific genre categories of channels carried by cable and satellite services, including movie channels (which have a 30% local content requirement), animation channels (40%), music channels (60%), and other categories (50%). The same legislation also set content quotas for terrestrial broadcasting, limiting total foreign programming to 20% of total airtime, with subquotas that effectively limit U.S. programming to 45% of all airtime allocated to movie broadcasts. Both the intent and the effect of the sub-quota are to discriminate against U.S. programming by artificially providing preferences to products from third countries, raising serious concerns as a restriction on trade in services that violates GATS. It may also violate GATT most-favored-nation and non-discrimination obligations, since U.S. television programming is typically exported to Korea on magnetic tape.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# TAIWAN

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** While there have been some recent positive moves in Taiwan to tackle increasing piracy rates, by enforcing its new Optical Media and Copyright Law accompanied by deterrent sentences, and by making significant improvements in its draft Copyright Law amendments, the results are not yet evident. Accordingly, IIPA recommends that Taiwan remain on the Special 301 Priority Watch List.<sup>1</sup> For 2002, trade losses to the U.S. copyright industries due to piracy in Taiwan were an estimated \$756.7 million.

**Overview of key problems in Taiwan:** The uncontrolled growth of optical disc production facilities in Taiwan, the even more recent migration of piracy to commercial CD-Rs and the generally ineffective efforts by the Taiwan government to control these activities through aggressive and deterrent enforcement of its 2001 Optical Media Management Law and its copyright law, have led to a significant increase in piracy rates for most copyrighted material in Taiwan. This has again put Taiwan into the category of one of the world's worst pirate havens. Organized crime has infiltrated and internationalized this business with Taiwan continuing as a major source of the raw materials for pirates, disrupting global markets. Retail piracy in the night markets is also growing and has increasingly become more sophisticated, with pirates using courier services and juveniles who are not subject to deterrent penalties and behind whom the real pirates can hide. Despite increased cooperation by the Ministry of Justice in conducting raids of commercial photocopy shops, illegal photocopying of textbooks continues as a major problem, largely due to the unwillingness on the part of Taiwan officials to target illegal photocopying at university bookshops and other on-campus locations.

U.S. government (including Congressional) and industry engagement over the entire year has escalated, seeking to persuade the reluctant Taiwan government to devote necessary resources to the piracy problem, take deterrent action against blatant and organized OD factory piracy and amend its copyright law to provide the tools necessary to fight piracy effectively, such as through making piracy a "public" crime and thus allowing the police to act *ex officio*, without the need for a formal complaint from a right holder. It has only been very recently that there have been some hopeful signs, with the Taiwan authorities finally engaging to improve its proposed amendments to its copyright law, and with some of the first convictions of major pirates with deterrent prison terms. However, much more needs to be done.

**Actions to be taken by the Government of Taiwan:** In order to address the massive piracy problems in Taiwan, in order to meet Taiwan's obligations under the WTO/TRIPS Agreement, to which it is now a party, and in order to put the tools in place to deal with Internet piracy, the government needs to take the following actions immediately:

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<sup>1</sup> For a history of Taiwan's involvement in the Special 301 process, see Appendix E.

- Effectively implement its Optical Media Management Statute (2001), including amending it to increase penalties and overall deterrence, by expanding its coverage to deal with the real threat of massive commercial production of CD-Rs, and by ensuring that deterrent penalties, including immediate license withdrawal, are imposed;
- Initiate a sustained copyright enforcement campaign throughout 2003 against all pirates, particularly against the organized criminal syndicates that control piracy in the manufacturing, distribution, and retail sectors, and impose truly deterrent penalties;
- Increase enforcement against illegal photocopying around university campuses;
- Amend its copyright law in the first quarter of 2003 to make piracy a public crime, increase penalties, extend the term of protection for copyright material and fully and correctly implement the provisions of the WIPO "Internet" treaties.

**TAIWAN**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	42.0	44%	35.0	30%	30.0	30%	20.0	20%	15.0	10%
Records & Music	98.6	47%	51.7	48%	60.5	44%	60.0	35%	55.0	20%
Business Software Applications <sup>3</sup>	NA	48%	106.8	53%	123.9	53%	97.6	54%	112.1	59%
Entertainment Software	596.1	56%	119.4	70%	319.3	90%	115.7	68%	103.2	65%
Books	20.0	NA	20.0	NA	20.0	NA	21.0	NA	19.0	NA
TOTALS	756.7		332.9		553.7		314.3		304.3	

## COPYRIGHT PIRACY REMAINS OUT OF CONTROL

### Pirate Optical Disc Production Remains Among the Highest in Asia

In 2001 there were at least 61 known optical disc plants in Taiwan (and possibly nine or more underground plants) engaged in the manufacture of finished optical disc 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. In 2002 the number of licensed factories

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$107 million at 52% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.



remains at 61 with 3 suspected underground plants, but the production capacity has increased, and pirate production continues to flood the local market. There are now 81 DVD lines (93 lines in 2001), 202 VCD/CD lines (229 lines in 2001) and 889 CD-R lines (865 in 2001). With 38 lines able to produce masters (37 in 2001), Taiwan now has 1,205 production lines (1,187 in 2001). Production capacity of lines not producing blank CD-Rs increased to 1.127 billion in 2002 and despite some enforcement successes, piracy rates for audio and video product have continued to escalate as the above chart clearly demonstrates. Taiwan continues to be one of the world's worst piracy havens for optical disc production and a key source for the raw materials used globally in the international piracy business. In addition, "burned" CD-Rs in Taiwan, including movies, compilations of music (including MP3 audio files), computer programs, console-based games, etc., flood the domestic markets in Taiwan. RIAA/IFPI report that the ratio of pirate factory production and pirate commercial CD-R production is now approximately 4:6 showing the clear migration of this massive global problem from traditional factory production to harder-to-detect commercial CD-R production. Much of this factory and CD-R production is controlled by the same criminal syndicates.

As a result of the production and sale of such massive quantities of pirate OD product in Taiwan, sales of U.S. and local audio and video product have decreased substantially, threatening the viability of Taiwan as a vibrant market. Moreover, failure to deal effectively with the problem is damaging Taiwan's reputation internationally. RIAA/IFPI reports that sales have dropped off 13.4% in just the first six months of 2002 (and fell 22.9% in 2001) with revenues dropping from \$306 million in 1999 to US\$170 million in 2001. Taiwan has dropped from the second largest music market in Asia in 1999 to the fourth largest today, after Japan, South Korea and India. This rise in piracy has had the greatest adverse impact on local artists who now account for half the music sales in Taiwan, while the figure was 66% in 2000. Taiwan's status as the creative center of Chinese music is now threatened; Taiwan has been the source of 80% of Mandarin music worldwide. Employment in the recording industry has fallen 30% since 1999. The piracy rate for video product has increased more than 35% in the last 5 years.

The piracy rate for entertainment software also remains high. While most pirate discs are pressed in the factories, the rate of CD-R burning is rapidly increasing. China continues to be the primary source of pirate videogame cartridges coming into the Taiwan market. In August 2002, Guangzhou administrative enforcement officers raided the Yongshen Electronic Factory where approximately 10,000 counterfeit *Game Boy Color* printed circuit boards and about 300 Game Boy Color game cartridges were confiscated. The owner of the factory was a Taiwanese national who had purchased the pirated component parts in Taiwan, shipping the parts back to China for assembly at his factory. Charges have been filed against the owner and the matter remains pending.

## **Piracy at the Retail and Wholesale Level Remains Unacceptably High**

The takeover of the markets by manufactured (pressed) optical disc product as well the spectacular recent growth of CD-R piracy has devastated the legal market throughout Taiwan. Notorious *Ta-Bu-Tieh* or CD-R (CD-recordable) compilations abound and these and factory produced OD product are marketed all over Taiwan through an estimated 300 night-market vendors. According to RIAA/IFPI, the population of night market vendors has increased from an estimated 250 in 2001 to 300 in 2002 indicating that current enforcement efforts have not had a significant deterrent effect. Product sold by these street vendors can vary from a few hundred to thousands of pirate music CDs, VCDs, DVDs, CD-ROMs and videogames each. These vendors are highly mobile and to prevent arrests, they have increasingly used the "Conscience Vending Box" tactic where the vending location is not manned by the pirates but price information is posted at the stall and money collected in plastic buckets or boxes. In 2001 it was

estimated that 40% of the vendors used this tactic. In 2002 this surged to an estimated 90%. The remaining 10% hire juveniles to man the stalls in order to avoid or deter the arrest of the stall vending personnel. As described in further detail in the enforcement section, 55% of the arrests made were of juveniles where deterrence is virtually non-existent.

While night markets are still an important source of pirate product at the retail level, many new techniques appear to be taking over. Mail order has been a growing channel for pirates operating at the retail level in Taiwan. Advertisements are regularly placed in newspapers or on the Internet. Accounts are then opened at the Post Office and the pirate product is mailed to the consumer with the money collected by the post office. Courier services are also used to deliver pirate product and collect payment.<sup>4</sup> Pirate product catalogues are printed with untraceable mobile phone numbers and spread around office buildings throughout major cities with couriers doing the rest. Sometimes product is transferred between courier services en route to avoid detection and arrest. This courier service technique has grown enormously in 2002 and industry reports that the distribution centers supplying the couriers are part of organized criminal syndicates that control pirate production and distribution throughout Taiwan, from production to even retail. However the syndicate owners are rarely known and virtually never caught and punished. Arrests are almost always of insignificant lower level operatives. Another technique for getting the pirate “word” out is the use of “flyers” placed in newspapers. The government has recently warned newspaper distributors to discontinue their practice of supporting piracy in this way. The effect is as yet unclear since, despite this government warning to the newspaper distributors and their stated willingness to cooperate (under threat of being held as accomplices under the copyright law), the distributors have claimed that they cannot distinguish the flyers and have asked the government to do the work by setting up a system.

While it has been clear for some time that even factories engage in CD-R “burning” for product with less demand (and don’t appear to view the burning of CD-Rs as a competitive problem), there has been a massive increase in the commercial duplication and distribution of CD-Rs of U.S. copyrighted works throughout Taiwan. In addition, 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 CD-R piracy was originally limited to within colleges, it is now a major problem in the night markets and is present in all pirate distribution channels, and by some accounts represents up to 50% of the pirate market in the country. With respect to audiovisual works sold and/or rented through retail shops, the Government Information Office maintained a system of loose regulatory control over the retail shops in 2002. Despite this, even more of such shops continue to engage in the unauthorized duplication of CD-Rs. GIO must once again tighten its grip on the retail markets.

## **Corporate End-User Piracy of Business Software Remains a Problem**

The piracy rate for business software has declined 5% since 2000 in part due to some improvement in corporate end-user piracy enforcement. In 2002, the “Action Year for IP Enforcement” as declared by the Taiwan government, the Ministry of Justice and Ministry of Economic Affairs endorsed a BSA 60-day truce campaign. During this period, the government

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<sup>4</sup> Recently the Taiwan Minister of Justice has specifically told courier companies that they will be arrested as accomplices. This announcement was made following the well-reported “Catch me if you can” incident reported below.

joined with BSA in educating businesses about the copyright law and software asset management seminars. This campaign was followed by a series of criminal raids against corporate end users. Also, in April 2002, the Premier issued instructions to all government agencies to conduct software audits and to report back the findings. The Directorate General of Budget, Accounting and Statistics (DGBAS) followed up and requested all agencies to provide audit results by May 2002. While this action fell short of the Business Software Alliance's (BSA) request for an executive order on government legalization, which many other governments have issued, this was a move in the right direction. The piracy rate remains too high and much more still needs to be done.

## **Internet Piracy is Growing**

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. This type of piracy is also being run by organized groups mainly located in Taiwan but also emanates from 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. So far at least, the Taiwan authorities have not set up an appropriate and trained infrastructure to stop this problem from becoming the next piracy epidemic. The Ministry of Education (with respect to use of University servers), the Ministry of Transportation and Communications (MOTC), and other law enforcement authorities, must respond quickly and effectively with well-organized enforcement strategies.

Two types of piracy predominate. First is the distribution of finished pirate product ("hard goods piracy") using the Internet as an advertising tool. Websites at universities, for example, are used to announce the availability of pirate recordings (including MP3s), videogames in all formats, business software and motion pictures (back-to-back copies of VCDs, CD-Rs or even DVDs), including CD-R sales. Commercial sites also are a growing phenomenon, such as the fortunately short-lived "Movie88.com" site which made thousands of new and old movie titles available for just \$1 each and at the instance of MPA was taken down in February 2002 by a Taiwan-based ISP and the Taiwan enforcement authorities. Entertainment software is also made available through Internet sites. Internet piracy of entertainment software product is now estimated to be at 40%, up from last year's estimate of 30%.

Second, and even more dangerous, is the downloading of pirate copies from websites and FTP sites, and the rapid growth of "Napster" and "Morpheus" clones, using "peer-to-peer" file-sharing technologies, like KaZaa software. This phenomenon is on the increase without any clear strategy to deal with it. The recording and movie industries are 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. Another version of this phenomenon occurs at "cyber-café's," of which there are 3,000 throughout Taiwan. Entertainment software is particularly hard hit at these cyber-cafes. Some IDSA member companies suspect that a large number of these cafes are operated by criminal syndicates and obtain the pirate product used at these cafes from local optical disc factories. IFPI did do some Internet enforcement training of the IPR Task Force in June 2002 after it was formed and lists of infringing websites were provided at that time. Unfortunately the lack of a unit dedicated to this problem has hindered enforcement efforts—currently enforcement is the responsibility of both the Telecommunications Police and the Criminal Investigation Bureau (CIB). In 2002, the recording industry filed a complaint against EZPeer, a Taiwan P2P file sharing service and will shortly sue another such service named Kuro. According to a recent news report, the parent

company of Kuro, music.com.tw, has generated revenue of NT\$190 million (US\$5.5 million) in 2002, 90% of which is generated by Kuro which charges a fee of NT\$99 (US\$2.85) per month for unlimited downloads of illicit MP3 music files. Kuro's users have increased from 50,000 in 2001 to 300,000 in 2002. The industry estimates there are more than 26,000 users online at any time. Kuro has now surpassed EZPeer as the largest free pirate download service in Taiwan. It is reported that the parent company plans to go public in 2003.

## **Piracy of Textbooks and Other Piracy Issues**

Illegal photocopying of entire textbooks is most prevalent in Taipei and other major cities, including on and around prestigious campuses such as 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 addition, illegal photocopying is rampant in bookshops situated on the university campuses themselves. In September 2002, the Taiwan Book Publishers Association, capitalizing on the central government's designation of 2002 as the "Year of IP Enforcement" received generally good, though sometimes uneven, cooperation from the police and Ministry of Justice in conducting over 80 raids throughout Taiwan against photocopy operations. These raids uncovered the infringement of over 600 titles, including approximately 100 Chinese titles, clearly demonstrating that the infringing activity is harming not only foreign publishers, but local creators and publishers alike. The publishing industry has been pleased with the increased level of cooperation from the Taiwan government that allowed for this type of raiding activity. However, lasting success depends on continued efforts by the government to coordinate, support and increasingly self-initiate raiding activities on a regular basis. Success is also *highly* dependent on the government's initiative in enforcing compliance with copyright laws *on university campuses*. The publishing industry is dismayed at the government's unwillingness to raid on-campus facilities, as well as its reluctance to issue mandates and requests to university officials to police illegal photocopying. The Ministry of Education must work closely with university officials to create a climate on the college campuses in which students and educators abide by Taiwan's TRIPS obligations.

The publishing industry is also disappointed by failures at the prosecutorial level. As discussed later in this submission, procedural hurdles continue to hinder effective prosecution, including the discriminatory POA requirements imposed on foreign publishers. U.S. publishers currently have cases from the September 2002 raids pending in the courts, and the government should take immediate action to bring these cases to completion in a timely and expeditious manner.

Finally, public and business misunderstanding of the limits of fair use and other exemptions in the copyright law have resulted in significant damage to publishers. First, publishers have come across instances where teachers and businessmen have cited fair use as justification for copying up to one half of a work without permission. Second, local book companies have also compiled anthologies of text materials from foreign textbooks without permission. Third, publishers report that pharmaceutical companies are increasingly photocopying medical textbooks and clinical reference works for client doctors, without appropriate permission. IIPA and AAP urge the government to clarify the scope of permissible copying by working with publishing representatives and affected third parties to draw up useful and equitable fair use guidelines. This should be followed by judicial and prosecutorial training on fair use and on book piracy generally.

China continues to be the primary source of pirate videogame cartridges coming into the Taiwan market, though it is believed that much of this production is controlled from Taiwan. For example, in August 2002, the Yongshen Electronic Factory, owned by a Taiwan citizen, was raided by enforcement authorities in Guangzhou, China. Approximately 10,000 counterfeit *Game Boy Color* printed circuit boards and about 300 Game Boy Color game cartridges were confiscated. The owner had purchased the components in Taiwan, and then shipped the parts back to China for assembly at his factory.

## **COPYRIGHT ENFORCEMENT IN TAIWAN**

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### **Taiwan Must More Effectively and Aggressively Implement the Optical Media Management Statute**

Taiwan has the tools to deal with optical disc piracy in its Optical Media Management Statute, adopted, after much controversy internally and with the U.S. government, in 2001. While that law has a number of weaknesses (discussed below), it can and must be used more effectively to crush this phenomenon which is so devastating the Taiwan market, Taiwan creators, and Taiwan's international reputation. Taiwan's President Chen has declared the "Year of IPR Protection" and promised effective enforcement to the U.S. government and to the Chairman of the U.S. House Judiciary Committee, James Sensenbrenner, at a January 13 meeting in Taipei. Also at this meeting, the President appointed his National Security Council Director, one of his closest advisors, to lead this effort with a six month deadline to fully address and resolve this and other enforcement issues. The IPR Task Force was formed and, as announced at the start of 2003, that force was increased to 220 officers and led by Commissioner Liao Kao Jian, who is under the supervision of the 2<sup>nd</sup> Security Police. The tools and manpower are in place, some progress has been made in terms of inspections and seizures at plants including a recent raid and seizure of actual equipment at an underground VCD plant on January 13, 2003 (the machines including two VCD lines and one printing machine)—and the conviction and jail sentence given to the Chairman and Plant Manager of the infamous Digi-Gold plant—raided three times since 2000. But still the piracy rates in Taiwan have not come down and the local (and international and U.S.) audio and video industries continue to face declining revenues and local job losses.

Excuses are unacceptable and not credible. The Taiwan authorities, if they have the will, can quickly solve this problem by aggressively inspecting and raiding plants, and seizing all pirate product and equipment, withdrawing licenses, completing old criminal cases, starting new ones, and making sure that heavy fines and jail terms are imposed on factories, both licensed and unlicensed. The government must do this quickly to avoid further market deterioration.

### **Enforcement against Factory Piracy**

While the Digi-Gold sentence was a major step in the right direction, MPA reports that 12 of its factory cases remain pending in the courts, five of them from as early as 2000. While jail terms were given and equipment finally forfeited, the process remains flawed, with little transparency, and with the judicially-ordered and totally unjustified "unsealing" of lines, without notice to the rightholders who were the victims of this blatant piracy, and their reuse for piracy purposes during the pendency of the case.

In 2002, MPA conducted 12 factory raids with 5 reported as “successful,” including the sealing of lines. 10 plants were closed down, including 7 licensed and 3 unlicensed plants. 252 stampers were seized along with 68,874 pirate discs. 13 VCD production lines and 9 printing/packaging machines were sealed. The plant inspection teams conducted 242 inspections, but only 11 at night when most pirate production is suspected to occur. While the seized discs were taken into custody, the replicating equipment was not being removed, with the government claiming there was insufficient warehouse space. However, the authorities have just recently announced a plan to increase the number of warehouses for storing seized discs and machines. In a most welcome development, on January 13, 2003, an underground VCD factory in Taichung was raided and its replicating machines were immediately moved to a new MOEA warehouse.

To achieve the needed results, these inspections must be increased, done completely randomly, and at night. RIAA/IFPI reports that 99% of the pirate music CD product in the market does not contain SID codes, as required under the Optical Media Statute. While some of these discs may be imported, most are either from licensed plants, using non-Sid-coded molds or by unlicensed plants.

RIAA/IFPI reports 9 successful factory raids in 2002 and 3 convictions involving pirate music product. MPA reports 4 convictions.<sup>5</sup> RIAA/IFPI reports 16 and MPA 12 cases still pending following the recent Digi-Gold conviction.<sup>6</sup> Working closely with industry, the Taiwan government must exponentially increase all this activity and apply real deterrence in the process if piracy rates are to be reduced.

Organized criminal syndicates continue to dominate piracy in Taiwan, particularly at the distributor level. The recording industry reports 69 raids against warehouses, wholesalers and packaging centers. Investigators determined that several major pirate distributors run these well-developed and well-protected distribution networks throughout the island. Their identities are always well-hidden, however, and hence they are never subject to being caught, arrested and convicted. The key is to arm the expanded IPR Task Force with stronger investigatory powers, train them in improved surveillance techniques and provide them with “public crime” powers and the clear ability to seize all machinery involved in piracy, particularly OD lines.

## **Criminal Enforcement in 2002**

As in previous years, the industries<sup>7</sup> continued to get a sizeable number of criminal raids. However, again, these efforts haven’t made a major difference in the marketplace; indeed piracy rates are up, not down. The principal problem is that piracy is not a public crime which means that the enforcement authorities are reluctant to act without a formal complaint from right holders, who are simply not equipped to handle the vast volume of paperwork that this requires, thus severely diminishing the ability of the authorities to crack down, in particular on night markets and other highly mobile pirates operating at the retail level. Moreover, the industries do not have the investigatory powers that reside in the government authorities and again, this

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<sup>5</sup> Wei Lai Technology Co., Ltd (1998 raid); Unregistered VCD factory in Hsin Tien City (2002 raid); Nine Friends Technology Co., Ltd (1999 raid) and Digi-Gold Media (3 raids commencing in 2000).

<sup>6</sup> The RIAA/IFPI and MPA factory raids and convictions overlap, the difference being whether video and/or music product was involved in the raid or criminal case.

<sup>7</sup> This refers to all copyright industries other than business software, which is discussed separately in this section.

hinders the effectiveness and deterrent effect of the enforcement system. For this reason, IIPA and its members have urged Taiwan, and a number of other countries, to make piracy a public crime, actionable *ex officio* by the enforcement authorities. As discussed further below, the executive branch of the Taiwan government has agreed to propose an amendment to its copyright law making piracy a public crime in most cases. This is a most welcome—and absolutely key—development if it ends up soon as an amendment *actually* adopted and implemented.

The recording industry ran a total of 1524 raids against night markets, street vendors, mail order centers, distribution centers, retail shops and OD factories in 2002. This is down from 2235 raids in 2001 even though the government established its police IPR Task Force in 2002. 1502 raids were against retail piracy and 15 against factories. 99% of all raids involved retail piracy. Moreover, convictions and sentences were also down for 2002, providing one more important reason why piracy rates have been rising (see chart). Of the 1,867 persons convicted of music piracy in 2002, it appears that only 70 were given unsuspended sentences of more than 6 months<sup>8</sup> or only 4.2% of those convicted, down from about 14% in 2001<sup>9</sup>. According to RIAA/IFPI statistics, only a total of \$15,300 in fines were assessed and it is not known how many of these fines were actually paid. In short, for music piracy, it is little wonder that piracy rates have not come down. In 2002, as in 2001, and as noted above, the number of juvenile offenders far exceeded the number of adult offenders, continuing a very disturbing trend: Out of the 903 cases brought by the recording industry in 2002, 558 involved juveniles and only 372 involved adults. Because juveniles are below the statutory age for criminal responsibility, judges cannot impose criminal penalties on them.

Also disappointing was RIAA/IFPI's report of the reduction in the number of raids involving CD-R duplication centers in 2002 even though replication of CD-Rs containing infringing music and sound recordings was growing at an exponential pace. Only 5 such raids were conducted in 2002 (with seizure of 250 CD-R burners), compared to 27 and 12 in 2000 and 2001 respectively (with seizure of 154 CD-R burners), respectively. In one of these raids, in September 2002, involving a packaging center, the police seized 64 CD-R burners, 16,700 blank discs and almost 150,000 pirate CD-Rs.

The motion picture industry conducted fewer raids in 2002 as well, partly as a result of its intention to focus on larger targets. Because of the “juvenile problem” it has become far less cost effective to undertake raids on retail/street vendors in night markets and moreover there is little deterrence in this area in any event. MPA conducted 698 raids (vs. 1,118 raids in 2001), and initiated 671 cases, 551 of which were street vendors cases, 25 were retail shops cases, 69 against distributors, 12 against factories, 15 against CD-R labs and 31 Internet cases. The authorities seized 1,123,922 VCDs, 6,078 DVDs and 1,186,389 CD-Rs. Also seized in 2002 were 697 stampers, 206 silk screens and 14 packaging machines.

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<sup>8</sup> Sentences of six months or less can still be “bought out” to a fine in Taiwan.

<sup>9</sup> In 2001, only 107 out of the 766 defendants convicted (around 14%) actually served time in jail.

## Criminal Enforcement Against Corporate End-User Software Piracy

On March 14, 2002, BSA launched, with the cooperation of the Minister of Justice and the Vice Minister of Economic Affairs a 60 day "Truce Campaign" designed to encourage businesses to audit their software and to legalize as necessary. The campaign included a reward scheme for obtaining corporate end-user leads. The response from the use of a website and hotline was large with over 341 leads coming in. Following up on these leads, BSA conducted 15 criminal end-user raids and one channel raid in the second half of the year. All these raids were successful in turning up unauthorized software. These cases and 13 prior year cases are still pending. In 2002, two prior year cases ended in convictions and fines were imposed. On January 7, 2002, a Taiwan High Court affirmed a district court conviction and sentence of the general manager of Horng Com Data Inc. to seven months in prison and a fine of NT\$60,000 (US \$1,730). The prison sentence was suspended.

This case was followed a month later by the another conviction of Taiwan Product Online Co., Ltd. on February 8, 2002 leading to a small fine of NT\$80,000 (US\$2,306). The defendant appealed and BSA finally settled the case.

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS</b>				
<b>2002</b>				
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS SOFTWARE</b>	<b>SOUND RECORDINGS</b>	<b>TOTALS</b>
Number of Raids conducted	698	15 end user 2 channel	1,517	2,232
Number of cases commenced	671	17	903	688
Number of Cases Judgment for Juveniles	304		531	835
Number of Cases Judgment for Adults	367	2	372	741
Number of defendants convicted (including guilty pleas)	876	2	1,867 persons	2,745
Acquittals and Dismissals	9		27	36
Number of Cases Pending	574	30	614	1,218
Total number of cases resulting in jail time	332		345	677
Suspended Prison Terms	128	1	123	252
Maximum 6 months	45		43	88
Over 6 months	17	1	8	26
Over 1 year	66		72	138
Total Suspended Prison Terms	1,443 (months)	1	1,464 (months)	2,907 (months)
Prison Terms Served (not suspended)	204		222	426
Maximum 6 months	132		144	276
Over 6 months	16		9	25
Over 1 year	56		69	125
Total Prison Terms Served (not suspended)	1,800 (months)		2,046 (months)	3,846 (months)
Number of cases resulting in criminal fines	10	2	11	23
Up to \$1,000	1		6	7
\$1,000 to \$5,000	5	2	5	12
Over \$5,000	4		0	4
Total amount of fines levied	US\$63,314	US\$4,000	US\$15,300	\$82,614



## 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 <sup>10</sup>	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 <sup>11</sup>	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

<sup>10</sup> Total duration of suspended prison terms was six years.

<sup>11</sup> 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 <sup>12</sup>	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 <sup>13</sup>	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

## Enforcement Against Internet Piracy in 2002

As reported in the 2002 submission, the Taiwan enforcement authorities began taking action against Internet piracy in 2001. That effort has continued in 2002. The motion picture industry conducted 31 raids in 2002 vs. 24 raids in 2001 against pirates distributing infringing works via the Internet, resulting in the seizure of 933 pirate DVDs, 201 pirated VCDs, 3,108 pirated CD-Rs, 57 CDR-burners, 32 computers, and the arrest of 29 pirates in 2002 compared to the seizure of 31,570 pirated CD-Rs and the arrest of 23 pirates in 2001. Prosecutions resulted in 16 convictions in 2002 vs. nine convictions in 2001. The recording industry issued a total of 28 warning letters that were sent to the infringing FTP sites and websites, as well as 41 letters to related ISPs. As a result, 63 sites were closed down compared to 150 sites in 2001. There have been no prosecutions for Internet piracy of music so far in Taiwan, which bodes ill for the future. Other industries report more trouble getting cooperation of Internet service providers (ISPs).<sup>14</sup> The business software industry has 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.

<sup>12</sup> These suspended sentences range in time from one to twelve months, but most were over six months.

<sup>13</sup> 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.

<sup>14</sup> 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.

## Effective Criminal Enforcement is Hindered by Numerous Procedural Hurdles

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;<sup>15</sup> continued challenges to powers of attorney (POAs) of U.S. right holders in court cases and in raids;<sup>16</sup> raiding authorities' failure to seize all pirate product and tools and implements used in piracy;<sup>17</sup> and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids. And last and most importantly, commercial piracy offenses must be "public" crimes, without the need for a prior complaint from the right holder—a number one priority of all copyright industries.

## Recent Developments and Some Next Steps

In the last few weeks there have been a number of developments that deserve mention in the hope that they signal a new urgency in the enforcement fight against escalating piracy.

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<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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.

- Both RIAA/IFPI and MPA have announced reward schemes for leads to arrests of pirates. MPA's program focuses on the increasing problem of CD-R piracy while RIAA/IFPI's is more general.
- In December 2002, the Taiwan authorities announced an increase in their reward program for leads in "substantial cases" to NT\$1,000,000 (around US\$29,000)
- On January 13, the first day of Judiciary Committee Chairman Sensenbrenner's visit, a pirate VCD was released of the new James Bond film *Die Another Day*. The pirated disc was priced at around US\$3 and opened with the message "[Minister of Justice] Chen Ting-nan, come and catch me if you can!" At the same time, the local media reported that illegal VCD copies of *Hero*, directed by famed Chinese director Zhang Yimou, were also available prior to its authorized release on VCD/DVD in Taiwan, for as little as NT\$80 (US\$2.30). The Minister was incensed and immediately promised an all-out war against the pirates. The next day, he ordered a raid against an OD factory in Taichung which resulted in the arrest of four men and netted 16,000 illegal VCDs. Two VCD lines and one printing machine were immediately removed from the factory.
- The Taiwan authorities announced in December 2002 that they will institute an IPR Action Plan 2003-2005 to "follow on the achievements during the IPR Action Year in 2002." IIPA has not learned the details of such plan but it must result in real, not feigned, achievements that lead to real piracy reductions.
- In 2002, a Taiwan national, Lisa Chen, was convicted in Federal Court in Los Angeles as a ringleader of a massive conspiracy which imported into the U.S. from Taiwan over \$98 million worth of pirated business software. Her arrest occurred in November 2001 after a lengthy investigation and she was sentenced to 9 years in prison and ordered to pay US\$11 million in restitution. It was encouraging that Taiwan prosecutors worked with their U.S. counterparts in investigating this huge piracy case which culminated in the arrest on December 4, 2002 of six executives including several CEOs of Taiwanese firms. They were charged in connection with the production and export of this pirate software. IIPA has been told that the prosecutors have asked the judge for sentences of six to seven years. We will be watching these cases with great interest as a test of Taiwan's willingness to act to effectively deter this massive criminal conduct.
- On January 22, as reported by MPA, the Taichung Police conducted a raid that resulted in the seizure of over 63,000 CD-Rs containing pirate music, games and motion pictures and a record-breaking 127 CD-R burners. Five people were arrested. This CD-R lab was run by a syndicate that was one of the largest suppliers of the night markets in Taichung. MPA reports that in the first two weeks of January, two major criminal pirate syndicates in Taichung have been neutralized. We await the results of the criminal cases.

# THE OPTICAL MEDIA AND COPYRIGHT LAW MUST BE IMMEDIATELY AMENDED

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## The Optical Media Management Statute Must be Amended

On October 31, 2001, Taiwan's Legislative Yuan passed the Optical Media Management Statute (2001) (the "OD Law" was promulgated on November 14, 2001).<sup>18</sup> Unfortunately, this law represented 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 discs 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.<sup>19</sup> Failure to obtain a permit, the unauthorized manufacture of "prerecorded optical discs," 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 a major flaw 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.

In addition to these noted weaknesses, and among the law's most serious deficiency, the OD Law as passed by the LY (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 codes) of optical discs. Imprisonment for manufacturing "prerecorded" discs (which under the EY bill would be mandatory after the first offense) is now possible only after a third offense (and a failure to cure),<sup>20</sup> 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 offense) eviscerates the effectiveness of the criminal remedies under the OD law.

The following summarizes some of these key deficiencies in the Optical Media Management Statute that must be addressed in amendments

- **"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

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<sup>18</sup> 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.

<sup>19</sup> IIPA has now seen a preliminary translation of some of the implementing regulations, including "Laser Disc Production Permit and Application [Regulations]," and understands that this regulation also provides that companies that wish to produce "blank laser discs 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.

<sup>20</sup> 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.

stampers/masters who have been separately allocated identification code “by an agency other than” MOEA to report such to MOEA (Art. 27)). An amended law should ensure that the loopholes contained in Arts. 15 and 17 (allowing plants to cure after the first offense) 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.

- **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 the law be amended to give the authorities the power to seize stampers/masters that fail to meet requirements, as well as machines and tools used to produce such stampers/masters.
- **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 disc 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.
- **Transparency of All Applications, Notifications, Permit Information, and Records:** It is imperative that amendments to the law ensure 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 Discs,” 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 recordings pursuant to Articles 26 and 27.

The Taiwan authorities, realizing that the law as passed has many flaws, has informally indicated that it may amend the law. Since the passage of the OD Law, IIPA and IFPI have prepared a global model template for an OD law and also prepared a set of “key elements” that must be part of any effective OD law. These two documents, representing the views of all the copyright industries, have been provided to the Taiwan authorities. However, no draft has apparently been completed. IIPA urges the authorities to immediately prepare a full range of amendments consistent with these key elements and template—in particular, to increase penalties, to ensure that licenses can be more easily revoked, to ensure coverage of stampers, to adopt a full license requirement for producing blank CD-Rs and to strengthen the authority to seize and forfeit all equipment used in the production of pirate OD product. In the interim, aggressive and deterrent enforcement of the existing provisions, read to give those provisions their broadest scope, must be the highest priority for Taiwan.

## **Taiwan Must Complete Consideration of its Draft Copyright Law Amendments, Follow USG and Industry Suggestions, Pass Such Amendments Early in the Next Session of the Legislative Yuan, and Implement Those Amendments Immediately**

Over the course of the latter part of 2001 and throughout 2002, MOEA/IPO has been regularly engaged with the U.S. government in reviewing a large number of critical amendments to its copyright law. IIPA and its members have regularly provided comments on the various drafts that have issued during this period. MOEA/IPO is to be commended for taking this process seriously and agreeing to adopt many of the industry and USG suggestions for modifying their originally proposed amendments.

Many of these amendments are absolutely critical to strengthening the tools available to the enforcement authorities to deal effectively with the growing piracy rates in Taiwan. Key among these is making commercial piracy a “public crime” allowing the authorities to investigate, seize and commence criminal proceedings without the need for a complaint from the right holder and significantly increasing criminal penalties. Other amendments would fix the remaining TRIPS deficiencies in the law and modernize the law to deal with e-commerce and

the Internet by adopting the provisions of the two WIPO “Internet” treaties. IIPA strongly supports Taiwan’s goal to improve its enforcement machinery, bring its law into compliance with TRIPS, and implement the WIPO treaties’ provisions now as part of its development strategy and before online piracy levels become acute.

The following summarizes the main features of the proposed amendments being considered, including where further adjustments to those amendments are needed:

- **Coverage of Temporary Copies as Part of the Reproduction Right:** The current December 2002 IPO draft properly defines the reproduction right to include temporary and transient copies. This change to Article 3(5) is necessary to comport with WCT Article 1(4) and the Agreed Statement, TRIPS and the Berne Convention (incorporated by reference into TRIPS). Ensuring that such copies are subject to the exclusive right of reproduction will ensure that Taiwan is prepared to deal with the challenges of the new e-commerce environment.
- **Exception to Protection for Temporary Copies:** While IIPA has noted that the “fair use” provisions of Article 65 already provide the mechanism to ensure for exceptions to exclusive rights in appropriate cases, Taiwan so far has chosen to take the EU approach by including a specific exception for temporary copies in Article 22 of the law. However, this formulation, at a minimum, must be recrafted to ensure that, as in the EU situation, such exception language specifically excludes application to computer programs. The EU exceptions to the reproduction right for computer programs are in its Software Directive, not covered by the language of the EU Copyright Directive. Moreover, if the EU approach is taken, then the “fair use” provisions in Article 65 must not be interpreted to give a broader scope of exceptions than the specific language in Article 22. In fact, the fair use provisions should ensure that the EU approach to exceptions does not apply where it would conflict with the normal exploitation of a work or prejudice the legitimate interests of the right holder, as required under Article 13 of TRIPS.
- **Application of the Definition of the “Public Presentation” Right to Sound Recordings:** The definition of “public presentation” [Article 3(9)] should include a reference to sound recordings, as well as audiovisual works. Indeed, such right should be amended to extend to all works.
- **Definition of “Technological Protection Measures”:** The definition of “technological protection measures” [Article 3(16)] must be amended to ensure that access as well as copy controls are covered in order to comply with the requirements of the WCT and WPPT. Existing Taiwan law on hacking is insufficient to comply with these requirements. Similarly, the new Article 80*bis* must be amended to ensure that TPMs protect beyond just acts resulting in an infringement but also cover TPMs that “restrict acts which are not authorized” by the right holder, e.g., access controls.
- **Extending the “Public Performance” Right to Sound Recordings:** Article 26 should be further amended to apply the right to sound recordings as such right is defined in Article 3(11). IIPA is pleased that Articles 24 and 26*bis* were further amended to ensure that all interactive communications of sound recordings and performances are clearly covered as required by the WPPT and that the provisions covering “bootlegging” were clarified in Article 22(2).



- **Clarifying that the Rental Right Extends to Performers and Sound Recordings (WPPT):** The exclusive rental right (Article 29) has been clarified to extend to sound recordings and to performances fixed on sound recordings as required by TRIPS and the WPPT.
- **Term of Protection:** Taiwan should follow the modern trend of extending term of protection (both the EU and U.S. 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:** The personal use exception in Article 51 should be clarified and narrowed, in light of digital technologies, to permit only a single, analog copy for personal and private use.
- **Formalities and Scope of Licenses:** In a welcome change the notarization requirement in Article 37 has been deleted and paragraph 4 has been changed 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.
- **Deleting the Exemption for Retransmissions of Broadcasts by Cable Systems:** IIPA is pleased that paragraph 2 of Article 56*bis*, which provides for such complete exemption (which would violate TRIPS) has been deleted.
- **Eliminate the Intent to Profit Requirement for Civil and Criminal Liability:** IIPA is pleased that the provisions which imposed an “intent to profit” requirement as a condition to civil and criminal liability have been eliminated and urges the drafters to adopt a drafting option to Article 87(4) which ensures that corporate end-user piracy of software is clearly an infringement. However, many of these provisions still literally require the proof of “actual” knowledge; the test should be whether the defendant “knew or ought reasonably to have known” that the work was infringing and these provisions amended accordingly.
- **A Right of Distribution Must be Introduced:** IIPA is pleased that the draft adds an Article 28*bis* incorporating this right with is required by the WIPO Treaties. IIPA is concerned, however, that the first sale doctrine in Article 59*bis* may implicate the exclusive importation right in Article 87(4). This paragraph must be further amended to ensure that parallel import protection is fully preserved.
- **Ensuring Both Civil and Criminal Liability for Violation of TPMs and RMI:** IIPA is pleased that these further amendments were agreed to.
- **Ensuring that the TPMs Provision and Exceptions in Article 80*bis* Fully Comply with the WCT and WPPT:** This provision does not comport with the requirements of the WCT and WPPT. It does not cover access controls. It requires that the TPM be “specifically designed” to circumvent and language must be added to cover “indirect” proof based on how the product is marketed or whether the device has any significant economic purpose other than to circumvent. Moreover, and importantly,

the exceptions are overbroad and must be significantly narrowed to provide effective protection in compliance with the Treaties.

- **Ensuring that Customs has *Ex Officio* Authority:** IIPA welcomes the amendment ensuring that Customs has this authority.
- **Criminal Penalties Must Be Further Increased and Made Truly Deterrent:** Penalties still remain too low to act as effective deterrents under the TRIPS agreement and in an environment where deterrence is not credible. IIPA recommends significant increases in these penalties, welcomes that criminal penalties apply to offenses without an intent to profit, particularly Internet infringements, and has asked the drafters to make this even clearer. The minimum jail term for piracy should not be allowed to be “bought out” with a small fine, as is now the case. Criminal penalties should also be increased for violations of the TPMs and RMI provisions.
- **Making Copyright Infringement a “Public Offense”:** IIPA welcomes the changes to these Articles which would make key commercial infringements “public offenses” without the need to file a formal complaint. This is a major step forward for Taiwan. IIPA recommends, however, that the need to prove that the reproduction or distribution of a work is “exclusively” for sale or rental may create practical problems. We believe this term should be deleted.
- **Berne and TRIPS-Compatible Retroactivity:** Article 106*ter* and *quater* still have not been adequately amended to make them consistent with Article 18(3) of the Berne Convention. While we applaud Taiwan’s recognition of the need, at a minimum, to pay equitable remuneration for derivative works, this same treatment must be extended to making new copies of now-protected works. IIPA also believes that the two-year term remains too long to be compatible with TRIPS with respect to the making of new copies of protected works. Given the long warning already proffered to the public, this period should be deleted.
- **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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# THAILAND

### EXECUTIVE SUMMARY<sup>1</sup>

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Thailand should be elevated to the Priority Watch List. Optical disc piracy has worsened in Thailand, leaving Thailand a haven for rampant production of pirate discs. An adequate optical disc bill was before the Cabinet a year ago, but a year later, the bill has been weakened and is no closer to passage. There are hopeful signs that a government reshuffle of enforcement responsibilities will improve the situation, and the Thai government has done a laudable job of combating corporate end-user piracy of business software.

For most of the past decade, Thailand has been perennially on the Watch List. In 2002, the U.S. Trade Representative also announced an out-of-cycle review to “focus on Thailand’s progress in passing and implementing a satisfactory optical media bill . . . and most importantly, in launching a sustained enforcement drive against . . . copyright piracy, including optical media and illegal end use of business software.” Six copyright industry groups submitted a petition for the U.S. government to evaluate Thailand’s eligibility to continue receiving trade preferences under the Generalized System of Preferences program. That petition remains pending.

Thailand has failed to pass an effective law to curtail rampant pirate optical disc production. Meanwhile, pirate production has worsened, and the piracy situation remains so dire and penalties so lacking in deterrence that the emboldened pirates have taken to violence against government officials and industry representatives. Cabinet reshuffles have hindered otherwise laudable enforcement efforts by the Economic Crimes Investigation Division. The latest reshuffle in October 2002 bodes well for future enforcement, if the Parliament acts quickly to recognize and properly fund the new “Special Investigation Department” (FBI-Thai). Enforcement efforts against end-user piracy of business software in 2002 were commendable. Copyright law amendments appear no closer to passage than a year ago. Finally, Thailand must cease reclassifying motion picture film imports, inconsistent with Thailand’s bilateral and international obligations.

#### Required Action for 2003:

- Pass and implement an effective optical disc law by early 2003.
- Maintain the 12 special task forces established in August 2001 for IPR enforcement, and make the Special Investigative Division fully functional in early 2003; this unit should have independent power to investigate in order to supplement the police.
- Conduct hundreds of raids against optical disc factories, warehouses, key distributors and pirate retailers, with prosecutions leading to swift and deterrent sentencing, including of those in financial and/or managerial control of such factories, warehouses and distribution networks.

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<sup>1</sup> For more details on Thailand’s Special 301 history, see IIPA’s “History” Appendix to this filing.

**THAILAND**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	26.0	70%	24.0	65%	24.0	60%	21.0	55%	19.0	50%
Records & Music <sup>3</sup>	30.0	42%	16.6	45%	15.6	45%	6.0	40%	9.1	35%
Business Software Applications <sup>4</sup>	28.7	75%	32.6	77%	42.7	79%	66.5	81%	39.4	82%
Entertainment Software <sup>5</sup>	47.3	86%	29.1	93%	130.5	98%	116.3	95%	93.5	92%
Books	28.0	NA	28.0	NA	33.0	NA	33.0	NA	28.0	NA
<b>TOTALS<sup>6</sup></b>	<b>160.0</b>		<b>130.3</b>		<b>245.8</b>		<b>242.8</b>		<b>189.0</b>	

## COPYRIGHT PIRACY IN THAILAND

The piracy situation in Thailand has become dire for copyright owners, with optical disc production for export coming to rival the most egregious pirate producers in the world – like present-day Taiwan or China in the mid-1990s. If the Thai government does not find a solution early in 2003, copyright owners will have no choice but to press for relief through the U.S. government in its trade tools. The most crucial actions to be taken in early 2003 include passage and implementation of a strong optical disc law.

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> The piracy level in 2002 represents the "overall" level (for all repertoire) in 2002. The "international" piracy level (just international repertoire) was 65% in 2002.

<sup>4</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$38.6 million at 76% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> IDSA has revised its methodology for deriving the value of pirate videogame products in-country. IDSA reports that the increase in the value of pirated videogame products in Thailand in 2002 appears to be primarily due to the methodological refinements which allowed it to more comprehensively evaluate the levels of piracy in the personal computer (PC) market, a market segment which rapidly grew during 2002. IDSA's estimates for 2001 do not include production for export but only in-country consumption of pirated entertainment software.

<sup>6</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Thailand were \$136.3 million in 2001. Because of the adjustment to reflect BSA's final 2001 statistics (see footnote 4) the estimated total losses to the U.S. copyright-based industries in Thailand in 2001 are adjusted to \$130.3 million.

## Pirate Optical Disc Production for Domestic Consumption and Export Continues to Proliferate

The most serious piracy problem in Thailand today remains optical disc 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. Thailand is virtually facing an epidemic, representing a serious law-enforcement challenge, since optical disc pirates not only steal from Thai and foreign copyright owners, but engage in a serious organized criminal activity. Increasing evidence links pirate optical disc production in Thailand to foreign criminal organizations.<sup>7</sup> Foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China and Malaysia. One reason organized criminals engage in piracy is that it yields incredible profits (much like drug dealing or other organized crimes) without the threat of serious penalties applied to other criminals due to lax law enforcement in Thailand. Nonetheless, in 2002, those fighting piracy in Thailand have faced increasing instances of extreme violence, indicating that piracy has sprawled out of control from the standpoint of criminal enforcement.<sup>8</sup>

Thai pirate production, besides completely destroying the domestic market for music, movies, software and literary works,<sup>9</sup> also now fuels a thriving export trade.<sup>10</sup> Countries as far-flung as Italy, Germany, Sweden and South Africa report that Thailand is a major source of pirated goods seized by their customs officials.<sup>11</sup> Disturbingly, optical disc pirates in Thailand have begun the practice of “disc gouging,” namely, tampering with source identifiers used to identify the loci of production of a disc. Industry sources indicate that, as of February 2003, it is

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<sup>7</sup> Syndicates engaged in optical disc piracy have developed 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, since juveniles cannot be investigated unless both a police officer and a public prosecutor participate. Some in the Thai government point to the Criminal Procedure Code, Section 113*bis* which was amended and went into force on September 14, 1999 (which states that, 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.

<sup>8</sup> In November 2002, a record company distributor from Japan was shot in the head, suffering a severe injury. On December 20, 2002, the Deputy Director of the Motion Picture Association in Thailand was struck in the face with a bottle in front of his house before leaving for work. On December 24, 2002, a police officer was beaten by those guarding a pirate retailer. In November 2002, the gas tank of an industry representative's vehicle was found to have been tampered with (filled with brake fluid) during a raid. Threatening phone calls have become the norm for those having the courage to fight piracy in Thailand.

<sup>9</sup> For example, the motion picture industry reports that sales in 2001 dropped 24% compared with the previous year, and reports that for the first three quarters of 2002, the piracy situation in Thailand has worsened further.

<sup>10</sup> Thailand is a major exporter of manufactured pirate game software.

<sup>11</sup> For example, on January 27, 2003 the Customs Authority at Bangkok Airport held quite unknowingly four parcels sent from Chiang-Rai, a Northern Province of Thailand. The goods in those packages turned out to include 9,000 pirate copies of movies and 10,800 pirate music CDs. Officials are conducting, as this report goes to press, further investigations to identify the origin and intended destination of these shipments. What is apparent from these Customs actions is that optical disc production has migrated to remote areas, i.e., near the Thai-Myanmar border, to avoid detection. It is also possible that the products were produced in China and smuggled into the country through the Northern boundary.

verified that there are 51 optical disc production plants having 102 production lines in Thailand. IIPA also has intelligence that indicates there may be up to 90 factories. The total verifiable disc capacity (not including blank CD-Rs) is 357 million discs per year. Meanwhile, the legitimate domestic demand is only an estimated 60 million units per year.<sup>12</sup> Some plants operate in or near Bangkok, while others operate in more remote areas, particularly near the frontiers with Laos, Cambodia, and Burma.<sup>13</sup> One pirate plant is located directly opposite a major Defense Ministry office in Muangthong Thani, Nonthaburi province. The plants can now easily employ kits to change from CD to VCD to DVD production. As of January 2003, the number of plants capable of replicating pirate DVDs had reached 13 factories having 16 production lines.

## Optical Disc and Other Piracy Decimate the Domestic Market in Thailand

Piracy in many forms harms the domestic market in Thailand. Most retail piracy sales spots, including night markets as well as shopping malls, are well known to authorities, and despite constant raiding, continue operations, such as in Mah-boonkrong, Tawanna, Pantip Plaza, Klongtom, Banmore, Nonthaburi Pier, Tawanna, Bang-kapi and Klong Tom.<sup>14</sup> The following are some examples of the cornucopia of pirated goods/services available in Thailand:

- **Pirate Optical Discs Destroy Legitimate Market in Thailand.** Pirate optical discs of motion pictures, entertainment software, music, business software, and literary materials decimate the legitimate market demand in Thailand. For example, pirate “pre-release” DVDs now make up 40% in Thailand, while 70% of the video CDs (VCDs) within the Thai market are pirate (most of these are also “pre-release,” meaning they have not yet been released in Thai cinemas, thereby destroying the theatrical market as well).<sup>15</sup> The going price for pirate VCDs in the night markets or malls is about Bt90 (US\$2-3) and Bt130 (US\$4) for pirate DVDs. Five pirate DVD titles currently sell for Bt500 (US\$12). Pirate music optical discs proliferated in 2002, with pirate sales reportedly tripling in 2002 compared to the previous year.<sup>16</sup> For some entertainment software companies, there was a slight improvement in the market for 2002. Piracy levels are about 86%, with most pirate product being produced domestically. CD-R “burning” of games is also on the rise. Pirated optical discs (including

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<sup>12</sup> In 1998, by contrast, there were about ten optical disc plants in Thailand with fifteen to twenty manufacturing lines/machines, having a total capacity of 40 million discs per year. In 1999, there were twenty plants with thirty to forty lines/machines, capable of producing 80 to 120 million discs per year. In 2000, there were approximately 50 plants with 100 replicating machines, capable of producing nearly 200 to 300 million discs per year (legitimate consumption and export in Thailand ran at 15 to 20 million discs per year in 2000).

<sup>13</sup> As of late 2001, in addition to the known plants there were “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 other plants 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 understands that 80 optical disc “quality control systems” were purchased in 2001 in Thailand. Usually, one plant will own one quality control system.

<sup>14</sup> In the Klong Tom area alone there are now more than 200 retail piracy stalls, up from 90 in 2001.

<sup>15</sup> 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.

<sup>16</sup> Vendors of pirate music CDs have migrated to outlying areas such as Sri Nakharin Road, Rangsit and Bang Khae, as well as 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, and continued to do so in 2002.

VCDs and DVDs) are increasingly being imported into Thailand, including games from Cambodia and Laos, and Customs officials have failed to take effective action to curb such pirate imports. Retail piracy of business software is endemic and appears to have grown during 2002.

- **Internet Piracy A Growing Phenomenon.** In recent years, an increasing number of international pirate organizations have established an Internet presence in Thailand through websites that take orders for pirate CDs, CD-ROMs and VCDs.<sup>17</sup> As Internet usage grows in Thailand [there are now 18 Internet Service Providers (ISPs) serving an estimated 3.5 million Internet users in Thailand, representing a tripling in the number of users since 2000],<sup>18</sup> 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. Most music piracy is still hard-goods, since it is so easy and cheap to purchase pirated CDs from the market. However, IIPA believes that in the future, Internet piracy will increase as the Internet becomes more convenient and inexpensive.
- **Book Piracy Harms Market for U.S. Published Materials, and Other “Analog” Forms of Piracy Are Still Available.** Piracy of published materials, mainly in the form of illegal photocopies of textbooks, but also involving print piracy of entire books, illegal translations, and adaptations, harms the market for U.S. published materials. Such piracy is rampant around all university campuses, including shops near Chulalongkorn University, the most prestigious university in Thailand, Assumption University, a shop at the student cafeteria at Sripatum University, and a shop on the Mahanakorn University campus. Some publishers have had trouble staying in business and have had to cut many previously offered after-sales services, severely restricting publishers’ abilities to contribute to the development of the Thai educational system and economy. Illegal photocopying is tacitly, and sometimes actively, supported by lecturers, and plagiarism on the part of the lecturers is an increasing problem, due to the Thai government’s urging of lecturers to develop their own materials. The Thai government has been extraordinarily reluctant to intervene and demand copyright compliance by university employees and officials. The government needs to take a more active role in ensuring that university officials, lecturers and students respect protected works.<sup>19</sup> Copyshops make the bogus argument that they are not engaged in illegal copying but, rather, are providing a “service” to customers. Increasingly, pirate photocopies of texts and reprints are being exported out of Thailand. The book piracy situation has become so dire in Thailand that it has become a net export business. Combined exports to markets such as Hong Kong and the United States are estimated at over US\$3 million per year. Pirate videocassettes of motion pictures and audiocassettes of music remain available in major shopping areas in Thailand.
- **Cable Piracy and Public Performance Piracy Sap Into Legitimate Market for Motion Pictures.** 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

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<sup>17</sup> 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.

<sup>18</sup> ITU, Dec. 2002, at [http://www.itu.int/ITU-D/ict/statistics/at\\_glance/Internet01.pdf](http://www.itu.int/ITU-D/ict/statistics/at_glance/Internet01.pdf).

<sup>19</sup> Association of American Publishers members would like to see increased Thai government involvement in 2003 in educational efforts regarding copyright, targeting the general public, grade schools, and universities.

theatrical exhibition, home video, and licensing for broadcast of U.S. motion pictures. Public performance piracy also thrives in Thailand, as many hotels outside Bangkok still transmit unauthorized videos over in-house movie systems, most bars in tourist areas openly exhibit videos without authorization, and a growing number of bars and restaurants have also added “private” rooms to illegally screen U.S. motion pictures. The cable piracy rate, as well as the public performance piracy rate, is estimated at 35%.

- **Good Cooperation from the Thai Government Curtails Corporate End-User Piracy; Some Use of Pirated Software by Businesses and Educational Institutions Remains.** The Business Software Alliance received good cooperation in 2002 from the Thai government in its education and marketing campaigns and on enforcement against the unauthorized use of business software in a commercial setting, so-called “end-user piracy” of business software. As a result of positive activities in 2002, the piracy rate for software in Thailand dropped from 77% in 2001 to 75% in 2002, making it the sixth consecutive year of improvement. Notwithstanding the progress made, corporate end-user piracy remains a problem in Thailand, and raids conducted in 2002 all found evidence of the use of pirated software by businesses. The majority of educational institutions still use pirated software or software without licenses.

## COPYRIGHT ENFORCEMENT IN THAILAND

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS <sup>20</sup>
Number of Raids conducted	52	479
Number of cases commenced <sup>21</sup>	50	280
Number of defendants convicted (including guilty pleas)	49	280
Acquittals and Dismissals	1	199 <sup>22</sup>
Number of Cases Pending <sup>23</sup>	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 <sup>24</sup>	\$119,086 (Bt 5,358,900) <sup>25</sup>	-

<sup>20</sup> These statistics are estimates only, as the data was gathered from manual searches of court files.

<sup>21</sup> This figure includes ten cases in which the alleged offenders fled the scene of the raid. These ten cases may be dropped at a later time if the alleged offenders are not located.

<sup>22</sup> These cases were settled out of court.

<sup>23</sup> This figure does not include cases that have been sent on for appeal.



<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001</b>		
<b>ACTIONS</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
Number of Raids conducted	16	1,549
Number of cases commenced <sup>26</sup>	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) <sup>27</sup>	-

<b>THAILAND CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002</b>			
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
Number of raids conducted	343	19	461
Number of cases commenced	79	18	164
Number of defendants convicted (including guilty pleas)	89	1	183
Acquittals and dismissals	-		3
Number of cases Pending	3	10	161
Total number of cases resulting in jail time	79	1	30
Suspended prison terms		1	30
Maximum 6 months			22
Over 6 months	34		8
Over 1 year	43		-
Total suspended prison terms	77	1	13 yr. 1 month
Prison terms served (not suspended)			-
Maximum 6 months	1		-
Over 6 months	1		-
Over 1 year			-
Total prison terms served (not suspended)	2		-
Number of cases resulting in criminal fines		1	31

<sup>24</sup> This figure reflects all fines levied by the court against the defendants in these cases. These fines include those for Copyright Act infringement as well as all other offences.

<sup>25</sup> These monetary figures are historically accurate based on exchange rates at the time.

<sup>26</sup> This figure includes four cases in which the alleged offenders fled the scene of the raid. These four cases may be dropped at a later time if the alleged offenders are not located.

<sup>27</sup> These monetary figures are historically accurate based on exchange rates at the time.

Up to \$1,000	3		12
\$1,000 to \$5,000	49	1	18
Over \$5,000	25		1
Total amount of fines levied (in US\$)	\$351,032		\$69,788

The Thai government must take steps in 2003 to address mushrooming optical disc production, and the growing fact that organized criminal syndicates are responsible for running much of the illicit production/trade/export of optical discs in 2002. It is crucial that the Thai government have the will and take active steps to curtail and eventually stop pirate optical disc production.<sup>28</sup> The enforcement snapshot below demonstrates the practical difficulties the Thai government is having coming to grips with such a serious problem. All the vehicles of the Thai government enforcement regime (the police, the new FBI-Thai, the prosecutors, and the IP & IT Court) must work in tandem to beat back the severe piracy problem, lest Thailand wishes to compete for the dubious distinction of being the world's number one pirate producer of optical discs for export.

## Thai Government Reshuffling Leads to Uncertainty, Overall Failure to Make Progress Against Piracy

In late 2001, Gen. Pol. Noppadol Soomboonsupt successfully weeded out retail piracy from many markets.<sup>29</sup> Unfortunately, a February 2002 Cabinet reshuffle, in which Gen. Noppadol was removed from his post, resulted in most retail piracy activities returning in full force. In October 2002, the Cabinet was reshuffled again, and a Royal Decree led to the establishment of a new unit, the "Special Investigation Department" ("SID," also known as "FBI-Thai").<sup>30</sup> SID, to be headed by Gen. Noppadol, will be responsible for handling intellectual property infringement cases. IIPA hopes that SID may be operational by May 2003, with approximately 1,100 officers. Largely due to uncertainties arising out of the February 2002 Cabinet reshuffle, and the enforcement vacuum that was left in its wake, enforcement results largely waned in 2002. Missing throughout 2002 was a directive from the Prime Minister to all relevant IPR enforcement agencies to prioritize IPR enforcement in Thailand.<sup>31</sup>

## Fewer Raids in 2002 Embolden Pirates

<sup>28</sup> A recent article indicates that "compact discs" and "computer-program software" will be placed on the Thai government's "controlled-products" list. IIPA hopes that this designation will mean stronger enforcement against piracy in practical terms.

<sup>29</sup> To its credit, the Thai government in late 2001 and early 2002 mounted sustained and high profile operations in Pantip Plaza and other infamous shopping areas. Industry cooperated in these raids and the number of shops selling pirated software declined from over 200 to only a handful, with pirate retailers abandoning their shops or leaving product sleeves on the shelves. Some began approaching potential customers in the malls, sometimes holding only blank discs in case the purchaser was a police agent, and only handing over a pirate disc as the customer left the mall. They even resorted to selling by mail order. Another government initiative involved constant police and industry representative presence in malls known to be selling pirate product; however, this practice had only a limited effect on piracy, as the time delay in lodging a complaint and getting a search warrant for a raid proved too cumbersome and resulted in few raids. After the February 2002 Cabinet reshuffle, retail piracy returned full force. Previously clean malls such as the World Trade Centre, Pata Tiklao and IT Zeer now all have shops that stock pirate software.

<sup>30</sup> SID will reportedly be in charge of special crime, i.e., terrorism and organized crimes, as well as economic crimes, including intellectual property infringement. According to the Decree establishing SID, all responsibilities of the ECID are transferred to SID under Gen. Lt. Pol. Nopadol Somboonsub, who will act as the first Director-General. However, ECID has not been dissolved to this point and reportedly won't be until SID is fully up and running.

<sup>31</sup> In August 2002, the Prime Minister mentioned in public that the government policy is to combat piracy.

The Cabinet reshuffle in February 2002 resulted in net fewer raids for the recording industry, even though the number of potential raid targets increased.<sup>32</sup> *Ex officio* raids also ceased, since enforcement officials no longer raided based on probable cause, but waited for search warrants to be issued by the courts, causing delays and loss of evidence. The government should reinstate the ability for enforcement authorities to raid retailers selling pirate software on the spot. As a result of waning enforcement activity, the pirates have become emboldened, and have no fear of the Royal Thai Police or industry representatives participating in raids. On many occasions in 2002, right owners and their representatives were threatened and in some cases even physically attacked by pirates and their guards.

Regarding optical disc piracy, the government introduced a new policy to remove equipment used to produce pirate optical discs, exercising this power in 2002 to remove at least two replication lines and equipment from four factory raids. Through September 2002, MPA was involved in raids on three pirate DVD factories and one pirate VCD factory, raising the overall total number of factories raided to 53. Some enforcement against Internet piracy also occurred, as the music industry sent nine cease-and-desist letters in 2001, and 24 letters in 2002; only two positive responses came in 2001 (none in 2002). On August 2, 2002 the Business Software Alliance supported the Economic Crimes Investigation Division in raiding an Internet pirate in Bangkok. The pirate sold pirated discs and pornography to a network of customers all over Thailand, and at the time of the raids, discs were being actively copied on CD-R "burners." The perpetrator was arrested, and over 1,000 pirated discs were seized.

## **Beginnings of a Coordinated National Enforcement Plan**

One of the chief reasons enforcement efforts continue to falter in Thailand is the lack of a national plan to combat piracy. Confusion reigned in the wake of the Cabinet reshuffle in early 2002, exposing the Thai enforcement system as weak and subject to the vagaries of politics. The establishment of SID/FBI Thai was a positive move, but lag time in making the Department operational severely hinders prospects for deterrent enforcement in early 2003.<sup>33</sup> Other departments fail to follow their mandate. For example, the Department of Customs has not demonstrated its willingness to seriously engage in border control of IP infringements. It is also essential to begin involving the Department of Intellectual Property in copyright enforcement to counter-balance the power of the Police, although there are limits to what DIP can do given that they have no authority under the copyright law to conduct raids.<sup>34</sup> DIP officials should be

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<sup>32</sup> For the recording industry, there were 461 raids on 2002 and 59,129 items seized. The recording industry reports that since January 2002, only seven optical disc factories and four warehouses were raided, while only 40 retail raids are being carried out per month, a sharp decrease compared to 2001, when there were 1,567 raids, yielding almost that many arrests, and seizures of over 200,000 items. By contrast, for the motion picture industry, there were 277 raids run in 2001 resulting in seizures of over 500,000 items; of those raids, 13 optical disc factories and 24 warehouses were raided. In 2002, 343 raids were carried out, resulting in less than 400,000 items seized, but disappointingly, of those raids, only 6 were against optical disc factories, 9 against distributors and 18 against warehouses.

<sup>33</sup> As the Act establishing the SID and prescribing the scope of its authority and duties has not yet been enacted, it is still unclear how IPR enforcement will be handled by the new Department. Meanwhile, the ECID has no longer been accepting new cases or complaints filed by IPR owners, instead, only concluding IPR cases which had been filed with the ECID prior to the transfer of authorities. New IPR complaints and cases have had to be filed at the Crime Suppression Division and local police stations, since SID is not fully operational.

<sup>34</sup> Since DIP officials have no authority to conduct actions against piracy under the copyright law, DIP should accompany law enforcement or lead law enforcement to conduct raids, as well as coordinate and put pressure on other concerned units to engage in more sustained raiding.

empowered to search, arrest, interrogate, and otherwise investigate piracy cases. In order to combat potential corruption, it is also essential to switch and rotate the various authorities who deal with piracy regularly, in order to retain the integrity of those authorities when dealing with infringers.

IIPA has long been pressing for the development of a national plan giving a higher priority throughout the government, including at the provincial level, to the fight against piracy throughout Thailand. The beginnings of a coordinated enforcement effort emerged in August 2001, when the Prime Minister ordered the creation of the “Committee for Protection and Suppression of Intellectual Property Violations,” chaired by the Minister of the Interior and involving several government departments. Ironically, but not coincidentally, enforcement efforts were set back for months when the Cabinet was reshuffled in February 2002. Even with the establishment of SID/FBI Thai in October 2002, enforcement efforts have not picked up to levels seen in late 2001. Finally, on December 20, 2002, efforts to coordinate enforcement resumed when the Ministry of Commerce (MOC) organized a signing ceremony for a “Memorandum of Understanding on the Cooperation of the Relevant Government Agencies on the Enforcement of Intellectual Property Rights (IPRs),” including 13 government departments.<sup>35</sup> The stated objectives of the MOU are to facilitate the efficient enforcement of IPRs, to strictly implement the existing laws and regulations with regard to IPRs, to improve the business environment, and to increase public awareness. Immediate efforts should now be taken by the 12 departments signing the MOU, to fully implement all relevant laws, including the Copyright Law, Customs Law, Tax Law, Consumer Protection Law and the Sticker Price Law, in order to stamp out piracy. IIPA also agrees that increasing public awareness regarding the ills of piracy should be made a priority in 2003.<sup>36</sup>

## **Steps Taken Against Institutional End-User Piracy**

In 2002, the Business Software Alliance received good cooperation from the Thai government in its education and marketing campaigns and on enforcement against unauthorized use of business software in a commercial setting, so-called “end-user piracy” of business software. Specifically, the Economic Crimes Investigative Division (ECID), prior to its shifting responsibilities (away from copyright) in October 2002, was very helpful to BSA in conducting raids on five companies for suspected use and possession of pirated and unlicensed software. As another example, the ECID section and the Police supported BSA by raiding an Internet pirate in Bangkok, possessing the necessary expertise to collect the forensic evidence from the computers seized during the raid. The Thai government should be commended for its continued vigilance against corporate end-user piracy of business software. Of particular note, the BSA has not had difficulty obtaining search warrants from the Central Intellectual Property

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<sup>35</sup> The departments participating in the signing of an MOU on “the Cooperation of the Relevant Government Agencies on the Enforcement of Intellectual Property Rights” included the Royal Thai Police, the Office of the Consumer Protection Board, the Customs Department, the Revenue Department, the Excise Department, the Department of Industrial Works, the Department of Foreign Trade, the Department of Internal Trade, the Department of Business Development, the Department of Intellectual Property, the Special Investigation Department, the Metropolitan Electricity Authority, and the Provincial Electricity Authority.

<sup>36</sup> It would be most helpful if the government of Thailand set a budget for public awareness and relations campaigns, including educating consumers about the illegality of purchasing pirate copyright material on optical discs, but also, e.g., educating students with regard to book piracy issues, by making it part of the curriculum at the K-12 level, and conducting seminars at the university level; and educating on the need for businesses and educational institutions to ensure that they use only legitimate software. Regarding book piracy, one immediate step that would go far toward solving the problems of publishers in Thailand would be for the government of Thailand to support the establishment of a reprographic rights organization (RRO).

and International Trade Court, usually obtaining them within a couple of hours after a complaint has been lodged.<sup>37</sup> The Thai government, in addition to increasing the awareness of end-user software piracy in general and the harm that it does to the economy and the copyright holders,<sup>38</sup> has whole-heartedly supported BSA in the Software Asset Management seminars that it has conducted in Thailand, sometimes providing high-profile government officials as speakers to open such events.

Notwithstanding the positive achievements in 2002, corporate end-user piracy remains a problem in Thailand. Raids conducted in 2002 all found evidence of the use of pirated software; only three countries in the Asia Pacific Region have a higher business software piracy rate than Thailand. The majority of educational institutions still use pirated software or software without licenses. The Department of Education should take a lead in sending a strong message that the use of pirated software in educational institutions is wrong and will not be tolerated. It is also noted that, in some cases, the officer performing the end-user raid fails to follow up and prepare cases, for example, by issuing a summons to obtain explanations from the director or IT manager of the company raided (and if such explanations are not satisfactory, by issuing arrest warrants against them). Instead, in most cases, the officer waits almost six months (the maximum period for filing a case at the IP & IT Court) before following up.

## **Some Systemic Problems Stymie Enforcement Efforts**

- **Leaks to Targets Destroy Efficacy of Raid:** Right holders in Thailand have had to face the fact that, the larger the raid, the more likely it is that the target of the raid will be forewarned. This fact certainly implicates Thai authorities to some extent, and is a systemic problem that must be addressed.
- **Destruction or Loss of Evidence in (or After) Raids Hinders Effectiveness of Raids:** Targets often destroy evidence before a raid can be run, sometimes by refusing entry for as little as ten minutes. It is not uncommon for a pirate to use grinding machines, specially designed to destroy CDs, or hidden cameras to detect a possible raid. Another technique used by infringers is to ensure that very few illegal items are kept on the premises at any time, while always keeping some legitimate copies of copyrighted works to show the authorities that they are “clean.” After a raid, right holders have difficulty accessing materials or documents seized by the government for further investigation or review. Such lack of cooperation, coupled with other administrative problems, such as extensive documentation supplied by right holders to investigators disappearing after a raid, further hinders enforcement efforts.<sup>39</sup>
- **Evasive Techniques of Defendants Lead to Arrest of “Lackeys”:** Another disturbing problem involves the authorities’ preference to close a case when one person has been

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<sup>37</sup> Such a warrant allows police to enter a suspicious premise and conduct a search and seizure of evidence only in criminal cases under the rules of the Criminal Procedure Code. Although there is no *ex parte* search and seizure order for civil cases, under the Rules of the Establishment of the IP & IT Court, if any party in an IP infringement case fears that evidence of the case might be lost or become difficult to be obtained in the future prior to bringing the case to the court, such party can request that the evidence be seized/attached and examined.

<sup>38</sup> In August 2002, the Prime Minister was the chief guest at an anti-piracy event held in a stadium in Bangkok which attracted tens of thousands of spectators and received wide publicity.

<sup>39</sup> In late 2001, ECID officers admitted mislaying documentation for ten cases from raids done in 1999, requesting fresh sets of documents.

arrested, rather than seeking the key perpetrator, such as the owner or director of an establishment. Such key players use evasive techniques such as fake names and addresses. Particularly when it comes to optical disc piracy, an organized criminal enterprise, the Thai authorities should be instructed to stay on the case, since it is absolutely essential that the directors, owners, and financiers of such operations be brought to justice.

## **IP&IT Court Provides Model for the Region, But Must Step Up Efforts to Resolve Procedural Hurdles and Impose Deterrent Sentencing**

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 in copyright enforcement. The Court's personnel have received specialized training; streamlined procedures have been adopted; and the Court's jurisdiction is broad. Early in its tenure, the IP&IT Court processed cases expeditiously, thus addressing one of the main shortcomings of the old system.<sup>40</sup>

Not only did defendants start serving actual jail time in 2001 as compared to previous suspended sentences, but fines also increased.<sup>41</sup> In that regard, the IP&IT Court has been one of the true success stories in the entire region. Still, the U.S. government should closely monitor the cases still on appeal to ensure that the lower courts' imposition of prison sentences has a deterrent effect. The Court must continue firm sentencing practices, particularly as more operatives from pirate optical disc plants are brought to justice. It should also continue its practice of ordering the forfeiture of optical disc production equipment used to make pirate product, and should extend that forfeiture policy to other cases as well.

One very positive feature of the Copyright Act of Thailand is that it permits a copyright holder to withdraw a criminal case at any time before the court passes judgment. This has proved to be very effective in promoting the settlement of cases, so much so that nearly all cases brought by the Business Software Alliance or its members reach settlement before they enter the court system.<sup>42</sup> The ability to withdraw cases has been crucial to BSA finding a form of redress that is at once not too costly and effective in spreading the message to companies regarding the negative consequences of engaging in software piracy. Any steps to amend the copyright law to take away this procedure should be resisted and rejected, as they would hinder greatly the business software industry's ability to fight corporate end-user piracy.

One feature of the court system that may be in need of some repair involves the extent to which prosecutors are well trained to handle copyright cases before the court. IIPA has received feedback that some of the public prosecutors slated to handle copyright cases may be unfamiliar with copyright, particularly, with "end-user" piracy of business software. In other

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<sup>40</sup> For the recording industry, in 2002, there were 461 IPR criminal cases in the IP&IT Court, 31 of which resulted in convictions. For the motion picture industry, there were 89 convictions in 2002 including guilty pleas (with 79 cases remained pending in 2002).

<sup>41</sup> 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 2002, there were two unsuspended jail sentences meted out in optical disc factory cases, and fines were higher than 2001, totaling more than US\$300,000 in fines. The recording industry had less success, as all the cases resulting in a conviction in 2002 resulted in suspended jail terms and average fines of only about US\$5,000 for each case.

<sup>42</sup> However, there are notable exceptions where some end-user cases that were raided as far back as 1997 have still not entered the courts. Another end-user case from mid-2000 has also not entered the courts.

cases, just as prosecutors receive training in copyright cases, they are transferred out of their offices. IIPA would like the Thai government to ensure that prosecutors handling copyright cases that receive training have an opportunity to apply that training in bringing cases to fruition through the courts.

In addition, several procedural problems with the IP&IT Court have emerged, and should be addressed forthwith:

- **Lengthy Process to Obtain Search Warrant and Unavailability of Nighttime Searches:** The process of obtaining a search warrant in Thailand can take about a half day, which is lengthy, especially when particularly egregious activities are occurring. Worse yet, 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.
- **Burdensome Requirements with Respect to Presumptions of Subsistence of Copyright and Copyright Ownership:** Once a raid has been carried out, 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) as applied in these cases should be remedied.
- **Notarization/Legalization Requirement Unduly Burdensome:** 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.
- **IP&IT Court Should Allow Checks to Pay Fines Be Made Out to Local Representative:** Presently, checks are only issued in the name of the claimant's or victim's company. As many companies do not have representative offices in Thailand, these checks cannot be cashed conveniently, and the process of doing so becomes unnecessarily cumbersome.
- **Court No Longer Allowing Manual Searches of Cases.** Normally, in order to obtain court records, a right holder would send in a request letter, send personnel at its own expense to do a manual search, and request a copy of the record. However, at present, right holders may no longer conduct manual searches, and while the court now has its own personnel to run searches, the staff of the court is overloaded and reluctant to do searches. This creates an extra barrier to obtaining information, and ultimately, to being able to enforce copyright through the courts.

## **MARKET ACCESS BARRIERS IN THAILAND**

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### **Thai Customs Must Cease Reclassifying Motion Picture Film Imports, Unfairly Increasing Duties**

Thailand has traditionally classified motion picture imports (which are generally imported in two parts, a 35 mm audio portion and a 35 mm video portion) at a rate of Bt10/meter (US 23.3 cents), and had even promised to reduce the rate to Bt5/meter (US 11.65 cents). Recently,

however, the Thai authorities have reclassified the audio negative (the soundtrack), unduly increasing the rates charged on the importation of motion picture films (specifically, the rate involves a new *ad valorem* duty equivalent to 20% of the box office revenue remitted outside of Thailand on the audio component). The Thai government must cease this reclassification, which may be inconsistent with Thailand's bilateral commitments (with the U.S.) and multilateral commitments (under the WTO tariff schedules) regarding tariffs on motion picture film imports.

## **COPYRIGHT LAW AND RELATED ISSUES**

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The Thai government's greatest failure in 2002 was its inability to pass and implement a strong law to curtail optical disc pirate production. In addition, little progress was made in passage of an amended copyright law to provide stronger enforcement measures, and to bring Thailand's copyright system up to date with the latest international standards, including those embodied in the WIPO "Internet" treaties. Enactment of cable regulatory controls is long overdue and is needed to help control cable piracy of IIPA members' audiovisual works. Finally, six copyright associations have an application outstanding to the U.S. government to evaluate whether Thailand continues to qualify for benefits under the Generalized System of Preferences (GSP), given the enormity of the copyright piracy problems in the country.

### **Passage and Swift Implementation of an Effective Law to Curtail Optical Disc Piracy Must Become a Top Priority**

An effective optical disc law in the Thailand will aim to weed out optical disc pirates, through robust licensing and controls over optical disc production, controls on imports of production equipment (including stampers and masters) and raw materials, as well as requirements to use unique source identifiers to track the loci of production.<sup>43</sup> In early 2002, a

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<sup>43</sup> The global copyright community has agreed that the key elements of an effective optical disc law include:

- 1) Licensing of Facilities:** Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and "production parts" (including "stampers" and "masters"), including requirements like production take place only at the licensed premises, a license only be granted to one who has obtained "manufacturer's code" (e.g., SID Code) for optical discs and production parts, licensee take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.
- 2) Licensing of Export/Import of Materials:** Centralized licensing of export of optical discs, and import/export of production parts (including "stampers" and "masters"), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- 3) Requirement to Apply Manufacturer's Code:** Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer's code, and to cause each optical disc and production part to be marked with manufacturer's code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including making, possessing or adapting an optical disc mould for forging manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mould or any disc; selling a production part not marked with manufacturer's code, etc.).
- 4) License Record Keeping Requirements:** Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) Registration Requirement for Commercial Optical Disc Duplication:** Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.
- 6) Plenary Inspection Authority:** Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.
- 7) Search and Seizure Authority:** Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.



draft optical disc law reportedly received a stamp of approval by the State Council of Ministers.<sup>44</sup> However, the Juridical Council has reportedly re-worked the original draft, resulting in a much weaker proposal (which IIPA had not reviewed at the time of this filing).<sup>45</sup> Furthermore, there is little prospect that even the weakened proposal will become law soon. We note that even if a proposal emerges from the Cabinet, there exist pressure groups in the National Assembly who remain opposed to passage of a law to effectively eradicate optical disc piracy.

IIPA recognizes that a stop-gap measure has been put into place 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.<sup>46</sup> We applaud the implementation of this measure.

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**8) Government Record-Keeping Requirements:** Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.

**9) Criminal Penalties for Violations:** Violation of any significant aspect of the regime is criminally punishable, including individual liability (fines and/or imprisonment).

**10) Possibility of Withholding, Suspending, or Revoking a License for Prior Copyright Infringement, Fraud in the Application Process, or Violation of the Optical Disc Law.**

**11) Possibility of Closure of a Plant.**

<sup>44</sup> The initial draft was reportedly approved by the Cabinet of Prime Minister Taksin Shinawatra in late 2000. That 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 disc products produced in Thailand. IIPA has had a chance to review a draft from June 2001, but has not fully analyzed later drafts, including the draft that is before the Cabinet. The key features of the June 2001 draft included: a licensing requirement for manufacturers of CDs and other "optical disc products" (including CD-R and CD-RW); requirement that a separate license be obtained for each premise engaging in manufacture; 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 plenary search and seizure authority. Criminal penalties for production of optical discs without a license include up to four years' imprisonment and/or a fine of up to Bt800,000 (approximately US\$18,643). 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." Lesser penalties are provided for various other offenses. For example, production of optical disc without SID code, or production of optical disc 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 Bt400,000 (approximately US\$9,322). IIPA understands that the latest Bill that is before the State Council resolved some but not all of the known issues. Based on our reading of the earlier draft, we note the following as potential problem areas.

- **There is No Express License Requirement for Production of "Production Parts" (Masters and Stampers)**
- **Grounds for Rejection of Application for License Should Not Be Discretionary:** Section 10 provides for discretionary rejection of an application for a 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 offense); or 3) false statements were made on the application or other document. The grounds set forth should be sufficient for rejecting the application.
- **Transfer of Production License Should Not Be Permitted, or Only Permitted With Prior Approval**
- **Grounds for License Revocation Should Not Be Discretionary (see Discussion of Section 10)**
- **Failure to Report "Plastic Seeds" (i.e., Optical Grade Polycarbonate) Should be Punishable Offense**
- **Forcible Entry of Plant in Inspection/Raid Should Be Provided**
- **Grandfathered Plants Are Apparently Not Subject to Grounds for Rejection of a License; They Should Be**
- **Penalties Should Be Doubled for Recidivists**

<sup>45</sup> Reports indicate that the Juridical Council was dissatisfied with the draft, making the argument that it contradicted the Constitution regarding the 'freedom of trade and occupation,' and that it was redundant and overlapped existing legislation, namely, the Act on the Importation and Exportation of Goods B.E. 2522 (1979). Fortunately, the Drafting Group has voted to put forward the original version and requested that the Juridical Council speed up its work.

<sup>46</sup> IIPA understands that on August 10, 2001, 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, and that on November 22, 2001, the Minister of Commerce issued a Ministerial Regulation (Royal Gazette, Gen. Iss. Vol. 119, Sec. 61, January 17, 2002, in force March 17, 2002) on the process to approve the importation of equipment that can potentially be used to infringe copyright. This Regulation appears to be

However, it cannot substitute for a comprehensive optical disc law. IIPA strongly urges that passage of the Bill approved by the Cabinet be given top priority on Thailand's legislative agenda.

## **Failure to Pass Copyright Law Amendments Leaves Thailand's Copyright Regime Stagnant**

In early 2002, a Thai government working group (including the Department of Intellectual Property) indicated that it was likely to embark on amendments to the Copyright Act (last amended in 1995), importantly, to include amendments intended to comply with the WIPO "Internet" treaties, the WCT and WPPT. On March 4, 2002, the Thai government convened a "public consultation" on proposed amendments to the copyright law, including DIP, the Intellectual Property & International Trade Court, copyright owners (local and foreign), academics and members of the Intellectual Property Association of Thailand (IPAT). Subsequent to this consultation, DIP reportedly prepared minor draft copyright amendments (which IIPA has not seen), and thereafter the Juridical Council prepared a more comprehensive draft based on the DIP draft. Public consultations were reportedly scheduled for late 2002. While these reported developments are positive, the process has been less than transparent, and we look forward to the opportunity to provide input from the perspective of the copyright community on this important legislation. It is most important that the Thai government address key aspects of implementing the treaties, by providing express protection for temporary as well as permanent reproductions, and providing an adequate remedy against the act of circumvention of, and the business of trafficking in, technological protection measures used by right owners to protect against unauthorized access to, or unauthorized exercise of rights in, a work.

Since IIPA has not seen the draft prepared by DIP, it is impossible to comment definitively on its content. IIPA understands that the following issues were considered by DIP:

- Whether penalties in the copyright law should be increased. IIPA agrees that penalties on the books, especially fines, in Thailand are non-deterrent on their face.
- Whether Section 66 of the current law, which stipulates that copyright cases may be withdrawn prior to going before the court for judgment, should be repealed. IIPA opposes repealing Section 66, since it could take away the ability of a right holder to withdraw a criminal case before prosecution (in order to settle a criminal case). Such a change could hinder greatly the business software industry's ability to fight corporate end-user piracy, since it frequently withdraws cases prior to judgment as a means to settle claims. If a decision is made to repeal Section 66, the government should ensure that it always remains 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. IIPA strongly supports the Thai government's implementation of landlord liability to help address blatant retail piracy in shopping malls. Such liability is even more

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a positive development, and could potentially be used as a stop-gap means to control the importation of optical disc production equipment. Unfortunately, this stop-gap measure may be proving ineffective against pirate producers, since they are apparently evading the law by bringing in optical disc manufacturing machines in parts.

crucial given the expansion of pirate retail outlets to other shopping malls recently. Just the threat of landlord liability had a deterrent effect in 2002.<sup>47</sup>

Meanwhile, one report indicates that there may be a competing draft amendment to the Copyright Act that sits in a sub-committee below the Cabinet level,<sup>48</sup> but that sub-committee (the Sub-Committee on Economic Law) includes no representative from DIP, indicating both a lack of cooperation among governmental agencies, and that the Cabinet draft may not incorporate DIP's proposed changes. Again, IIPA has not seen a draft from the sub-committee, so cannot comment definitively, but IIPA understands that the Sub-Committee proposed amending the Copyright Act in several specific areas, including:

- to separate the right to "distribute/sell" from the right to "communicate to the public."<sup>49</sup>
- to grant copyright protection to persons who created work in the course of employment, ordered or controlled by governmental authority.<sup>50</sup>
- to entitle an "exclusive licensee" a right to bring a civil action against infringers for damages lost from copyright infringement.<sup>51</sup>

IIPA also notes some other needed changes to the Copyright Act and related laws in order to make enforcement more effective in practice. First, it would greatly enhance the ability to enforce against copyright infringement if intellectual property infringement is made a money laundering offense. Second, in order to combat illicit reproduction of books by copyshops more effectively, the government should amend the Copyright Act to close a loophole argument currently being used by copyshops to get cases against them thrown out of court – namely, the argument that they are merely providing “a service to customers.” Specifically, it should be made an offense ‘to make for sale or hire or reward an infringing copy of a work.’<sup>52</sup> Such a provision would eliminate the copyshops’ argument. Second, it should be made an offense to possess substantially identical reprographic copies of a copyright work as published in any literary, artistic, or dramatic work capable of reprographic copying.<sup>53</sup>

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<sup>47</sup> On December 20, 2002, the Deputy Minister of Commerce, Mr. Watana Muangsook, decided to file an offence against landlords who let or sub-let their premises to piracy. After release of this news, the government reported that the sale of illegal products in major areas such as Pantip Plaza and Tawana fell off dramatically.

<sup>48</sup> A Prime Ministerial Order, Order No. 46/2546, was issued in September 2002, with the objective to simplify the legal code such that laws deemed obsolete or obstructive to the development of the economy, society, politic and administration would be abolished. The Committee on Law Studying was established to review all existing laws for the purpose of carrying out the Order. In the Sub Committee's deliberation, it was decided to reexamine the Copyright Act, but for different reasons than the DIP review.

<sup>49</sup> The apparent intent of this change would be to provide for a “first-sale”-type doctrine (national exhaustion) as to physical copies of works that are distributed. Since the rental right and the “communication to the public” right would then separately be provided for, IIPA assumes that those rights would not be subject to national exhaustion.

<sup>50</sup> It is presumed that the addition of a provision dealing with works commissioned by the government will have no effect on provisions dealing with ownership of a work, for example, Section 10 (which provides, “Copyright in a work created on a commission shall vest in the employer”).

<sup>51</sup> IIPA would have no problem with such a provision, as long as the copyright owner reserves the right to bring suit.

<sup>52</sup> The government of the Hong Kong SAR has recognized such a problem, and has proposed a similar fix in its Copyright (Amendment) Bill 2002, draft clause 2, § 118(1)(a).

<sup>53</sup> The government of the Hong Kong SAR has similarly recognized the need to strengthen enforcement against copyshops illegally reproducing books, and has introduced a similar prohibition in its Copyright (Amendment) Bill 2002, draft clause 2, § 118C. The Association of American Publishers has commented favorably on the proposed Hong Kong provision (with some specific reservations).

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 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 protect technological protection measures used by copyright owners to protect their works. The WCT went into force on March 6, 2002, while the WPPT went into force on May 20, 2002. By updating its copyright regime for the digital age, Thailand would position itself as a leader within the APEC and ASEAN communities in the adoption and implementation of modern intellectual property regimes.<sup>54</sup>

## **Questions Regarding Liability of ISPs Unresolved**

Many questions with respect to the law concerning ISPs remain unresolved. A law dealing with ISPs in Thailand has been enacted,<sup>55</sup> and went into force in early 2000, but the National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of that law, has not been established. Currently, ISPs operate their business under agreements made with the Communications Authority of Thailand (CAT). ISPs must comply with contractual agreements with CAT, requiring the ISPs to control, verify, or warn their customers not to use their services in ways that contradict any laws. Regarding an ISP's duty to take down infringing material, at present, ISPs are not obligated to immediately remove or take down an infringing website, but the police and copyright owners may request an ISP to remove an infringing website from its system when there is evidence of infringement. The police may also request ISPs to provide information regarding the identity of the persons operating a website when such information is required for investigation or when there is evidence of infringement.

## **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 government agency that issues and renews cable TV licenses, the Public Relations Department, currently does not enforce copyright compliance as a licensing condition. The PRD claims it does not have a mandate to enforce intellectual property rights, and that such responsibility falls to the Department of Intellectual Property. The PRD should take appropriate steps to ensure copyright compliance when issuing or renewing TV licenses.

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<sup>54</sup> Coming out of the October 2002 APEC Ministerial in Los Cabos, Mexico, was the "Statement to Implement APEC Policies on Trade and the Digital Economy" (Leaders' Statement), including the following statement regarding WIPO treaties ratification/implementation:

[APEC Member Economies] will ratify and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty as soon as possible. If an Economy is a non-Member of WIPO, it will implement the provisions of these treaties as soon as possible. For any Economy in the process of reviewing accession or implementation, it will commit to completing that review as soon as possible.

<sup>55</sup> Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000).

The draft broadcast legislation 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 Bt2 million (US\$46,800). Stronger penalties are needed if this law is to be effective. Unfortunately, the Bill is still pending. Other legislation passed in January 2000 – the Frequencies Management Act – created a National Broadcasting Commission, but selection of its members has been delayed.<sup>56</sup> The cable Bill is unlikely to make any forward progress until the National Broadcasting Commission is formed. This commission should be appointed promptly and given the authority to fight cable piracy, and to guide policies on commercial issues including foreign investment and advertising restrictions. Foreign investment in pay television is presently capped at 25% and should be increased. In addition, the ban on advertising on pay television should be removed.

## Generalized System of Preferences

Thailand currently 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.<sup>57</sup> Those deficiencies include: the growing optical disc piracy problem in Thailand; the lack of effective optical disc 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. In the first 11 months of 2002, \$2.1 billion in duty-free goods entered the U.S. from Thailand duty free under the GSP Program (approximately 15.5% of its total exports to the U.S.).<sup>58</sup>

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<sup>56</sup> The National Communication Resource Management Board has not yet completed its process of forming the Commission due to the fact that the proposed board was rejected by an Administrative Court. According to sources, the Commission is not expected to be set in place for at least another year.

<sup>57</sup> 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.

<sup>58</sup> In 2001, \$2.1 billion in duty-free goods entered the U.S. from Thailand duty free under the GSP Program (approximately 15% of its total exports to the U.S.).

# **WATCH LIST**

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# BANGLADESH

### EXECUTIVE SUMMARY

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Bangladesh should be placed on the Watch List. The piracy rate in Bangladesh for sound recordings is close to 100%, due in large part to a lack of enforcement of Bangladesh's Copyright Act. In addition, two optical disc manufacturing plants are operational and further plants are likely to be opened, which could produce optical discs for the pirate market. There are also numerous CD-R duplication units operating in Dhaka.

Bangladesh has not appeared on the Special 301 list.

Bangladesh remains a cassette-dominated market. The market size is estimated at two million units of music cassettes per month and 0.7 million audio CDs per month. CD penetration for all formats is expected to increase significantly over the next two to three years, partly due to smuggling of CD players from Taiwan and China.

In 2003, the Government of Bangladesh should take several steps to address piracy:

- Crack down on pirate production facilities (especially pirate optical disc plants and CD-R duplication units) and pirate retail outlets through sustained raids by enforcement authorities (including surprise inspections), followed up by swift police investigations, efficient handling by prosecutors, imposition of deterrent penalties and destruction of all infringing articles as well as materials and implements used in the pirate activities.
- Enhance border enforcement, especially including seizures of imports and exports of pirated audio CDs, CD-ROMs and cassettes, and the tracking of machinery and parts (including masters and stampers) used to produce such pirated goods, including optical disc production equipment.<sup>1</sup>
- Promptly pass and implement an optical disc law to regulate optical disc production, production equipment, raw materials and facilities.
- Promptly accede to and implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and update the Copyright Act.

### COPYRIGHT PIRACY IN BANGLADESH

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Piracy levels are extremely high in Bangladesh. The recording industry reported that the piracy rate for music cassettes, still the dominant format, totalled 96% for all types of repertoire. Repertoire sold on cassettes is 80% Indian (Hindi), 16% Bangladeshi and 4% international. The annual retail turnover for both legitimate and pirate product is 160 million BDT (Bangladeshi taka) (US\$2.76 million). The retail price for local cassette albums is 35 BDT (US\$0.60),

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<sup>1</sup> Because the Motion Picture Association does not have an anti-piracy operation in Bangladesh and would not be in a position to support Custom's actions against piratical import or export of pirated DVDs or VCDs, MPA is not requesting the Bangladesh Customs authorities to focus on intercepting optical disc products containing American filmed entertainment at this time.

compared with 30 BDT (US\$0.52) for pirate cassette albums. The piracy rate in the CD sector is 100% for regional (Indian) and international repertoire, and 85% for local repertoire.

Pirate optical discs are both produced locally and imported from abroad. It is estimated that at least 50% of pirated CDs are smuggled into Bangladesh from Pakistan, Sri Lanka, Singapore, Malaysia and other channels. A manufacturing plant in Dhaka is producing at very high capacity and a second plant opened up recently. Tourists from neighboring countries also contribute to pirate sales.

There are at least 30 to 45 CD-R duplication units in Dhaka, ranging from sophisticated European stand-alone duplicators to PC workstation duplicators. Although not confirmed, some industry officials estimate that the Bangladeshi market for audio and videos CDs is almost entirely supplied by these CD-R facilities and that there are as many as 60 CD-R duplicating facilities operational in the entire country.

Bangladesh, especially the city of Dhaka, today displays a scenario dangerously similar to Pakistan in 1997, one year prior to the establishment in Pakistan of the first of the eight currently operating CD plants. Currently in Bangladesh there is one fully functional optical disc manufacturing plant, and a second plant that recently became operational, in addition to the CD-R duplication units. It is only a matter of time before other parties also venture into CD production unless immediate action is taken.

It is very sad to note that Sunbeam, the official agent of one of the most important record companies in the region (Saregama) in Bangladesh, is considering closing its HMV business in Bangladesh due to financial losses it accrued mainly due to piracy. Sony Music, which has already delayed its launch in Dhaka, could face a similar scenario. Sunbeam is now thinking of changing its business from audio cassette production to blank CD-R production and is in negotiation with European companies for the purchase of a blank CD-R-producing plant for installation in Dhaka.

Different sources confirm that Bangladesh is importing 1 million blank CD-Rs from China and Taiwan per month. The price of a blank CD-R is \$0.07 (seven cents) per unit.

## **COPYRIGHT ENFORCEMENT IN BANGLADESH**

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There is little or no enforcement of Bangladesh's recently amended Copyright Act.

Bangladesh should step up its efforts to crack down on pirate production facilities (especially optical disc plants and CD-R duplication units) and pirate retail outlets. The government should organize sustained raids by enforcement authorities (including surprise inspections), followed up by swift police investigations, efficient handling by prosecutors, imposition of deterrent penalties and destruction of all infringing articles as well as materials and implements used in the pirate activities.

Another important initiative should be the enhancement of border enforcement, including seizures of imports and exports of pirated audio CDs, CD-ROMs and cassettes, and the tracking of machinery and parts (including masters and stampers) used to produce such pirated goods, including optical disc production equipment.



## **COPYRIGHT LAW AND RELATED ISSUES**

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The Copyright Act of Bangladesh went into effect in July 2000. Bangladesh should take the opportunity to update the Copyright Act in order to combat piracy and pave the way for intellectual property industries to develop, invest and create jobs.

In addition to the rights granted in the Copyright Act, Bangladesh should accede to the WIPO Performances and Phonograms Treaty (WPPT) as well as to the WIPO Copyright Treaty (WCT) and should update the Copyright Act to comply with the treaties. Accession and implementation of these two treaties ensures that the legal framework in Bangladesh offers an adequate basis to fight international piracy, ensures the protection of Bangladeshi right holders in foreign territories, and supports the development of electronic commerce in the region.

In this context it is essential that Bangladesh grant producers of sound recordings exclusive rights for the communication to the public, public performance and digital transmission of their works. An adequately broad right of communication to the public ensures that right holders enjoy adequate protection for all commercially significant uses of their works, including the making available of works so that individual members of the public are able to access them from a place and at a time of their liking. The granting of such a right guarantees right holders protection in new forms of communication, such as digital media. The public performance right is also very important for the protection of all categories of works.

Bangladesh should revise its reproduction right for works as well as for neighboring rights, including for record producers, to include express protection of reproductions, whether temporary and permanent, partial and whole, or direct or indirect. The reproduction right continues to be a pivotal economic right in the new digital environment. A sufficiently broad reproduction right is essential on the one hand to enable right holders to devise and implement new licensing models and on the other to fight all forms of piracy.

The Copyright Act should be amended to provide adequate protection for all right holders against the circumvention of technological protection measures (TPMs), including access and copy controls, used by right holders to protect their works against unauthorized uses, as well as adequate protection against the manufacture and trafficking of devices and offering of services/information that enable the circumvention of such technological measures. The Bangladesh government should also add provisions prohibiting the illegal removal and altering of rights management information and the trafficking of copies that contain tampered-with information. Such amendments would deal with key WIPO treaties requirements.

The exceptions and limitations to exclusive rights in the current Copyright Act are very broadly formulated and should be amended in order to avoid prejudice to right holders' legitimate interests, which would be inconsistent with Article 13 of TRIPS (which requires that exceptions and limitations to exclusive rights comply with the well-established "three-step test"). It is important that exceptions, such as the exemption for private copying, are sufficiently narrow so that broad unauthorized uses are not unintentionally permitted.

TRIPS also requires civil and criminal sanctions that constitute a deterrent to further infringements as well as provide for adequate compensation to right holders for injury suffered due to infringement. Bangladesh could achieve this objective by offering injured right holders the opportunity to select pre-established (i.e., statutory) damages, and by substantially increasing the minimum and maximum fines and sentences for criminal offenses.

In order to fight piracy and protect its right holders, Bangladesh should enact an optical disc law to regulate optical disc production, as well as the import and export of raw materials, equipment and parts. An optical disc law would enable local intellectual property industries to develop and thrive.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# BULGARIA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Bulgaria be added to the Special 301 Watch List in 2003. Resurging problems with the production and ongoing problems with the importation of pirated optical disc (OD) media, along with persistent ineffective enforcement, require heightened bilateral attention. Bulgaria last appeared on a USTR Special 301 list in 1998, after the conclusion of a Section 301 trade investigation.

**Overview of key problems:** Piracy, especially optical media piracy, has returned massively to Bulgaria, after a brief absence in the late 1990s. Legal reforms adopted in the 1990s to regulate the production and distribution of optical disc media worked well then to halt the exportation of pirated OD product, but, over time, loopholes and shortcoming were revealed and conveniently used by the illegal manufacturing companies. Recent deregulatory zeal by the Bulgarian government in 2002 jeopardized some of the existing CD regulatory regime elements. High-level international intervention was necessary to avoid the total abolition of certain elements. In addition, Bulgaria's CD plant licensing system is currently up for renewal, and efforts are underway to implement a new optical media licensing system. Large-scale manufacturing may reappear for the following reasons: the 2002 deregulation of the decree on the importation of polycarbonate and stampers used in the manufacture of optical discs; the negative attitude of certain elements in the Bulgarian government with respect to the regulation of optical media production; and law enforcement's failure to properly supervise ongoing OD manufacturing activities. There are now five plants operating in Bulgaria: CHSL, TOT (Sofia), Media Sys, Optical Storage (Stara Zagora), Silver First (Plovdiv). Additionally, there is one plant (formerly Unison) in Botevgrad, and one (formerly DZU) in Stara Zagora, both believed to be non-operational and without licenses.

The markets in Bulgaria are still swamped with pirated product and Bulgaria's overall enforcement system continues to be dramatically ineffective. Estimated 2002 trade losses due to piracy amounted to \$39.4 million. There is relatively good cooperation between the industries and the tax police on anti-piracy actions; in fact, the level of raiding activity and market inspections increased in the end of 2002 and early 2003. The industries look for continued cooperation with law enforcement. MPAA notes that BullAct, the local anti-piracy organization for the audiovisual industry, has a very active program against video piracy and optical disc piracy and enjoys excellent cooperation from law enforcement authorities. In other instances, the national police, however, fails to cooperate at critical moments. A serious bottleneck remains at the prosecutorial level; cases are not moving forward, and as a result, there is little chance for the judiciary to issue sentences. Furthermore, for those few cases which do reach final judgment, the sentences are not deterrent, are usually suspended, and involve low fines. The courts also continue to have difficulties in expeditiously issuing injunctive orders and sufficient damages in civil copyright infringement cases. Bulgaria's 1993 Copyright Law has been amended several times, most recently in mid-2002. However, the copyright industries report that troubling provisions remain in the law. As a result, Bulgaria's implementation of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (of which it is a member) may not be fully adequate to meet the needs of the industries in the Internet age.

## **Actions which the Bulgarian government should take in 2003**

### **Enforcement**

- Review and effectively enforce its regime regarding title verification, CD plant licensing and polycarbonate tracking. While measures in place appear to be more than adequate to prevent piracy, they are in fact seriously flawed and have been shown to be so over the last two years. To the extent that elements are going to be amended and/or enhanced, the expert input of the copyright industries on developing a comprehensive optical disc regulatory regime is imperative;
- High-level government officials should instruct the enforcement agencies, including the national police, to make piracy a priority and to set goals for tough anti-piracy sanctions. They should also recognize that organized crime elements are involved in piratical activities and, consequently, instruct the National Service for Combating Organized Crime to significantly step up their actions against crime syndicates involved in copyright theft;
- Increase enforcement actions against those selling and distributing infringing copyrighted products in the streets, in retail stores and in markets throughout the country and effectively enforce in all major cities in Bulgaria the local decrees prohibiting street sales of copyrighted products, such as CDs and cassettes;
- Improve judicial issuance of adequate civil remedies in business software cases, including the issuance of *ex parte* civil searches, damages, and injunctive relief;
- Focus police enforcement action on larger software end-user targets;
- Improve border enforcement to halt the importation of piratical products, especially optical media products;
- Provide the tax authorities with the competence and mandate to seize infringing copyrighted products and impose administrative sanctions (fines);
- Instruct law enforcement bodies, judiciary and courts not to return pirated goods to the market, but to destroy these goods as a rule.

### **Law reform and decrees**

- Amend the criminal procedural code, introducing presumption of rights ownership for criminal infringement cases, and allowing rightholders or their representative organizations to assist in preparing expert opinion reports concerning infringement of their intellectual property rights.
- Instruct the judiciary and the courts to accept affidavits from rightholders as sufficient proof for their identification. At present, rightholders are required to present a bulk of documents which are very difficult and sometimes impossible to obtain as they are unknown to foreign legal systems (in most cases rights of international companies are affected);
- Increase criminal sanctions in the Penal Code for copyright infringement up to deterrent levels;
- Encourage the issuance and implementation of a decree which would require that federal, state and municipal government agencies procure and use only legitimate business software programs;
- Consult with rightholders for any reform related to the optical disc regulatory regime.

**BULGARIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	3.0	20%	3.0	20%	3.0	25%	4.0	25%	4.0	35%
Records & Music	7.2	83%	3.0	65%	NA	NA	NA	NA	125.0	90%
Business Software Applications <sup>2</sup>	7.0	72%	8.3	75%	8.1	78%	9.1	80%	10.7	93%
Entertainment Software	21.9	91%	NA	84%	NA	NA	NA	NA	66.5	99%
Books	0.3	NA	0.3	NA	NA	NA	NA	NA	0.5	NA
<b>TOTALS</b>	<b>39.4</b>		<b>14.6</b>		<b>8.1</b>		<b>NA</b>		<b>207.7</b>	

**Two bilateral agreements affecting IPR:** 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.<sup>3</sup> In April 1995, 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.

The 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

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and estimated piracy losses is described in the IIPA’s 2003 Special 301 submission, which is posted on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$9.4 million at 81% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> Bulgaria adopted a new copyright law effective August 1, 1993, but the law was deficient, 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.

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. As a result, amendments to the TVD were passed by the Bulgarian government and new plant licensing procedures of operation were introduced in 1998. Later, the decree was once again amended to cover not only the licensing of CD manufacturers, but also those who manufacture matrices/stampers for CD production. Also in 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. (A more detailed explanation of this system appears at the end of this report.) By not providing effective enforcement against piracy, Bulgaria is in breach of its two bilateral agreements with the United States.

**GSP, WTO and the EU:** 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.<sup>4</sup> Bulgaria joined the World Trade Organization (WTO) in 1996 and is currently obligated to have implemented both the letter and the spirit (performance) of the TRIPS Agreement. The European Commission too has identified problems with inadequate copyright enforcement in Bulgaria and called on that government to intensify measures to combat piracy and counterfeiting, strengthen border controls, and improve coordination between enforcement bodies.<sup>5</sup>

## **COPYRIGHT PIRACY IN BULGARIA**

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### **Optical Media Developments**

Optical media piracy has been growing in Bulgaria during the last years, a tendency which continued during 2002. Indeed, the domestic market is flooded with pirate optical discs. Finished discs are mass-imported from other countries and the growing CD-R piracy (every second pirate disc sold is now believed to be a CD-R) is allegedly a domestic duplication problem.

Between 1994 and 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. The introduction of the TVD 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.

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<sup>4</sup> For the first 11 months of 2002, \$26 million worth of Bulgarian goods (or 8.1% 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 39.9% increase over the same time period last year. For more detailed information on the history of Bulgaria under Special 301 review, see appendices D and E of this submission.

<sup>5</sup> To access the European Commission's October 2002 annual report on EU enlargement and Bulgaria, go to <http://www.euractiv.com/cgi-bin/cgint.exe/?1100=1&204&OIDN=1504033>.

**Plant capacity:** There are now five plants operating in Bulgaria: CHSL, TOT (Sofia), Media Sys, Optical Storage (Stara Zagora), Silver First (Plovdiv). Additionally, there is one plant (formerly Unison) in Botevgrad, and one (formerly DZU) in Stara Zagora, both believed to remain non-operational and are without license. This totals five operational lines plus four non-operational lines, giving an operational capacity of 31 million, and a potential of 46 million, should the lines believed to be non-operational be included. Media Sys has mastering facilities. Inoperative mastering equipment is believed to exist in Stara Zagora with the former DZU plant.

HEMUS GROUP Ltd is a production line which appeared mid-2001 and was licensed in October 2001. This license was revoked in September 2002, following an earlier raid at the end of July. After that the line was swiftly sold to another company (TOT 2002), the new company immediately applied for a production license and was granted one in December 2002.

**Seizures:** The recording industry reports seizures of 136,792 pirate CDs, CD-Rs and MCs in 2002, which contrasts with unconfirmed official reports from the Chief of the Copyright and Neighboring Rights Directorate in the Ministry of Culture,<sup>6</sup> suggesting Bulgarian enforcement authorities seized between 250,000 and 300,000 pirated CDs in 2002. The Directorate is in the process of drafting two copyright ordinances which are expected to be adopted by April 2003; one involves the licensing and distribution of CDs and CD matrices, and the second involves the use of legal software by the state and municipal authorities. IFPI and local BSA representative are closely involved in this.

## **Piracy levels remain high, and Internet piracy is on the rise.**

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. From 1998, Bulgaria became an import market swamped with illegal CDs from Ukraine, Russia and Montenegro, and later Serbia. In addition, there is a large and fast growing pirate CD-R market. This phenomenon has been exacerbated by the fact that the sole CD-R plant that was operating in Stara Zagora has now been added to in 2002 by another in Plovdiv. The likelihood of blank CD-R production moving straight into the pirate chain of unauthorized burning and distribution is greatly increased. In addition, Bulgarian licensing regulations do not oblige CD-R production to use SID codes. As indicated above, the Bulgarian mastering facility, which left the country having been involved in the production and export of illegal masters, could re-enter the country under (purportedly) different ownership. Piracy of foreign sound recordings remained unacceptably high in 2002 with 83% of all foreign sound recording sold being illegal copies. The overall piracy level in Bulgaria for all repertoire is 66%. Estimated trade losses to U.S. companies due to recording piracy in Bulgaria is placed at \$7.2 million in 2002.

The Motion Picture Association of America (MPAA) reports that the most significant problem facing its industry in Bulgaria is the threat posed by pirate digital media, with piracy levels of 20-25%. Although videocassette piracy still exists (8-10% piracy levels), pirate optical discs and the Internet have overshadowed its impact. Unfortunately, it is expected that this trend will continue. Internet cafes are growing in popularity, serving as the conduit for an increase of movies burned onto CD-ROMs. Consumers use high-speed access to download films and burn them onto discs. The cafes also serve as centers to rip and copy DVDs. The distribution of films through informal networks and chatrooms has made the Internet one of the most popular methods for distribution of

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<sup>6</sup> Bulgarian News Agency, "Authorities Seize 250,000-300,000 Pirate CDs in 2002," January 10, 2003.

pirate product in Bulgaria. In addition to the Internet, pirate product enters the country in the form of illegal VCDs and DVDs. These discs are professionally pressed in Russia or the Far East and are affecting the legitimate home entertainment and theatrical markets. Shipments that have been stopped in transit to neighboring countries of Turkey, Romania, and Yugoslavia indicate that the country is being used as a transshipment point. Videocassette piracy still exists in the form of back-to-back copying of new titles and of pre-release titles sourced from pirate VCDs and DVDs. Most stores that engage in videocassette piracy are small outlets dispersed throughout the country. MPAA believes that there are currently no large, illegal duplicators of pirate optical discs or videocassettes in Bulgaria. 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. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Bulgaria are estimated to be approximately \$3 million in 2002, with an overall piracy rate of 20%.

For the entertainment software industry, market stalls and regular retail outlets selling pirate videogame products remain a key problem. Internet piracy is growing and Internet burn operations are increasing too. Piracy of entertainment software products are occurring increasingly through Internet café operations. There are over a thousand Internet cafes in Bulgaria, only about 300-400 of which use licensed entertainment software products. In many cases, the cafes allow their customers to burn illegal downloads off “warez” (a term meaning illegal software) sites, for a fee. Newspaper advertisements also flaunt CD burning of game software. The Interactive Digital Software Association (IDSA) reports that most of the industrially produced pirate CD-ROMs (silver discs) of PC games and games for the PlayStation® are being imported from Russia. There also appear to be silver discs of PlayStation2® products coming in from Serbia. Doing business and anti-piracy activities can be quite dangerous; one local distributor of legitimate product was attacked in mid-2002 in a calculated manner, possibly by persons involved with organized crime. IDSA estimates that the overall value of pirated entertainment software products present in Bulgaria was \$21.9 million in 2002, with an estimated piracy level of 91%.<sup>7</sup>

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 \$7.0 million for 2002, with a piracy rate of 72%. 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 (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). Although BSA continues to experience very good cooperation overall from the police, the lack of actual prosecutions and court decisions has kept the piracy rate at an

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<sup>7</sup> IDSA has revised its methodology for deriving the value of pirate videogame products in-country and is able to report 2002 estimates.



unacceptably high level. As a result, within the last three years, out of over 122 criminal prosecutions filed, only four have reached settlement and not a single one has produced a court sentence. The others, despite BSA's efforts, are not likely to be brought to court in the foreseeable future.

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 2002 continue to be are \$300,000.

## **COPYRIGHT ENFORCEMENT IN BULGARIA**

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In summary, the key elements for effective action are: (1) increased 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 rightsholders to conduct targeted raids throughout the country.

### **Interagency Coordination**

**Inter-Ministerial Council (1997):** 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 (Decree No. 120/1997). 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 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.

The Inter-Ministerial Council for the Protection of Copyright and Neighboring Rights was abolished in July 2002 by decree, when the Council of Ministers repealed the 1997 decree. In November 2002, a new council was formed with an ordinance issued by the Minister of Culture. The new council includes representatives from the Ministry of Culture, the Ministry of Economy, the Ministry of Interior and the Customs Service. Unfortunately, once again this body does not include representatives of the copyright industries. This new group has not even held a meeting yet.

**Task force (2001):** 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 met for only two sessions in 2001

without any result whatsoever. The new government was supposed to pass a decree designating the new members of the council and the task force. However, this Task Force was also dismissed and no new initiatives for its re-establishment have been undertaken by the new council.

The Ministry of Finance's General Tax Directorate recently joined the anti-piracy fight in Bulgaria.

## **Title Verification and CD Plant Licensing**

In 1996, Bulgaria adopted a title verification system in 1996 to crack down on illegal production (Decree 87/96). The decree was amended in April 1997 to include the registration of CD-ROM manufacturing (even though it was limited to manufacturing, not distribution, orders). The 1998 amendments introduced 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. In March 1998, the Ministry of Interior was quite successful in implementing the TVD plant licensing system.<sup>8</sup> 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.

**Current licensed CD plants:** The plant 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 supposed to be undertaken by economic police within the Ministry of Interior and its units. Here is a summary regarding the current known CD plants in Bulgaria:

- The state-owned DZU plant in Stara Zagora, with an estimated capacity of 7.4 million discs per year, 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 3.7 million disks.
- UNISON CDM in Botevgrad with two lines and an estimated capacity of 7.4 million discs per year is not licensed and not operational.
- TOT 2002 in Sofia is a production line with a capacity of 5.2 million disks annually, and is licensed and operational.
- OPTICAL STORAGE is a CD-R production line operating in Stara Zagora, with a production capacity of about 7.7 million CDs or blank CD-Rs annually.
- SILVER FIRST is a CD-R production line operating in Plovdiv, with a production capacity of about 7.7 million CDs or blank CD-Rs annually.
- MEDIA SYS is a newly established DVD plant operating in Stara Zagora. Its DVD production line has a maximum annual capacity of about 4.4 million units. There is one mastering facility, which is also licensed and operational.

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<sup>8</sup> 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.

The estimated overall production capacity for the country, therefore, is approximately 31.5 million discs, with a further potential of 15 million discs should inoperative equipment be licensed.

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 give the Ministry of Culture additional means to carry out proper title verification and post-production controls. This should be made 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.

Long-suspected concerns about weaknesses in the checks and control measures of the current system were proven to be well-founded by the cases of Kyralfa mastering plant (potentially unauthorized mastering to a massive scale), and the discovery of illegal production by, and subsequent closure of, the HEMUS plant. The liability of key personalities of both these plants has not been pursued by the authorities. Indeed, in the case of HEMUS, key personalities, along with the plant equipment, have simply moved into the newly created TOT 2002.

Of continued concern is that a licensed manufacturer is able to hold as many moulds—including non-coded moulds—as they wish, since it effectively is the production of non-coded discs that constitutes an infringement. In the absence of an obligation on the plant to declare and submit moulds for examination, and of regular, proactive checks, a plant can undertake illegal production. (Two examples of the need for proactive and regular checks: in 2001 it was established during a visit to Hemus by IFPI representatives that the plant had been producing discs with a non-coded mold, thereby by-passing the requirement in a manner which would allow them to produce both coded and non-coded discs with the same mold; at the end of 2001 a batch of mastering substrates being exported by the Kyralfa mastering facility were uncovered by customs. These substrates had been involved in the mastering of unauthorized material, and their being in Kyralfa’s possession should have been identified by the security measures in place.)

**Deregulatory zeal in 2002 jeopardized the various OD-related decrees:** In mid-2002, copyright sectors representatives, joined by U.S. government and EU officials, expressed opposition to Bulgaria’s attempts to rescind and/or reconfigure some of the key decrees which regulate optical disc production in Bulgaria. To the best of our knowledge, here is the current state of play:

- The CD plant licensing regime (Title Verification Decree No. 87/96) will not be abolished, nor will it be converted to a registration system. Obtaining this result was a major victory.
- The importation of optical disc grade polycarbonate and stampers, which used to be regulated by Decree 233/2000, seems to have been caught up in deregulatory zeal. Despite strong protests from the U.S. government, a decision by the Council of Ministers on November 14, 2002 abolished this system. Fortunately, such a registration schedule is now included in Section 7 (Articles 39-41) of the new draft OD plant licensing and title verification decree, and, if adopted by the Council of Ministers, will reactivate this registration of

polycarbonate and stampers. The obligation to register the importation of optical disc grade polycarbonates and stampers is an essential element for the accurate and effective enforcement of an optical disc law.

- The draft “Act on the Limitations of the Administrative Regulations and Administrative Control over Business Activities” was submitted to the Parliament on December 9, 2002. There is no information that it has passed first voting in the plenary session. The draft act provides that the activities listed in its Appendix 1 are subject to licensing, and manufacturing of CDs and stampers was included in that appendix, at the very last moment.

The 2002 Amendments to the Copyright Law provide for obligatory licensing of CD manufacturers. The terms for such licensing, as well as the conditions for the production and distribution of CDs and other carriers embodying subject matter of copyright and neighboring rights, are to be outlined by the Council of Ministers. In November 2002 the drafting of a new decree began. The leading ministry is the Ministry of Culture. Representatives of the copyright industries (BAMP, BullAct and BSA) took part in the preparation of the Draft. On February 7, 2003, the draft decree was sent to the other ministries for consideration. The Ministry of Culture reportedly will submit the draft to the Council of Ministers by the end of February 2003.

## **Criminal Enforcement in Bulgaria**

### **Police Actions: Good Cooperation, Some Problems**

The Bulgarian police are generally cooperative. Police districts with the Sofia region (especially those under the direction of the Sofia Directoria of the Ministry of Interior) remain reluctant to aggressively pursue anti-piracy actions; those actions which they do take are ineffective. However, the police 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 cafés. 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.

The recording industry reports that, in 2002, the competent authorities in Bulgaria carried out 729 checks at 2274 points, including wholesale and retail points, storage places, production premises (recording facilities), as well as vehicles (during checks at the customs), during which they seized a total of 136,792 pirate CDs, CD-Rs and MCs. Over 90 of those raids have been carried out together with BAMP/IFPI Sofia. Some 79,810 optical discs and tapes with music, films, entertainment and business software 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 piracy remain strong. BullACT (the local anti-piracy organization) continues to maintain a high level of activities against videocassette and optical disc piracy and enjoys excellent cooperation from law enforcement authorities. In 2002, BullACT, in cooperation with local law enforcement, conducted 672 investigations and 501 raids. These actions resulted in the seizure of over 10,635 pirate optical discs and 5,628 pirate videocassettes, representing a dramatic increase over total seizures in 2001.

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-Rs 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.

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 2002, the police, with the substantial assistance of the BSA, have conducted 123 raids. Of these, there is one prosecutor's denial to initiate a criminal trial and of the remaining 122 criminal proceedings initiated, 21 have been abandoned by the prosecutors, 95 are pending at the preliminary investigation stage, two have reached court stage but are not decided yet, four have been completed with a settlement and none has been completed with a verdict. 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 also reports that as a consequence of a joint initiative by the IP industry, the Bulgarian Parliament voted amendments to the Tax Procedure Code in April 2002 pursuant to which tax authorities are now entitled to review the software licensing status of companies being audited for compliance with tax laws. Unfortunately, the amendments failed to authorize tax inspectors to impose administrative penalties, although the software industry is working with the Ministry of Finance to change the law in this respect.

Entertainment software companies report that there has been little police cooperation with their enforcement efforts, unlike the efforts which appear to have been extended to the other industries. It remains difficult for entertainment software companies to undertake their own investigations into the syndicates that operate in the country given the dangers they face absent police backing. In fact, one entertainment software company reports that one of its local distributors was physically attacked, though fortunately, he did not suffer grave harm. This mid-2002 attack appears to have been a well-calculated hit, possibly involving organized crime elements intended to pressure the company into dropping its anti-piracy program in Bulgaria.

### **Prosecutions and judicial sentencing are ineffective and non-deterrent.**

MPAA reports that there has been little improvement in the Bulgarian court system since 2001. Court cases can still take up to three years to complete, but overall the length of time has been decreasing. While convictions for copyright offenses are quite common, judges have been reluctant to impose deterrent penalties. It is important that judges recognize the seriousness of these offenses and begin to impose jail time in serious cases involving repeat offenders. MPA reports that no defendant has received an actual jail sentence. Every criminal case seems to result in a suspended sentence being imposed as part of the probationary period.

BSA reports that, despite the active enforcement by police, the 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 122 software

criminal prosecutions initiated, only four have been completed with a settlement and none have reached a criminal verdict. The four settlements acknowledge that the offenders are guilty for having committed software crimes but the criminal fines imposed are quite insufficient, amounting to a maximum of 700 leva per person (about US\$350) and confiscation and destruction of the illegal software. (Under the Bulgarian penal law a settlement between the prosecutor and the defense approved by the court is considered a final verdict.)

The recording industry reports that in 2002, of the 400 raids conducted, the police instituted 110 inquiry cases to investigate alleged criminal offences under Article 172a of the Criminal Code. The police sent 75 police enquiry cases to different prosecutors' offices, recommending these to be filed in court for criminal offences (these include both cases instituted in 2002 and cases from previous years). Only 22 persons were reported to be convicted for criminal offenses under Article 172a of the Criminal Code. However, as the prosecution and court system lacks any transparency, the number of convictions could actually be higher.

### **Unwarranted Delays in Criminal Actions; Problem with Expert Reports**

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 nine months),<sup>9</sup> 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 to 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 be to 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 these problems, 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.

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<sup>9</sup> 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).

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN BULGARIA: 2002</b>			
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
Number of Raids conducted	501		729
By Police		38	400
By Customs			6
Number of cases commenced	79	38	75
Number of defendants convicted (including guilty pleas)	62		22
Acquittals and Dismissals	0		N/a
Number of Cases Pending	29	38	N/a
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			
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	62		
Up to \$1,000			
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied			

## Civil Cases

IDSA reports that one of its member companies has some 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.

The Bulgarian judiciary is notoriously slow and the procedures are to a great 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.

<b>CIVIL COPYRIGHT ENFORCEMENT STATISTICS IN BULGARIA: 2002</b>		
<b>ACTIONS</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>	<b>ENTERTAINMENT SOFTWARE</b>
Number of civil raids conducted	0	NA
Post-Search Action		
Cases Pending		
Cases Dropped		
Cases Settled or Adjudicated		
Value of loss as determined by rightholder (\$USD)*	\$718,873 **	
Settlement/Judgment Amount (\$USD)	8,218	

Note: The civil claims are filed within the criminal proceedings initiated upon police/BSA raids. 21 civil claims have been filed within the respective criminal proceedings.

## Border Measures

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 makes border control unenforceable.<sup>10</sup>

The Bulgarian market is being flooded with imports from Russia and Serbia and Montenegro. Therefore, border controls must 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. The draft of the new Decree on CD plant licensing provides for registration of import and export deals with the Ministry of Culture. A certificate must be issued in each particular case, so that customs can clear the shipment

## COPYRIGHT LAW AND RELATED ISSUES

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### 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, 2000 and 2002.

**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 by 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.

The amendments to the Copyright Act in 2000 were aimed to amend the national legislation to the requirements of the two WIPO Treaties. In addition to the amendments enumerated in the

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<sup>10</sup> IIPA does not have the text of this decree on border control measures.



above paragraph the following rightholders were granted the right to claim additional damages calculated on the basis of the revenue from the infringing act, the value of the infringing goods at retail price (of the legitimate copy), or pre-established damages instead of compensation.

**Ratified WIPO treaties:** Bulgaria deposited its instruments of accession to both the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty in March 2001. It was one of the original 30 countries which put these two important treaties into force in 2002.

**Copyright Law amendments (2002):** As IIPA reported in our 2002 Special 301 report, Bulgarian officials created a government-industry working group in 2001 to assist in the drafting of amendments to legislation so that Bulgaria would be in compliance with the EU's directives on copyright, e-commerce, and conditional access. Amendments to the Bulgarian Copyright Act were passed on July 25, 2002; these entered into effect on January 1, 2003. IIPA is informed by our industry colleagues that the amendments achieved the following, for example: a new chapter on database protection was inserted; the definition of the distribution right was revised; revisions/refinements were made to existing exceptions to protection; criminal sanctions for violations involving technological measures of protection were added; and the reprographic levy was introduced with the 2000 amendments to the copyright law, but some amendments with regard to the collection and distribution of the reprographic levy and the blank tape levy were made in 2002. Additional amendments were made to the provisions involving transfers of rights and the administration of collecting societies.

Local industry colleagues report that one of the most important amendments to the Copyright Act in 2002 was the introduction of national exhaustion of the distribution right. Together with the exclusive right to authorize the importation and exportation of copies of works, sound recordings, etc. recognized in favor of all categories of right owners, national exhaustion leads to the prohibition of "parallel imports." The definition of the "distribution right" was revised accordingly to exclude importation and exportation (now separate exclusive rights). Another amendment affects the way to define the term of protection of sound recordings. The term remains 50 years, but is calculated in conformity with provisions of the EU Directive on copyright. Administrative penal sanctions (fines) for violations involving technological measures of protections were added. The amendments provide that the Copyright Act requires obligatory licensing of CD manufacturers, and the terms for such will be outlined by the Council of Ministers (see discussion below on OD regulations).

Unfortunately, local industry reports indicate that not all the 2002 amendments were positive ones. Troubling provisions include: a mandatory fall-back/return of exclusive rights to authors and performers after ten years; contractual arrangements for the transfers of rights which exceed ten years in duration are considered void; an exception from the importation and exportation right for amounts of less than commercial quantities; the scope of the "making available right" extends to "an unlimited number of people" instead of a more clearly defined and limited "public"; the scope of the right of communication to the public for producers of sound recordings is only a right of remuneration; the three-step TRIPS Article 13 for limitations contains only two of the steps; fines provided under administrative and criminal sanctions are too low and not deterrent; the new provisions on technological protection measures and rights management information appear to lead only to administrative and criminal sanctions, there is no civil liability, and all are subject to a "primarily designed test" (thus limiting its usefulness); and the term of protection for sound recordings remained at only the TRIPS *minima* level.

According local experts, another troubling problem is the maximum duration of agreements

for the transfer of rights, which was originally introduced in the 1993 Copyright Law. Proposals to eliminate this transfer provision were made twice (in 2000 and 2002), but were not accepted. In addition, with regard to the scope of the “making available right,” the expression “unlimited number of people” is the most adequate translation of the word “public” within the meaning of the “making available” right in the Bulgarian language. It is not correct that the right of “communication to the public” for producers of sound recordings is only a right of remuneration. Producers have the exclusive right to authorize any communication to the public of their sound recordings by wire or wireless means. Unfortunately, “communication to the public” is difficult to translate directly into Bulgarian. However, confusion may arise from a provision in the law according to which remuneration collected for public performance and broadcasting of phonograms is split equally between performers and producers.

## **Title Verification Decree (1996, as Amended)**

The discussion above described the recent Bulgarian efforts to deregulate aspects of the system implemented years ago to regulate the production and distribution of optical media products. To summarize the current law, Bulgaria’s 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) requires the following:

- **Title verification system.** The current 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 inter-ministerial 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.

## **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. The monitoring of the trafficking of polycarbonate was established with Decree 493/1997, in force from January 1, 1998 till December 31, 1998. Appendix 1 provided that subject to registration are *imports* of polycarbonates and stampers and *exports* of computer software and CD-ROMs as well as audio and video carriers. Decree 271/98 (in force from January 1, 1999 till December 31, 2000) amended the 1998 legislation and provided for registration only of imports of polycarbonates and stampers. In case of import of polycarbonates, the agreement with the final consignee was required. In case of import of stampers, registration under the Title Verification Decree of the reproduction and distribution rights in the works which might be reproduced from the stamper was required. Decree 233/2000 (in force from January 1, 2001) replaced the 1998 legislation without alterations to the established registration regime. Industry representatives had reported that it was 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. As discussed above, however, the registration system was abolished by the Council of Ministers with amendments to Decree 233/2000 in November 2002 (the registration of imports was deleted).

The various local copyright industries question whether the polycarbonate import is being analyzed alongside—and cross-referenced with—declared production levels. It is also important that the re-sale or movement of imported polycarbonate within Bulgaria must be tracked carefully in order to counteract illegal production.

Registration of the import of optical grade polycarbonate and matrices for CD manufacturing is included in the new draft decree on OD plant licensing and TV system. However, it is possible that before the final voting of the decree by the Council of Ministers, or during the voting sessions, these provisions could be deleted. To prevent this very negative outcome, it is crucial that the Bulgarian government understand the importance of this keeping this registration regime.

## **Revisions to Optical Media Regime**

The 2002 Amendments to the Copyright Law provide for obligatory licensing of CD manufacturers, as well as the terms and conditions for the production and distribution of CDs and other carriers containing subject matter of copyright and neighboring rights, to be outlined by the Council of Ministers. In November 2002, the drafting of a new decree began, with the Ministry of Culture in the lead. On February 7, 2003, the Draft has been sent to the other ministries for pre-consideration. We understand that the Ministry of Culture will submit the Draft to the Council of Ministers by the end of February 2003.

The global copyright community has agreed that the key elements of an effective optical disc law include the following 11 points. This list contains the absolute minimum for effective OD regulations. It is imperative that Bulgarian government officials work closely with the copyright industries in developing these regulations. Key elements include:

- 1) Licensing of facilities: Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and "production parts" (including "stampers" and "masters"), including requirements like production must take place only at the licensed premises, a license only be granted to one who has obtained "manufacturer's code" (e.g., SID Code) for optical discs and production parts, the licensee must take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc. The implementation of and final responsibility for the registration and licensing of CD plants and related activities under the CD plant and TV decree should be brought under the jurisdiction of one single agency. The Bulgarian Ministry of Culture with its specific expertise in this matter is in an ideal position to carry out this task.
- 2) Licensing of export/import of materials: centralized licensing of export of optical discs, and import/export of production parts (including "stampers" and "masters"), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- 3) Requirement to apply manufacturer's code: Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer's code, and to cause each optical disc and production part to be marked with manufacturer's code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including making, possessing or adapting an optical disc mould for forging manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mold or any disc; selling a production part not marked with manufacturer's code, etc.).
- 4) License record keeping requirements: Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) Registration requirement for commercial optical disc duplication: Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.
- 6) Plenary inspection authority: Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.
- 7) Search and seizure authority: Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.

- 8) Government record-keeping requirements: Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- 9) Criminal penalties for violations: Violation of any significant aspect of the regime is subject to criminal sanctions, including individual liability (fines and/or imprisonment).
- 10) Possibility of withholding, suspending, or revoking a license for prior copyright infringement, fraud in the application process, or violation of the Optical Disc Law.
- 11) Possibility of closure of a plant.

The copyright industries look forward to working with Bulgarian authorities to draft, implement and enforce comprehensive optical disc regulations.

## **Government Software Asset Management**

A new stage of the Government Software Asset Management Decree developments was reached with the 2002 amendments to the Copyright Law whereby a new Article 71a was introduced and required that the Council of Ministers should pass such a decree. A working group to finalize the draft decree was called and its first session was held on February 3, 2003. The next session of the working group is expected February 10–14, 2003, and the draft is scheduled to be completed by then. The working group draft government software asset management decree will be circulated by the Ministry of Culture among other ministries for consultations, and upon completion of this procedure, it will be submitted to the Council of Ministers. The consideration and voting of the draft by the Council of Ministers is expected in April to early May. BSA strongly commends the many great steps taken by the Bulgarian government in 2002 to ensure legal software use through out the state administration by legalizing their desktop software use. IIPA encourages the government to continue down the path towards implementation of effective software asset management practices and to work closely with the private sector in doing so.

## **Criminal Code**

The fine levels for copyright piracy were established in the 1995 penal legislation. In 1997, the fines provided for in the Penal Code were increased by amendment to Article 172(a), so that the fines for a first offense range from a minimum of \$552 (1000 BGL) to a maximum of \$1,658 (3000 BGL), and for a second offense from a \$1,658 (3000 BGL) minimum to a \$2,763 (5000 BGL) maximum. The fines for administrative remedies (provided for in the 1993 copyright act) were also too low: about \$12 to \$112 for a first offense, \$56 to \$280 for a second offense. These were amended (in January 1998), raising the administrative fines to \$1,105 (2000 BGL) for a first infringement, and to \$2,763 (5000 BGL) for a second infringement. Although these amendments are improvements, the penalty levels are still too low to act as deterrents to commercial crimes. IIPA acknowledges that 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).

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# CHILE

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Chile remain on the Watch List for 2003. Serious improvement in criminal raids, prosecutions, judgments and border controls is urgently needed, as are changes to implement effective civil *ex parte* searches and damage awards. The recently concluded U.S.-Chile Free Trade Agreement (FTA) contains a chapter on intellectual property rights. IIPA and its members look forward to reviewing the IPR chapter in detail, after the text is released to the public.

**Overview of key problems:** Chile must take immediate action to elevate the attention of its police and civil authorities to heighten the priority of anti-piracy enforcement. Copyright piracy in Chile has increased dramatically in certain sectors, notably music CDs. Deficiencies in the Chilean enforcement system fail 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 establish and implement effective, TRIPS-compliant border controls. Its civil *ex parte* search remedy is deficient; advance notice must be given to the target, thus making the provision essentially useless. Chile is known for slow prosecution of infringement cases and low, non-deterrent criminal sentences imposed upon defendants. Estimated trade losses due to piracy in Chile were \$76.5 million in 2002. On the legislative front, Chile's long-stalled bill to upgrade its current copyright law to TRIPS standards falls far short of accomplishing that goal, and furthermore, it fails to come close to meeting the higher standards of protection required under the two WIPO Internet treaties and those found in the new bilateral FTA with the U.S.

**Actions which the Chilean government should take in 2003:** The Chilean government should engage in several simultaneous measures to improve copyright protection—

- Take concerted actions to conduct raids and prosecutions against piracy, and to apply deterrent-level criminal sentences;
- Acknowledge that the pending amendments to the copyright law (the Miscellaneous Bill) are inadequate, and take steps to expeditiously draft proposals to improve the 1982 copyright law to, at a minimum:
  - Fully implement the obligations of the WIPO treaties, including a full panoply of exclusive rights to rightsholders
  - Afford an effective civil *ex parte* search remedy
  - Afford statutory damages
  - Increase the level of criminal sanctions for copyright infringement;
- Improve the speed of civil copyright law litigation;
- Take action to improve border enforcement by amending the relevant laws and improving performance by customs officials;
- Continue and enhance its efforts to implement sound and effective software asset management practices in order to comply with its 2001 government software legalization decree.

**CHILE**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1999 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.0	40%	2.5	25%
Records & Music	14.0	35%	12.2	35%	5.0	30%	NA	NA
Business Software Applications <sup>2</sup>	59.4	51%	46.3	51%	33.1	49%	47.7	51%
Entertainment Software	NA	NA	NA	NA	41.0	80%	NA	78%
Books	1.1	NA	1.1	NA	1.0	NA	NA	NA
<b>TOTALS</b>	<b>76.5</b>		<b>61.6</b>		<b>82.1</b>		<b>50.2</b>	

## THE U.S.-CHILE FREE TRADE AGREEMENT

On December 11, 2002, the United States and Chile concluded the Free Trade Agreement (FTA) designed to facilitate trade and investment between the two countries. The text of the U.S.-Chile FTA IPR chapter has not yet been made public. According to USTR's Trade Facts press release,<sup>3</sup> the IPR chapter includes the following elements (bullets are USTR's text):

### Copyrights: Protection for Copyrighted Works in a Digital Economy

- Ensures that only authors, composers and other copyright owners have the right to make their works available online. Copyright owners maintain all rights even to temporary copies of their works on computers, which is important in protecting music, videos, software and text from widespread and unauthorized file sharing via the Internet.
- Copyrighted works and phonograms are protected for extended terms, consistent with U.S. standards and international standards.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$35.0 million at 49% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> Office of the U.S. Trade Representative, "Free Trade with Chile: Significant New U.S. Access to South America's Most Dynamic Economy," Dec. 11, 2002, pages 5-6 at [http://www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile\\_summary.pdf](http://www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile_summary.pdf).

- Strong anti-circumvention provisions to prohibit tampering with technologies (like embedded codes on discs) that are designed to prevent piracy and unauthorized distribution over the Internet.
- Ensures that governments only use legitimate computer software, thus setting a positive example for private users.
- Limited liability for Internet Service Providers (ISPs), reflecting the balance struck in the U.S. Digital Millennium Copyright Act between legitimate ISP activity and the infringement of copyrights.

#### IPR Enforcement: Tough Penalties for Piracy and Counterfeiting

- Criminalizes end-user piracy, providing strong deterrence against piracy and counterfeiting.
- Chilean government guarantees that it has the authority to seize, forfeit and destroy counterfeit and pirated goods and the equipment used to produce them. IPR laws will be enforced against goods in transit, to deter violators from using U.S. or Chilean ports or free-trade zones to traffic in pirated products. *Ex officio* action may be taken in border and criminal IPR cases, thus providing more effective enforcement.
- Mandates both statutory and actual damages under Chilean law for IPR violations. This serves as a deterrent against piracy, and provides that monetary damages can be awarded even if actual economic harm (retail value, profits made by violators) cannot be determined.

Over the last two years, IIPA has provided public comments to the U.S. government regarding the FTA IPR negotiations with Chile.<sup>4</sup> IIPA was vocal in supporting a U.S. position which would support an IPR chapter that must: (a) be TRIPS- and NAFTA-plus; (b) include, on a technologically neutral basis, the obligations in the 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. We also advocated the importance of Chile taking immediate action to combat widespread piracy. During the end-game of the negotiations, IIPA expressed concern over the adequacy of the then-pending Chilean proposals on IPR, services and e-commerce.<sup>5</sup>

IIPA looks forward to reviewing and evaluating the text of the U.S-Chile FTA IPR chapter once it is made public. On January 29, 2003, President Bush notified the Congress of his intention to enter into an FTA with Chile.<sup>6</sup>

Chile presently benefits from preferential trade benefits under 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

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<sup>4</sup> See the IIPA's January 29, 2001 Letter to the Trade Policy Staff Committee on the Proposed U.S. - Chile Free Trade Agreement at [http://www.iipa.com/rbi/2001\\_Jan29\\_Chile\\_FTA.PDF](http://www.iipa.com/rbi/2001_Jan29_Chile_FTA.PDF) and the IIPA's December 12, 2001 Letter to the International Trade Commission on the Proposed U.S.-Chile Free Trade Agreement at [http://www.iipa.com/pdf/2001\\_Dec12\\_ChileFTA.pdf](http://www.iipa.com/pdf/2001_Dec12_ChileFTA.pdf).

<sup>5</sup> See IIPA November 5, 2002 Letter to Ambassador Robert B. Zoellick on the Chile FTA, available at [http://www.iipa.com/rbi/2002\\_Nov5\\_CHILE\\_FTA.pdf](http://www.iipa.com/rbi/2002_Nov5_CHILE_FTA.pdf).

<sup>6</sup> White House press release, Notice of Intention to Enter Into a Free Trade Agreement with Chile, January 30, 2003, available at <http://www.whitehouse.gov/news/releases/2003/01/print/20030130-25.html>.



“adequate and effective protection of intellectual property rights.”<sup>7</sup> In the multilateral realm, Chile is a WTO member and is obligated to have already implemented both the letter and the spirit (performance) of the TRIPS Agreement.

## COPYRIGHT PIRACY IN CHILE

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Copyright piracy involving hard goods continues to be a serious problem, with trends of local CD-R burning, optical media piracy and even Internet piracy being reported.

The recording industry continues to report that pirate music 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 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 level of piracy has increased over the past year, from 30% in 2000 up to 35% in 2001 and 2002, mostly due to the shift from cassette piracy to CD-Rs. As a result of the growing pirate CD-Rs, estimated losses due to sound recording piracy in Chile more than increased to \$14.0 million in 2002. The legal market for music and recordings that began in 2000 continued to decline in 2002. 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 audiovisual industry reports that there is an increasing incidence of optical disc and Internet piracy in Chile, and some new incursions of signal theft. Video piracy remains a big problem, according to the Motion Picture Association of America (MPAA). Back-to-back duplication in video stores is prevalent, but organized reproduction and distribution of counterfeit videos and optical discs is of primary concern. These counterfeit videos and CD-Rs are found throughout the country in flea markets, street sales and 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 overall audiovisual piracy rate is estimated to be 40%. An increasing worry, especially involving pirate optical discs, is the illegal importation as contraband of product from Asia, directly or via Peru or Paraguay. These pirate optical discs are now being seen in video stores and in black markets. Iquique, for example, appears to be a

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<sup>7</sup> In the first 11 months of 2002, \$462 million worth of Chilean imports to the United States benefited from the GSP program, or 14.4% of Chile's total imports to the U.S. between January and November, representing a 2.2% increase over the same period in 2001.

center of contraband traffic of pirate optical disc. The country's black market, such as the Bio-Bio market in Santiago, and the increasing number of street vendors, present problems. 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. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Chile are estimated to be \$2 million in 2002.

Business software piracy rates in Chile were estimated at 51% in 2002, with estimated trade losses due to piracy amounting to \$59.4 million, according to the Business Software Alliance (BSA). One of the most devastating forms of piracy for the business software industry in Chile is the unauthorized use and copying of software by small to medium-sized businesses.

The Interactive Digital Software Association (IDSA) reports that there is piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Chile.

The book publishing industry continues to report 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.<sup>8</sup> 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 remained at \$1.1 million for 2002.

## COPYRIGHT ENFORCEMENT IN CHILE

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The Chilean enforcement system fails to meet Chile's existing bilateral and multilateral obligations—both in substance and by performance. 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 those few cases which do reach judgment, sentences are regularly suspended and the defendants are never incarcerated. Furthermore, Chile's border controls are not effective. In addition, the civil courts are still relatively slow in issuing relief to rightsholders. It is impossible to obtain an effective civil *ex parte* search, since advance notice must be given to the target. Adequate damages are difficult to achieve in civil copyright infringement cases.

### Lack of an Effective Civil *Ex Parte* Search Remedy

Chile fails to grant *inaudita altera parte* (*ex parte*) proceedings in civil cases. When *ex parte* search requests are filed, they are registered in a public electronic register and are available to the public; such advance notice violates TRIPS Article 50. Thus, target companies have prior notice that an *ex parte* search request has been filed against them before the

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<sup>8</sup> "Chile holds the record for literary piracy in Latin America," Agencia EFE S.A., November 3, 2001.

inspection takes place. This notice obliterates the effectiveness of the remedy, because it allows a defendant the opportunity 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 2002, 25% of BSA's requested inspections failed for this reason; the Business Software Alliance (BSA) brought 24 civil cases, six of which failed because the companies had advance notice of the *ex parte* search request. The U.S-Chile FTA requires an effective civil *ex parte* remedy.

## **Criminal Penalties and Procedures**

**Procedures:** 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, although this law was passed in late 2000, it is still not operative in the entire country; it is being applied only in two of 13 Chilean regions. The law has a long transition period, so it is not possible to assess whether it will ultimately bring more efficiency to the system.

**Raids and suggested actions:** 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.

Several immediate actions could be taken by Chilean authorities to counter piracy:

- 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.

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.

During 2002, MPA coordinated with police to initiate 138 cases from raids (including 90 for retail sales of pirate works and 23 for pirate reproduction), seizing just over 30,200 pirate VHS tapes, close to 14,000 pirate optical discs (DVDs, VCDs and CD-Rs) as well as other equipment. Raids were conducted against clandestine laboratories, video retailers and street vendors, and accomplished with the cooperation of the *carabineros*. Approximate 350 people were arrests, and 62 indictments were issued. Nevertheless, MPA's local attorney continues to track 783 pending cases (619 in video retail outlets). Of those outstanding cases, MPA's attorney achieved eleven convictions for retail piracy and seven for street sales in 2002, however, all were either suspended sentences or probation, and notably, there were no sentences for duplication or distribution.

The book publishing industry conducted raids in 2002, but more government sensitivity to copyright infringements involving book piracy is needed. 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 previously reported 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.

## **Slow Civil Process, No Statutory Damages, 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 judgment. For example, in 2002 BSA conducted 24 actions against end-user defendants, of which six cases were settled through private negotiation and five more are under negotiation. However, BSA could not reach agreements with the other seven defendants, and consequently resorted to civil actions against them; none of these has yet reached judgment.

The 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 the U.S., Brazilian and Taiwanese legislation obviate the virtually impossible and time-consuming requirement that the value of

infringement damages, lost profits, etc. be proved. The U.S.-Chile FTA requires that Chile afford statutory damages in copyright cases.

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 the Dominican Republic, have given administrative agencies specific authority to conduct some anti-piracy inspections and levy administrative sanctions.

## **Ineffective Border Measures**

Chile has failed to set up and implement effective, TRIPS-compliant border control mechanisms. 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. The U.S.-Chile FTA contains border measures which Chile must implement.

The increasing amount of optical disc piracy coming from across the border is of great concern. Weak border enforcement has allowed individuals in Chile to act in concert with pirates located on other territories—notably Peru and Paraguay. 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.

## **COPYRIGHT LAW IN CHILE**

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The Chilean government must entirely revamp, revise and significantly improve its proposed legislation to amend the copyright law. The long-pending amendments to the copyright law are totally inadequate to meet existing bilateral IPR standards, multilateral standards, and the standards of the U.S-Chile FTA. In addition, Chile has made no progress on advancing its own promises made to the U.S. when the U.S. Secretary of Commerce and Chile's Acting Minister of Economy signed a Joint Statement on Electronic Commerce on February 18, 2001 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."

Chile has deposited its instruments of ratification to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), making it one of the first 30 countries which put these treaties into force. IIPA believes that it is critical that Chile amend its current copyright law to implement the obligations of both these treaties, treaties which respond to today's digital and Internet piracy realities.

### **Copyright Law of 1970, as Amended**

Over the years, IIPA members have identified deficiencies and/or ambiguities in the Chilean Law on Copyright (Law No. 17.336 of 1970, as amended) that 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 non-interactive 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 are 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 Miscellaneous Bill Amending the Law on Copyrights and Neighboring Rights**

On October 11, 1999, the government presented a bill to the Chilean Congress with the stated purpose of updating copyright legislation and customs matters 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 this “WTO Miscellaneous 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, the proposed amendments would protect computer programs (but not expressly as literary works), add rental rights, afford protection for databases, and include a section on border measures. However, the revised reproduction right does not cover clearly temporary copies. 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, nor 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 rightsholders on the other remains unchanged. 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).

The WTO Miscellaneous Bill has passed the Chamber of Deputies and is pending in the Senate. Reports indicate that the executive branch is pressing for its prompt approval in early 2003. The copyright industries have long opposed the passage of this bill as completely inadequate. The Chilean government and the legislative branch should scrap the Miscellaneous Bill and expeditiously prepare a comprehensive proposal which fully meets Chile’s bilateral and multilateral obligations.

## 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.<sup>9</sup> 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.

This was a significant step forward that demonstrated the government’s increased awareness of the value of managing its software assets in a systematic and thorough manner. We understand that the government is implementing this Executive Order to ensure any new software it acquires is duly licensed. BSA urges the government to extend its implementation to existing software assets throughout the government. Good software asset management practices can best be achieved through active public-private sector partnership. We urge the government of Chile to work closely with the private sector in implementing these practices.

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<sup>9</sup> 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

## 2003 SPECIAL 301 REPORT

### COMMONWEALTH OF INDEPENDENT STATES (C.I.S.)

#### EXECUTIVE SUMMARY: TEN COUNTRIES OF THE C.I.S.<sup>1</sup>

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This report includes an executive summary containing common issues followed by brief separate reports on the following ten countries<sup>2</sup> of the Commonwealth of Independent States (C.I.S.):

Armenia  
Azerbaijan  
Belarus  
Georgia  
Kazakhstan  
Kyrgyz Republic  
Republic of Moldova  
Tajikistan  
Turkmenistan  
Uzbekistan

**Special 301 recommendation:** IIPA recommends that Armenia, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan be retained on the Watch List in 2003, and that Georgia, the Kyrgyz Republic and the Republic of Moldova be placed on the Watch List in 2003. IIPA also recommends that the United States government suspend the duty-free trade benefits under the Generalized System of Preferences (“GSP”) of Armenia, Kazakhstan and Uzbekistan based on the petitions IIPA filed as a result of the major shortcomings in the legal regimes of these countries.<sup>3</sup> IIPA recommends that the U.S. government block accession to the World Trade Organization of Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan (as well as Russia and Ukraine as outlined in separate reports) because the legal and enforcement regimes in each of these countries is not in compliance with the WTO TRIPS obligations.

**Overview of key problems:** IIPA’s broad summary of the priorities in these countries is that: (1) the legal regimes are in need of critical reforms to their copyright law, criminal code, customs code, and civil procedure code and administrative code in each country, and in some cases also need regulation of optical media production facilities; (2) accession to key treaties is

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<sup>1</sup> For more details on each country’s Special 301 history, see IIPA’s “History” appendix to this filing.

<sup>2</sup> IIPA filed separate Special 301 reports on Russia and Ukraine as a result of serious piracy problems, in particular wide-scale illegal optical media production and distribution, confronting the copyright industries in those countries.

<sup>3</sup> In the separate IIPA filings on Russia and Ukraine, we recommend that Russia’s GSP benefits be suspended based on a petition IIPA filed in 2000, and that the U.S. government continue its suspension of Ukraine’s GSP benefits (first suspended in August 2001). Benefits for Belarus are also suspended (since 2000) but for reasons unrelated to intellectual property matters.



still not complete, especially for neighboring rights and the WIPO digital treaties (WCT and WPPT); and (3) there is virtually no on-the-ground enforcement against commercial pirates, much less against smaller-scale operations starting with the need for administrative remedies, effective border enforcement, and criminal prosecutions.

**Actions to be Taken by the Governments of These Countries:** The actions that must be taken are:

- Amending the copyright law, criminal code, customs code, administrative code, civil procedure code (adding *ex parte* search provisions) to provide a comprehensive and effective legal regime, as well as adding provisions to regulate the production and distribution of optical media;
- Acceding to key treaties including full implementation of the Berne Convention, Geneva Phonograms Convention, WTO TRIPS, and the WIPO digital treaties (WCT and WPPT);
- Enacting and enforcing effective border measures to stop the export and import of illegal material;
- Commencing raids and following up with criminal prosecutions against pirates engaged in commercial distribution, as well as using administrative procedures for smaller-scale operations directed at street vendors, kiosks, and retail stores.

## Legal Reforms

The legal deficiencies of the ten (of twelve) countries of the C.I.S. covered in this report are discussed here in general terms, and later specific legal reforms are discussed in more detail for each country. (In separate reports, IIPA treats the remaining two countries of the C.I.S. not covered by this report, namely **Russia** and **Ukraine**, where very serious piracy problems confront the copyright industries.)

The legal deficiencies are, in most cases, violations of the bilateral trade agreements signed and ratified by each country, as well as shortcomings in compliance with the World Trade Organization (WTO) TRIPS Agreement, especially the enforcement obligations. Two other problems of particular note in this region need consideration: (1) the growth of optical media production and distribution, particularly in this region by organized criminal syndicates, requires the adoption of legal controls tied to criminal sanctions for violators; and (2) the rise of Internet piracy requires the accession, implementation, and enforcement of the 1996 digital treaties of WIPO—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

**Two key reforms—sound recordings and preexisting works/recordings:** One of the most glaring legal shortcomings that exist in this region is the lack of protection for foreign sound recordings. Three countries—Tajikistan, Turkmenistan, and Uzbekistan—provide absolutely no protection; two just started in 2002 and 2003 (Belarus and Armenia) and all provide little or no enforcement even where the legal protection exists. The absence of protection (legally or in practice) is a breach of commitments made in bilateral trade agreements eight or even nine years ago. In fact, the obligation was to make “best efforts” to join the Geneva Phonograms Convention and provide adequate and effective protection in most cases by the end of 1993—an obligation that has been flaunted by the delinquency of these countries.

The other legal shortcoming common to the countries in the C.I.S. is the absence of clear protection for preexisting works (before Berne or U.C.C. accession) and sound recordings (before Geneva Phonograms or WTO TRIPS accession). At a minimum, these countries must provide protection for preexisting works and sound recordings reaching back at least 50 years, and preferably 70 years, from the date of their entry into Berne or the WTO TRIPS Agreement. The U.S. copyright law unilaterally provides automatic protection for preexisting foreign works and sound recordings from 1923 to the present for published works—so, reaching back at least 75 years, and lasting for a term of 95 years for works made for hire, or life plus 70 years for natural authors.

**Additional legal reforms needed:** In addition to providing full legal protection for sound recordings, and protection for preexisting works and sound recordings, the other key legal reforms include:

- Amending the criminal code and criminal procedure code to provide deterrent penalties for copyright and neighboring rights violations; and avoiding “grave harm” or other ambiguous (or high) thresholds that prevent police from commencing criminal investigations;
- Amending the criminal code (or criminal procedure code) to provide police with *ex officio* authority to commence criminal investigations;
- Amending the customs code to provide for clear *ex officio* authority to seize material and commence criminal investigations without awaiting rightholder’s registration or other ministerial delays;
- Amending the administrative code to provide clear remedies for copyright and neighboring rights violations for smaller-scale operations including revoking business licenses for street vendors, kiosks and retail stores for piracy activities;
- Amending the civil procedure code with the addition of *ex parte* search provisions—a remedy required by the WTO TRIPS Agreement for effective enforcement against end-user piracy, especially for the software industry;
- Providing optical media regulations to address (with criminal sanctions) the protection and distribution of optical discs and the equipment and machinery used to produce them.

Introducing the necessary legal infrastructure, including the regulation of optical media production and distribution, 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, and to a lesser degree in Kazakhstan (with one known CD plant); Belarus also has a plant that is currently closed. But at any time, the production facilities could easily move, for example to Georgia, Uzbekistan, or another country given the weak enforcement regimes prevalent in the area. Providing the necessary legal framework, including as a centerpiece effective criminal enforcement, will go a long way toward dissuading this type of movement, or to effectively confronting it when does present itself in any single country.

**Civil code reform in the C.I.S.:** Comprehensive civil code reform is a process underway in several countries of the C.I.S. (including the Russian Federation and Ukraine). Unfortunately, this activity threatens to seriously undermine whatever effective legal reforms have been adopted in the past ten years to protect copyright material. That’s because anti-copyright forces see the comprehensive legal reform as a way to “re-do” whatever copyright laws have been

adopted. They propose to load up civil code “reform” with crippling IPR provisions.<sup>4</sup> If successful, new IPR provisions would be added on top of the existing copyright laws resulting in confusing copyright provisions inconsistent with Berne, WTO TRIPS, and the bilateral agreements, and inconsistent and weaker than the more fully developed national copyright laws. These efforts to revise the civil codes in this manner 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 and again in 2002, drafts of the Civil Code reform were circulated. These drafts included IPR provisions completely incompatible with the bilateral trade agreement, the Berne Convention, and WTO TRIPS. Fortunately, these efforts failed, but they are likely to be rekindled in 2003.

In Ukraine in December 2001, a new draft of Chapter IV of the Civil Code was proposed—reduced to 14 articles. While this proposal (not yet adopted) was an improvement over earlier drafts, even the 14 articles contained references to 90 other laws. If adopted, this civil code section on IPR would create a patchwork of protection and refer to other laws that ultimately will themselves be amended—all in all resulting in confusion and a weakening of the existing IPR regime.

IIPA continues to urge that the civil code should not be adopted in Russia, Ukraine or any of the other countries of the C.I.S. and certainly not in a manner that would in any way weaken the copyright law or its enforcement. Thus, 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 reforms:** The following is a chart of the passage of major revisions to copyright laws in each of the countries of the C.I.S.:

**Armenia:** May 13, 1996; effective June 6, 1996; amended December 8, 1999; effective February 12, 2000; amended September 25, 2002; effective November 10, 2002;

**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;

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<sup>4</sup>Prior 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 their own 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 though it is not known if any countries explicitly treat the 1991 amendments drafted by the former U.S.S.R. as effective within their territories.

**Republic of Moldova:** November 23, 1994; effective May 2, 1995; amended May 28, 1998; amended July 25, 2002; effective September 19, 2002;  
**Russian Federation:** July 9, 1993, effective August 3, 1993; amended July 19, 1995;  
**Tajikistan:** November 13, 1998; effective December 17, 1998;  
**Ukraine:** December 23, 1993, effective February 23, 1994; amended July 11, 2001, effective September 5, 2001;  
**Uzbekistan:** August 30, 1996; effective September 17, 1996.

**Turkmenistan** has, for over ten 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.

## Copyright Piracy and Enforcement

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 and minimal border activity, 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. Also, effective border enforcement is critical to cut off and isolate the activity to particular territories.

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.

As a starting point police and prosecutors must commence raids and seizures; then they have to bring criminal actions and judges must impose criminal sanctions. Second, 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

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It is critical that the U.S. government insist that each of these countries cure current violations in the bilateral trade agreements that, when adopted in the early 1990s, provided the then-minimal international standards for IPR protection and enforcement, pre-TRIPS. There is no excuse why for almost ten years these countries have not been providing basic (or any)

protections for American works and sound recordings while the countries enjoy Normal Trade Relations (NTR) with the U.S.

**History of 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 an 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 joining ("best efforts") the Geneva Phonograms Convention;

- (4) Providing full retroactivity—that is, protecting preexisting works (per Article 18 of Berne; WTO TRIPS required equivalent sound recording protection);
- (5) Protecting computer programs and databases (as “literary works” consistent with Berne, and now TRIPS);
- (6) Providing adequate and effective protection and enforcement (which was understood to include deterrent civil and criminal penalties, as well as border measures); and
- (7) Establishing a working group with each country to monitor the continuing progress of copyright and other IP protection and enforcement.

**Berne Convention:** Ten of twelve of the countries in the C.I.S. are members of the Berne Convention. They are: the Russian Federation (1995), Ukraine (1995), Georgia (1995), the Republic of Moldova (1995), Belarus (1997), Kazakhstan (1999), Azerbaijan (1999), the Kyrgyz Republic (1999), Tajikistan (2000), and Armenia (2000). This means that two countries, Turkmenistan and Uzbekistan, are in breach of this trade agreement obligation, and are not providing any protection for works in their countries.

**Sound recording protection (Geneva Phonograms Convention, WTO TRIPS Agreement and WPPT):** Nine of twelve countries in the C.I.S. provide 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). Seven of twelve countries are members of the Geneva Phonograms Convention: the Russian Federation (1995), Ukraine (2000), Moldova (2000), Kazakhstan (2001), Azerbaijan (2001), Kyrgyz Republic (October 2002), and Armenia (January 31, 2003).

Georgia uses its WTO membership (1999) to provide a point of attachment for foreign sound recordings since they are not Geneva Phonograms members. Kyrgyz Republic (1998), Moldova (2001), and Armenia (February 5, 2003) are also WTO members and can (and until Geneva membership did) use that as a point of attachment as well.

Belarus is a WPPT member and can use that as a point of attachment.

So, three countries still provide no protection for foreign sound recordings nine years after they obligated themselves to do so: Tajikistan, Turkmenistan, and Uzbekistan.

All the countries are encouraged to meet their bilateral trade agreement obligation and to join the Geneva Phonograms Convention. The five that have not done so—Belarus, Georgia, Tajikistan, Turkmenistan, and Uzbekistan—are encouraged to accede.

**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.<sup>5</sup> This lack of protection

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<sup>5</sup>The 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 serve 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 U.S. government requested that each country send such a confirmation letter to UNESCO to avoid any confusion about this status.

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). The draft Russian copyright law amendments circulated in 2002 are intended to fix this problem, but they have yet to be enacted.

This absence of protection was also an issue in Ukraine until the passage in 2001 of 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 (Kyrgyz Republic) probably did intend to provide such protection but the provisions in their law are unclear. But, many of the countries of the C.I.S. are likely not providing protection for pre-existing works and sound recordings. Given the lack of judicial expertise on IPR matters, IIPA encourages all of the countries in this region to clarify by copyright law amendment, by regulation, or by some other administrative means, the full nature and extent of protection for pre-existing works and sound recordings so that they all meet their bilateral agreement and WTO TRIPS obligations on this matter.

This problem of protection for pre-existing material, especially for sound recordings, is a serious regional problem because such protection has only in the past few years been provided in neighboring countries such as Ukraine, Poland and the Czech Republic, thereby creating a regional 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 civil *ex officio* authority to the police to commence raids necessary for effective enforcement against end-user piracy. And, although 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 incorporate criminal provisions for IPR violations. In the cases where criminal codes have been adopted, the next step must be the actual imposition of criminal penalties especially aimed at the organized syndicates. This latter step has not been taken in any of these countries.

**Customs code:** Most of these countries have not 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. This is the step that is the most needed to limit the scope of the problem from a regional to a country-specific problem.

**Enforcement:** None of the 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 and to trade specific information on enforcement. 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.

## **WTO TRIPS Compliance and WCT and WPPT Accession**

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The critical multilateral legal reforms that entered into force after the bilateral trade agreements (adopted in the early 1990s) was the World Trade Organization TRIPS Agreement and the 1996 digital WIPO treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

**World Trade Organization TRIPS Agreement:** Only four of twelve countries in the C.I.S. are members of the World Trade Organization, and are thus bound by the WTO TRIPS Agreement's substantive and enforcement obligations. They are the Kyrgyz Republic (December 20, 1998), Georgia (June 14, 2000), Moldova (July 26, 2001) and Armenia (February 5, 2003).

Seven other countries in the C.I.S. are in the process of acceding to the WTO. Working parties have been established for Azerbaijan, Belarus, Kazakhstan, the Russian Federation, Tajikistan, 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 would be further bolstered by accession and implementation of the WIPO digital treaties to effectively combat 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).

The same five countries are also members of the WIPO Performances and Phonograms Treaty (WPPT). They are: Moldova (March 1998), Belarus (July 1998), Georgia (July 2001), Ukraine (November 2001) and the Kyrgyz Republic (August 15, 2002). The United States deposited its instrument of accession to the WCT and WPPT in September 1999. On March 6, 2002 the WCT entered into force, and on May 20, 2002 the WPPT entered into force.

In December 2000, the Interparliamentary Assembly of the member 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 twelve member states of the C.I.S., working with officials from the W.I.P.O. This was 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 are members of the Brussels Satellite Convention. The Republic of Moldova (1995), Ukraine (June 12, 2002) and Armenia (January 31, 2003) are members of the Rome Convention.

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.

## **Generalized System of Preferences (GSP)**

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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 provide “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 only in 2001.

In 2001 (the latest full year of statistics), the countries of the C.I.S. received the following preferential trade benefits under GSP:

	<b><u>\$ Amt. GSP duty-free</u></b>	<b><u>% of U.S. imports from GSP</u></b>
<b>Armenia</b>	\$14,893,000	45%
<b>Azerbaijan</b>	\$0	0
<b>Belarus</b>	Suspended in 2000	—
<b>Georgia</b>	\$2,080,000	6%
<b>Kazakhstan</b>	\$214,083,000	61%
<b>Kyrgyz</b>	\$263,000	8%
<b>Moldova</b>	\$145,000	Less than 1%
<b>Russia</b>	\$378,007,000	6%
<b>Tajikistan</b>	\$0	0
<b>Turkmenistan</b>	\$0	0
<b>Ukraine</b>	\$37,849,000 (before suspended)	6%
<b>Uzbekistan</b>	\$2,529,000	4.7%

On June 16, 1999, IIPA submitted a request to the United States government in accordance with U.S. law that the eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan as a GSP beneficiary developing

country be reviewed, and that GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements were 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 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. These sanctions and the withdrawal of GSP benefits remain in effect.

In 2002 the IIPA sought 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 2003 these countries 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 (now, effective February 5, 2003, a WTO TRIPS member), 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 Reforms and Treaty Adherence

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The U.S. Trade Representative in his April 30, 2002 announcement placing Armenia on the Watch List said “Armenia has several remaining steps to take to fulfill its intellectual property rights commitments under the 1992 U.S.-Armenia Trade Agreement” and further that its overall “intellectual property regime does not appear to be TRIPS-consistent...” Armenia fixed one glaring deficiency when it joined the Geneva Phonograms Convention effective January 31, 2003, thus providing a point of attachment for foreign sound recordings. This came ten years after it pledged to provide this protection in the 1992 Trade Agreement.

On December 10, 2002, Armenia was approved by the WTO General Council for accession into the World Trade Organization and on February 5, 2003 became the 145<sup>th</sup> WTO member. As a part of that accession, the Armenian Parliament adopted a legislative package of copyright and criminal code reforms (including amendments to the criminal procedure code) as required by WTO TRIPS. It is expected (IIPA was provided with descriptions of but not the actual laws) that the criminal code reforms increased the penalties for IPR violations and included application to neighboring rights violations. While these are welcome changes, Armenia’s intellectual property regime will remain short of compliance with the WTO TRIPS Agreement, as the USTR noted last year, if its enforcement regime is not improved. In particular, Armenian enforcement of IPR violations is inadequate as a legal and practical matter with no known criminal convictions, no *ex officio* authority granted to police to commence criminal copyright cases, and because the criminal provisions set an unreasonably high threshold to apply to IPR violations—even after the 2002 amendments.

**History of legal reforms:** 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 (details of the 1992 Trade Agreement are provided in the C.I.S. 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 contained many substantive deficiencies, including no national treatment obligations for foreign works and no clear protection for pre-existing works and sound recordings.

The National Assembly of Armenia adopted a new Law on Copyright and Neighboring Rights on December 8, 1999 to replace the 1996 law. The new copyright law entered into force on February 12, 2000. In addition, the Civil Code of Armenia (effective February 1, 1999) included one article on copyright (Article 63) and one on neighboring rights (Article 64). These two articles provided only general provisions pertaining to the subject matter and terms of protection but did not fix the other deficiencies noted above. On September 25, 2002, the Armenian Parliament adopted copyright and corresponding criminal code amendments; the amendments became effective on November 10, 2002.

Armenia joined the Berne Convention, effective October 19, 2000. In 2003, Armenia finally became a member of the Geneva Phonograms Convention, effective January 31, 2003 (WTO TRIPS provides an alternative point of attachment, effective February 5, 2003). The ten-year delay in the protection of foreign sound recordings allowed unprotected back-catalog

material to flood the marketplace and will continue to make enforcement in Armenia that much more difficult.

**Legal reform deficiencies:** Until the adoption of the 2002 amendments, Armenia did 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 WTO TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). The Copyright Law of 2000 was silent on this matter in the relevant provisions for both works and sound recordings. Over the past several years IIPA and the U.S. government provided the government of Armenia with suggested language to clarify the point of attachment and protection for pre-existing foreign works and sound recordings. Instead of fixing the law, Armenian officials noted that pre-existing protection already existed in the 1996 Copyright Law. However, in 2002, Armenian officials acknowledged the shortcoming and proposed a new Article 45(2) of the Copyright Law—adopted September 25, 2002 (along with a “fix” in Article 44 for the deficient national treatment provisions). Effective November 10, 2002, the new provision is intended to correct this shortcoming by providing a “full term of protection” for pre-existing works and sound recordings. IIPA has not reviewed the adopted legislation; the Armenian government insisted (in talks in late 2002) that the provisions would clearly protect pre-existing works and sound recordings for a minimum of 50 years, and would meet Armenia’s bilateral and multilateral obligations.

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 revised in 1998 (effective January 1, 1999) does not provide civil *ex parte* search procedures. These must be adopted to provide effective enforcement against end-user pirates especially to prevent software piracy, and because it is a WTO TRIPS obligation.

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. Until the 2002 amendments, there were no provisions for criminal or administrative liability for violations of neighboring rights in Armenia. IIPA understands (but did not see the enacted law) that the September 2002 amendments (effective November 10, 2002) included a “fix” to Article 140 of the Criminal Code to apply criminal penalties, for the first time, to neighboring rights violations. Unfortunately, the draft Article 140 that IIPA did review set an extremely high threshold of 500 times the minimum wage for the criminal penalties to commence—this would render the provision useless as a practical matter. Most violations of copyright and neighboring rights, even of a commercial scale, would fall outside of the criminal sanctions. It is unclear whether the September 2002 amendments corrected this problem. In sum, 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. There has been no indication of any meaningful enforcement action to date and the police have not as

yet commenced any actions lending doubts to the government's claims. 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. Further amendments to the customs code were contemplated but not adopted in the 2002 WTO package; the draft provisions provided to IIPA did not address the registration and notification problems.

Armenia was not a signatory to either of the two new WIPO treaties. There are reports that Armenia may accede to these treaties in 2003. 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**

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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. The 2001 Customs Code amendments have not yet proven effective; customs authorities must be urged to take appropriate action. 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 in Armenia, but there are at least two cassette-manufacturing plants. Although most of the music piracy is in the form of audiocassettes, 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 2002 are estimated at \$4 million. It is estimated that in 2002, almost 700,000 CDs and 3.8 million cassettes were sold in Armenia; it is further estimated that of these figures, 600,000 CDs and 3.1 million cassettes were pirated copies.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

# AZERBAIJAN

## Legal Reforms and Treaty Adherence

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The U.S. Trade Representative in his April 30, 2002 announcement placing Azerbaijan on the Watch List said “Azerbaijan has several remaining steps to take before fulfilling its intellectual property rights commitments under the 1995 U.S.-Azerbaijan Trade Agreement” and specifically noted the shortcomings in protection for pre-existing works and sound recordings and the weak criminal penalties and border enforcement. One year after the U.S. government’s statement, and eight years after the trade agreement went into force, Azerbaijan still needs to fix these provisions to comply with that agreement in order to provide adequate and effective protection and enforcement at even the most rudimentary levels.

**History of legal reforms:** 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 (details of the 1995 Trade Agreement are provided in the C.I.S. 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. Late in 2002, IIPA was finally able to obtain a copy of this law in Russian; it is currently being translated by the Department of State and reviewed for bilateral treaty compliance.

Azerbaijan adhered to the Berne Convention, effective June 4, 1999. In 2001, Azerbaijan provided a point of attachment for foreign sound recordings when it joined the Geneva Phonograms Convention, effective September 1, 2001. The six-year delay in the protection of sound recordings allowed unprotected back-catalog material to flow into the marketplace. This delay will continue to make enforcement more difficult in Azerbaijan.

**Legal reform deficiencies:** Azerbaijan does not clearly provide protection for pre-existing works or sound recordings as required by the obligation in its bilateral trade agreement, and by Berne and the WTO TRIPS Agreement. Azerbaijan must clearly provide protection for pre-existing works and sound recordings either by legislative amendment or a clear judicial ruling on point.

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, especially for the software industry, and this is a WTO TRIPS requirement.

Article 158 of the Azerbaijani Criminal Code (in force on September 1, 2000) provided liability for copyright and patent infringements if they result in “significant damage” to the rightholder concerned. The “significant damage” standard created an unwarranted threshold in the fight against copyright piracy because it set 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 still been no known convictions under this law. The criminal code provides sanctions for criminal liability for copyright, neighboring rights and patent rights violations.

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 to provide this authority necessary for effective enforcement.

The Azerbaijani Customs Code (last amended in 1997) 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. This authority must be clearly provided, and if needed, the Customs Code revised.

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).

## **Copyright Enforcement**

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There currently is 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. As a result, IIPA filed comments (May 15, 2002) with the U.S. government requesting that Azerbaijan not be admitted into the WTO until these shortcomings are corrected.

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 ten times the minimum monthly wages. For another year, the copyright industries reported that there was not a single known case where either the administrative sanctions, or any of the criminal penalties, were levied.

Border enforcement remains very weak in Azerbaijan. This allows illegal copies, especially of musical material produced in other countries in the region, to cross borders freely for sale in Azerbaijan and other countries.

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 99%; trade losses for foreign rightholders in 2002 is estimated at \$14.8 million, an increase from 1999, when it was \$10 million. In 2001, the last year IFPI had reliable statistics on seizures, it was estimated that in total 8.9 million cassettes

and 1.6 million CDs were sold in Azerbaijan; of these, 7.6 million cassettes and 1.3 million CDs were pirated copies.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

There were reports in 2002 from the U.S. Embassy in Baku that licensed theater owners were complaining that Azeri television stations were threatening theatrical distribution because the stations are exhibiting pirated copies of American films without permission. It is unknown whether the Azeri government has the authority to act in such situations (by regulatory authority) and even less clear whether any such action was undertaken to stop this form of piracy. In addition, U.S. government officials reported on the ready availability of pirated copies of DVDs of current American films in Baku; the Motion Picture Association (MPA) reported that these DVDs were likely produced in Russia for sale in the countries of the C.I.S.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.



# BELARUS

## **Legal Reforms and Treaty Adherence**

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On April 30, 2002 in his annual Special 301 announcement, the U.S. Trade Representative called enforcement in Belarus “very weak” and noted the “extremely high” piracy levels resulting in a violation by Belarus of its commitments under the 1993 U.S.-Belarus Trade Agreement. In particular the U.S. government cited the lack of effective criminal enforcement, the absence of proper *ex officio* authority for the police to commence criminal investigations, the absence of protection for sound recordings and poor border enforcement allowing the transshipment of material in and through Belarus to other neighboring countries. On May 20, 2002, the WIPO Performances and Phonograms Treaty (WPPT) came into force so Belarus, for the first time, provided a point of attachment for foreign sound recordings. The absence of this legal protection for over ten years, however, allowed unprotected back-catalog material to enter the marketplace and will make enforcement that much more difficult for years to come.

Even more troubling is the migration of optical media production facilities into Belarus (also cited by the USTR report as the result of “lax border enforcement”) from neighboring countries. One known plant (Armita) located in Brest, Belarus migrated from Ukraine a few years ago. There were extensive investigations in 2001 at the insistence of the recording industry to identify illegal production taking place on two lines at that plant (and eventually the seizure of 11,000 illegal CDs). On August 5, 2002, the plant was closed and a criminal investigation was commenced. Currently, the Belarussian officials in the Ministry of Interior are in the process of gathering information for a possible criminal case; the investigation is expected to conclude in March 2003. The government of Belarus must be persuaded to push this criminal case forward, to seek criminal convictions and ultimately, deterrent sentences, of the plant operators. The other important step that the government must take is to insist that border enforcement authorities act more effectively to prevent other plants from Russia (Ukraine or other neighboring countries) from relocating to Belarus, as well as to stop the importing and exporting of illegal optical media discs (CDs, DVDs, CD-ROMs etc.).

**History of legal reforms:** 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 (details of the 1993 Trade Agreement are provided in the C.I.S. 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. Belarus has not yet joined the Geneva Phonograms Convention, although it pledged to do so in the bilateral agreement; on August 7, 2002, the government of Belarus announced its intention to join the Geneva Phonograms Convention and the Rome Convention but it has not yet acceded to either neighboring rights treaty. Instead, Belarus ratified the two WIPO digital treaties (becoming one of the first countries to do so) in 1998. So, when the WIPO Performances and Phonograms Treaty (WPPT) went into force on May 20, 2002 Belarus

provided, for the first time, a point of attachment for the protection of U.S. and other foreign sound recordings (albeit over eight years after Belarus agreed to do so in the bilateral agreement).

In 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]).

The amendments were adopted not only for eventual WTO TRIPS compliance, but also to comply with the WIPO digital treaties. Belarus is not yet a member of the WTO. As noted, Belarus deposited its instrument of ratification on July 15, 1998 for both the WIPO Copyright Treaty (WCT) and the WPPT.

**Legal reform deficiencies:** By not acceding to the Geneva Phonograms Convention, and instead relying in 2002 on its WPPT ratification, Belarus delayed for eight years providing any protection for sound recordings. This time delay permitted unprotected back-catalog musical material to enter the Belarussian market and will now complicate the eradication of this illegal material from street markets and retail outlets.

The 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 (effective January 1, 2000). Those provisions reportedly (IIPA was never provided a copy) include sanctions 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 never 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 in 1999, as providing additional remedies for IPR violations.

The Copyright Law (as amended through 1998) does not clearly provide protection for pre-existing works or sound recordings. Belarus is required by the clear obligation in its bilateral trade agreement, as well as by Berne (Article 18) national treatment obligations, and the WTO 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, and the WPPT does not directly offer this relief. So, even though Belarussian officials believe that protection for pre-existing sound recordings is provided in the copyright law, absent membership in the WTO, this protection is only theoretical. Belarus should clarify that this protection is provided for both works and sound recordings for a minimum of 50 years (and preferably 70 years—the U.S. provides it for at least 75 years for Belarussian works and recordings), to meet Belarus’ bilateral and multilateral obligations, and in order to create an environment for the development of the copyright industries there.

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, especially in the software industry.

Neither are its anticircumvention or copyright management information provisions fully compatible with the WIPO 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.

## **Copyright Enforcement**

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The most important action Belarus can take for effective enforcement in 2003 is to bring the Armita optical disc plant investigation to a successful conclusion by commencing a criminal case and getting the courts to impose deterrent criminal on the plant operators.

In general to date, levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. There are numerous reports of material being produced in or shipped through Belarus ending up in other markets. For example, after a raid and seizure (of 56,000 illegal CDs) in Warsaw, Poland, recording industry and police investigators were told by those involved in the illegal operation that the material came to Poland from Russia and Belarus. As a result, Belarussian customs officials seized additional deliveries of illegal material intended for Poland.

In 2001 the government of Belarus disbanded the Committee on Copyright and Neighboring Right and incorporated it into the State Patent Office. IIPA noted in past reports our concern that this would 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. In fact, in November 2002, a Belarussian official reported to the U.S. Copyright Office that a new interministerial committee to be headed by the First Deputy Prime Minister of Belarus would be formed to concentrate on IPR enforcement, but no additional information about this initiative has been forthcoming.

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 the WTO 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. As a result of the many shortcomings, IIPA filed comments (May 15, 2002) with the U.S. government requesting that Belarus not be admitted into the WTO until these problems are corrected.

Belarus must 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. Organized criminal enterprises operate regionally in the music piracy business, producing and distributing 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. As noted, a few years ago, a Ukrainian CD plants migrated to Brest on the Belarus-Poland border because of the poor border enforcement in Belarus and Ukraine (this is the Armita plant that was closed in August 5, 2002 and is currently the subject of a criminal investigation). 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 now under criminal investigation could be the start of other CD plants moving some of their production facilities to Belarus—unless the Belarussian government takes steps to impose criminal penalties for violations and to impose optical media regulations to prevent an outbreak of this form of piracy. These optical disc plants are capable of producing thousands of CDs, DVDs, CD-ROMs, and even VCDs. So, the Belarussian authorities must act quickly to close the Brest plant, and to prevent other illegal production facilities from taking root in Belarus. Belarus must adopt 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 and only the adoption of quick measures 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 (as well as the growing optical media production problem in the

region) are very serious developments. Belarussian authorities need also 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 2002, IFPI reported that 20,300 CDs intended for export to Ukraine, Poland, and Latvia, Lithuania, and Estonia were stopped by customs authorities in Belarus.

In 2002, the IFPI continued to coordinate its anti-piracy actions against retailers and illegal manufacturers, seizing over 12,000 tapes, over 56,000 CDs, and 16 recording devices, with a total value of US\$561,000. 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 \$22 million in 2002; the piracy rate was estimated at 73% (ranging from 57% for the Russian and "local" repertoire to over 90% for foreign repertoire). In 2002, more than 4.3 million CDs and 10 million cassettes were sold in Belarus; of these 3.2 million CDs and 7.3 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. In 2002, a total of 14 criminal cases were initiated; charges were filed against infringers of copyright and neighboring rights, but these cases have not reached final disposition. Of the three cases brought in 2001 (the first year ever), one concluded in 2002 with a court decision imposing small fines and confiscation of the material, and the other two cases were dismissed.

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. The one reported CD plant in Belarus (Armita) was, before its closure, producing both entertainment software and music material. Even with the suspension of operations at that plant, Belarus remains the source of a large amount of pirate entertainment software material, whether produced in or simply shipped through Belarus to neighboring countries.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

The Motion Picture Association (MPA) reports that video and other forms of piracy remain rampant in 2002. Almost all video product in Belarus' open markets are pirate mainly comprised of Russian-language copies imported from Russia by small traders. The lack of border checkpoints between Belarus and Russia facilitates such cross-border piracy. There was no local enforcement activity reported by MPA, that is, the local authorities permit sales at "rock bottom prices" of pirate goods at huge open marketplaces. Pirate produce is also sold at retail stores at slightly higher prices. Plus, there is virtually no border enforcement.

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 Reforms and Treaty Adherence

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Georgia is a member of the World Trade Organization and the WIPO digital treaties. While it has made a number of important legal reforms in the past several years, it is still not providing the type of effective enforcement necessary to stem the copyright piracy there, or to be in compliance with the enforcement obligations of the WTO TRIPS Agreement. As the U.S. Trade Representative noted after an out-of-cycle review (completed in February 2002), “the U.S. government is concerned with key gaps in the legal regime...” and noted in particular “the lack of *ex officio* authority (the authority to undertake action without a rightholder’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.” One year after this report by the U.S. government, Georgia has still not corrected these deficiencies and thus has not improved its enforcement regime.

**History of legal reforms:** 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 (details of the 1993 Trade Agreement are provided in the C.I.S. 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.

Georgia is a member of the World Trade Organization (WTO) effective June 14, 2000. It is therefore obligated to be in full compliance with the WTO TRIPS Agreement, including substantive provisions as well as the important enforcement obligations. On June 14, 2000, by its adherence to the WTO, Georgia finally provided a point of attachment for American and other foreign sound recordings. Georgia is also a member of the two WIPO digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), having deposited its instrument of ratification on July 4, 2001.

In 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 provide “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.

**Legal reform deficiencies:** The Georgian Copyright Law of 1999 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 WTO TRIPS obligations are self-executing, and therefore this protection is afforded works and sound recordings. The Georgian copyright law should be amended to clearly provide for protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably 70 years—the U.S. provides it for at least 75 years for Georgian works and recordings) to meet Georgia's bilateral and multilateral obligations, and in order to create an environment for the development of the copyright industries there.

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, especially software pirates.

The Georgian copyright law needs to be amended to fully implement the two WIPO digital treaties to fight against Internet and other forms of digital piracy, and to create an environment for the future growth of e-commerce.

In 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 in 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 WTO 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.

Georgia has, for years, been considering major revisions to its civil code. One such proposal, offered a few years ago, 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.



## Copyright Enforcement

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On April 30, 2001, U.S. Trade Representative 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. In the completion of that review on February 12, 2002, the U.S. government voiced its ongoing concerns about the lack of effective enforcement in Georgia, and laid out the details of these concerns. The government of Georgia did not correct these deficiencies in 2002. As a result, the IIPA strongly encourages placement of Georgia on the Watch List.

Thus, Georgia 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 copyright industries did not report a single case in Georgia in 2002 in which criminal penalties were levied.

The administrative sanctions provide penalties only for the reproduction (replication) of illegal products, but not for the distribution of these products. IIPA understands that these provisions do cover violations of both copyright and neighboring rights. However, because the administrative sanctions are limited to reproduction only, they are, in effect, never used. There was not a single reported case in 2002. 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.

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, to freely cross the borders for sale in Georgia and other countries. The lack of any effective border enforcement, in particular, 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 rightholders in Georgia in 2002 were \$8 million; the piracy rate was estimated at 86%. In 2002, about 900,000 CDs and 5.2 million cassettes were sold in Georgia; of these, 800,000 CDs and 4.6 million cassettes were pirated copies.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

# KAZAKHSTAN

## **Legal Reforms and Treaty Adherence**

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On April 30, 2002 in his annual Special 301 announcement, the U.S. Trade Representative noted that Kazakhstan has not met its commitments under the 1992 U.S.-Kazakhstan Trade Agreement. In particular the U.S. government cited the lack of clear protection for pre-existing works and sound recordings and “weak enforcement” in part caused by ineffective criminal code provisions that set a “high burden of proof threshold” (noting a “dearth” of IPR enforcement cases). Kazakhstan has not fixed any of these deficiencies in 2002 and thus remains in violation of its bilateral agreement obligations and woefully short of the World Trade Organization TRIPS Agreement enforcement obligations. As a result, IIPA recommends not only placement on the Watch List, but that the U.S. government block Kazakhstan’s membership in the WTO until these deficiencies are corrected.

**History of legal reforms:** 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 (details of the 1992 Trade Agreement are provided in the C.I.S. introductory section, above). That agreement entered into force on February 18, 1993.

In 1996, Kazakhstan passed the Law on Copyright and Neighboring Rights; it 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. 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 but has not yet ratified either treaty. The Kazakh government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and to adopt the appropriate legislation to 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.

**Legal Reform Deficiencies:** For the past several years IIPA has met with officials from the government of Kazakhstan to try to resolve the legal reform and enforcement issues that have persisted in Kazakhstan. On May 29, 2002 the government of Kazakhstan issued a resolution (from the Committee on IPR in the Ministry of Justice) with a package of measures intended to correct the legal deficiencies in the Kazakh IPR regime. In essence this committee has been tasked with preparing draft laws to fix the pre-existing works and sound recordings problem, to accede to the digital treaties and to improve enforcement sanctions. While this is a good first step, it is only that until the proper provisions are enacted and, more important,

utilized by the enforcement agencies. For example, on September 26, 2001, the government of Kazakhstan issued a resolution (#1249) that also instructed the appropriate government ministries to draft laws and regulations that would fix the acknowledged deficiencies in the Kazakh enforcement regime—and that resolution, instead of implementing change, was followed by a similar resolution in 2002. For the recording industry, Kazakhstan holds the promise of being an important market behind only Russia and Ukraine of the C.I.S. members. But this promise will not be realized until Kazakhstan transforms its regime into an effective copyright enforcement regime by making the needed legal reforms and enacting real deterrent penalties.

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 how it 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).

In sum, the Kazakh law must be amended to clearly provide protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably 70 years—the U.S. provides it for at least 75 years for Kazakh works and recordings), to meet Kazakhstan’s bilateral and multilateral obligations, and in order to create an environment for the development of the copyright industries there. Proposals to amend the copyright law were prepared in the last year but never adopted. The May 2002 decree also identifies this problem. It is time for Kazakhstan to finally fix this problem in 2003.

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, especially against software pirates.

In 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.

As IIPA has noted since their adoption, there is one major shortcoming in the criminal code: The provisions noted above 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 (perhaps 50 times the minimum wage) applied against those in commercial activities. Proposed amendments to fix the “considerable harm threshold” problem have been discussed in prior years but never enacted. 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. That is why IIPA recommends (as it has 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 in 1999. It contained five articles on IP border control (Articles 218-1 to 5). Effective February 15, 2001, the customs code was further revised; and IIPA understands that further revisions are anticipated for the spring of 2003. 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. However, the Kazakh government reported to IIPA that the customs code revisions contemplated for 2003 would implement a complicated registration system for copyright rightholders seeking enforcement. IIPA recommends that the government of Kazakhstan not adopt any system, such as a registration system, that limits the effectiveness of border enforcement. In lieu, IIPA recommends that the border officials be given clear *ex officio* authority to seize infringing material and to commence their own criminal investigations without requiring the initiation of the copyright rightholders in such instances. This proper authority is necessary to effectively enforce against IPR violations at the border that is, 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 in 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).

As a result of the numerous legal reform deficiencies, IIPA filed comments (May 15, 2002) with the U.S. government requesting that Kazakhstan not be admitted into the WTO until these shortcomings are corrected.

## Copyright Enforcement

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As noted, 2002 did not see any improvement in enforcement in Kazakhstan. Instead, a resolution (very similar to the one in 2001) was issued by the government in late 2002; but no effective enforcement action was undertaken. Until such time as Kazakhstan begins to undertake effective enforcement (including adoption of the needed legal reforms), IIPA believes that the long delays warrant that Kazakhstan's GSP benefits be suspended or withdrawn. While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country has received GSP trade benefits of over \$214 million per year (this was in 2001, the last full year of U.S. government statistics). The copyright industries have patiently waited for ten years for effective change; IIPA believes that suspending or withdrawing GSP benefits will speed the necessary changes.

The copyright industries continue to report 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 and again in 2002 in the amount of pirated product that was seized and destroyed by the police. The government of Kazakhstan reported that in 2002, 856 inspections were undertaken by the Justice Ministry of IPR violations (including copyright and trademark violations) and that over 207,688 copies valued at 59.1 million tenge (US\$381,000). The government noted that administrative actions increased 56% from 2001, and the total number of confiscated products increased by 69%. The Kazakh government report noted that border officials confiscated a total of 1,166 audiovisual copies (not specifying format) and 440 CDs in all of 2002. This is a very low confiscation total for a country the size of Kazakhstan.

Further, Kazakh officials pointed to licensing and administrative provisions for businesses that it claims it used successfully against “television stations, publishing houses, computer clubs, theaters” and other “entertainment businesses.” The government of Kazakhstan has not indicated (in its report to IIPA) the nature of any impact that these sanctions had on anti-piracy efforts. Separately, a private collecting rights organization was formed for performers, and an anti-piracy organization was established in 2002.

IIPA suggests that police and administrative activity is, if used correctly, 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.

Over three years ago 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 (1997) criminal penalties, now over five years after their adoption. IIPA again urges the government of Kazakhstan to direct prosecutors to use these new penalties scaled to

multiples of the monthly salary or income of individuals convicted, so that they can be imposed in a way to 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 International Federation of the Phonographic Industry (IFPI) reports good cooperation, but not much progress with the Kazakh copyright officials with ongoing legal reforms to improve the levels of protection and enforcement for sound recordings and copyrighted works.

The recording industry reports trade losses for foreign rightholders in Kazakhstan were \$23 million in 2002 (up from \$20 million for all rightholders 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 2002, more than 4.1 million CDs and 16.2 million cassettes were sold in Kazakhstan and that of these, 3 million CDs and 13 million cassettes were pirate copies. The recording industry reports that more than 590 raids were run in 2002, but only about 31,400 CDs and 66,900 cassettes (and no recording devices) were seized—of a total value of \$380,000. So, obviously most of the “raids” were taken against very small operations, and only minimal administrative sanctions were levied against infringers.

It was reported that 456 administrative actions were taken in 2002; unfortunately, not a single criminal case was undertaken in 2002, according to the copyright industries.

There is one known optical disc production facility reported in Kazakhstan at present; it is reported that the line is capable of producing 8 million CDs a year. However, the lack of effective enforcement and the infrastructure there makes this country ripe for movement of other 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 Russia, Ukraine, Poland, and the Czech Republic, which manufacture and distribute throughout the region. Optical disc plants, like the ones operating in Russia, 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 foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were

\$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

The software industry reports that open and unfettered advertising of pirated software is common, and that illegal software can be easily purchased at street stands and shops at very low prices. Also, many retailers install illegal operating systems and applications on computers they sell; in fact, the use of unlicensed software is very widespread.

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 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, and 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 *ex officio* authority 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

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The Kyrgyz Republic is a member of the World Trade Organization and the WIPO digital treaties (effective on March 6, 2002 for the WCT and August 15, 2002 for the WPPT). It has undertaken a number of important legal reforms in the past several years, but it is still not providing the type of effective enforcement necessary to stem the copyright piracy there, nor to be in compliance with the enforcement obligations of the WTO TRIPS Agreement. As the U.S. Trade Representative noted after an out-of-cycle review (completed in February 2002), “the U.S. government is concerned with key gaps in the legal regime...” and noted in particular “the lack of *ex officio* authority (the authority to undertake action without a rightholder’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.” One year after this report by the U.S. government, the Kyrgyz Republic has still not corrected these deficiencies and thus has not improved its enforcement regime. That is why it should be placed on the Watch List.

**History of legal reforms:** 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 (details of the 1992 Trade Agreement are provided in the C.I.S. 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. As IIPA has noted for the past five years, 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 joined the Geneva Phonograms Convention effective October 12, 2002, over nine years after it agreed to do so in the bilateral agreement. The Kyrgyz Republic deposited its instrument of ratification of the new WIPO Copyright Treaty (WCT) on September 10, 1998—



that treaty entered into force on March 6, 2002; last year it ratified the WIPO Performances and Phonograms Treaty (WPPT), effective August 15, 2002. Now the Kyrgyz Republic needs to fully and completely implement the two digital treaties 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.

**Legal reform deficiencies:** For several years IIPA has 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 have not been completed—especially the enforcement law reforms.

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 could use clarification to avoid judicial misinterpretation—this would best be done by amendment to the copyright law (absent a clear judicial opinion). As a member of the WTO, effective on December 20, 1998, the Kyrgyz Republic was obligated from that date 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 WTO TRIPS Agreement. This is an obligation of the bilateral agreement and the Berne Convention (for works) as well as a WTO TRIPS obligation.

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, especially against software 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 WTO 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.

## **Copyright Enforcement**

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On April 30, 2001, U.S. Trade Representative 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. In the completion of that review on February 12, 2002, the U.S. government voiced its ongoing concerns about the lack of effective enforcement in the Kyrgyz Republic, and laid out the details of these concerns. The government of the Kyrgyz Republic did not correct these deficiencies in 2002. That is why IIPA strongly encourages placement of the Kyrgyz Republic on the Watch List.

In years past, Kyrgyz government officials cited statistics about the numerous copyrighted materials that have been seized by enforcement officials. Unfortunately, as in years past, in 2002 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.

In 2001, 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, did not lead in 2002 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, Russia 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 (although the local market is probably too small to sustain its own production facilities, these could be used as plants for exporting material elsewhere in the region). 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. One danger is that the former military bases could be converted into illegal manufacturing operations. Currently, most of the music piracy is in the form of audiocassettes. The recording industry estimates trade losses in the Kyrgyz Republic were \$5 million in 2002, with the level of piracy estimated to be about 85%. Out of approximately 700,000 CDs and 4.2 million cassettes sold in the country in 2002, 600,000 CDs and 3.6 million cassettes were pirated copies.

There were no reported criminal cases in the Kyrgyz Republic in 2002. There were 35 raids with seizures totaling 6500 CDs, 3200 cassette tapes and only 4 recording devices—a total of \$69,350 worth of material.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 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. Over three 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 (and additional decrees in late 2001). 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 Reforms and Treaty Adherence**

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The Republic of Moldova is a member of the World Trade Organization and the WIPO digital treaties. While it has made a number of important legal reforms in the past several years, it is not yet providing the type of effective enforcement necessary to stem the copyright piracy there, or to be in compliance with the enforcement obligations of the WTO TRIPS Agreement. In particular, the Republic of Moldova needs to amend its criminal code to apply to neighboring rights violations—necessary to protect producers of sound recordings. Second, it must improve the levels of enforcement with criminal convictions and improved border enforcement.

**History of legal reforms:** 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 (details of the 1992 Trade Agreement are provided in the C.I.S. 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. On July 25, 2002, further amendments were adopted in order to implement the WIPO digital treaties; those amendments entered into force on September 19, 2002.

The Republic of Moldova is a member of: the Berne Convention (November 2, 1995); the Geneva Phonograms Convention (July 17, 2000); the WIPO Copyright Treaty (WCT)(March 6, 2002); and the WIPO Performances and Phonograms Treaty (WPPT)(May 20, 2002)—Moldova had deposited its instrument on March 6, 1998. Last, the Republic of Moldova is a member of the Rome Convention (December 5, 1995).

The July 2002 legislation was intended to implement the digital treaties (IIPA has not reviewed a copy of this law). Moldova should be encouraged to fully and completely implement and then enforce the treaties in order to protect against Internet and other forms of digital piracy and to create an environment for the growth of e-commerce.

The Republic of Moldova is a member of the World Trade Organization (July 26, 2001), and is thus obligated to meet all of the substantive and enforcement provisions of the WTO TRIPS Agreement.

**Legal reform deficiencies:** The Copyright Act of the Republic of Moldova adopted in late 1994 was intended to comply with the Berne Convention obligations. It provided a Berne-compatible term of life-plus-50 years. It provided 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 provided 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 WTO TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). This clarification came in the form of 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). The Moldovan government acknowledged that the 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. As noted in past reports, IIPA treats this matter as having 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 2002, there were no known 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.

In 2002 a new criminal code was adopted; it entered into force on January 1, 2003. Although the Moldovan law was amended to include special criminal provisions for copyright violations, the 2002 changes do not apply to neighboring rights violations. Thus, sound recording producers have no recourse in the criminal law system in Moldova. This is a glaring deficiency that must be corrected for WTO TRIPS compliance and for effective enforcement. (In 2001, the government of Moldova—Letter of October 16, 2000—cited improvements to the Criminal Code and Criminal Procedure Code, but IIPA remains uncertain how these provisions are applicable to IPR violations.)

The criminal procedures code does provide police with the proper *ex officio* authority to commence criminal copyright cases.

The Republic of Moldova amended its customs code to provide *ex officio* authority for customs officials to seize material at the border as required by the WTO TRIPS Agreement (in 2001 amendments). These provisions are necessary to conduct effective enforcement at the border; the applicability of these provisions was acknowledged by Moldova authorities in the Letter of October 16, 2000, along with an agreement to fix the then-deficient provisions. There were no reports in 2002 of these provisions being 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

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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 WTO TRIPS Agreement or the bilateral agreement. Although there are signs of stepped-up police activity in the past two years, there have not been 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 in the past few years (though no notable activity in 2002), especially cooperation with the police. In January 2001, Moldovan law enforcement officials raided a warehouse in Kishinev, 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 were no known instances where violators were charged and convicted under the criminal laws in 2002.

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.

Border enforcement remains weak in the Republic of Moldova, allowing illegal copies, especially of musical material produced in Russia (and including back-catalog from Ukraine) to freely cross borders for sale in the Republic of Moldova and other countries. This is causing significant harm to the copyright industries.

There was one success story in 2002. In 2001, several British authors (J.K. Rowling, Arthur Clarke and Robert Jordan) and their publishers sued a Moldovan Internet website offering illegal copies of English language materials. The civil case was brought before the Moldovan Copyright Tribunal; the tribunal issued a ruling in May 2002 that included a permanent injunction (removal of the material and periodic monitoring) and awarded damages totaling 3,600Mlei (200 times the minimum wage) to each author.

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 confirmed optical media plants in the Republic of Moldova. 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 rightholders in the Republic of Moldova was \$6 million in

2002, with the level of piracy estimated to be about 77%. Out of 800,000 CDs and 6 million cassettes sold in Moldova in 2002, 700,000 CDs and 3.4 million cassettes were pirate copies.

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. In particular, Moldova's location makes border enforcement especially important because material produced or transshipped through Ukraine is making its way into other pirate markets such as Romania and elsewhere in Central and Eastern Europe.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

# TAJIKISTAN

## Legal Reforms and Treaty Adherence

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The U.S. Trade Representative in his April 30, 2002 announcement placing Tajikistan on the Watch List said “Tajikistan has yet to fulfill all of its intellectual property rights commitments under the 1993 U.S.-Tajikistan Trade Agreement” and specifically noted that Tajikistan has neither joined the Geneva Phonograms Convention nor is providing any protection for U.S. or other foreign sound recordings. Further, the U.S. government noted that Tajikistan provides no clear protection for pre-existing works and sound recordings, has no criminal penalties for IPR violations, and an overall weak enforcement regime. One year after the U.S. government’s statement, and ten years after the bilateral agreement Tajikistan has not fixed any of these shortcomings and is not providing adequate and effective protection and enforcement at even the most rudimentary levels. Tajikistan should remain on the Watch List in 2003.

**History of legal reforms:** 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 (details of the 1993 Trade Agreement are provided in the C.I.S. 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 included: 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 were afforded the exclusive rights of reproduction, adaptation, distribution (including rental), and importation. However, the law provided 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 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 nine years ago. So U.S. (and other foreign) sound recordings remain completely unprotected in Tajikistan.

**Legal reform deficiencies:** 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 50 years old, and preferably 70 years old (the U.S. provides it for 75 years for Tajik works and recordings). Doing so is required to meet Tajikistan’s bilateral and multilateral obligations and in order to create an environment for the development of the copyright industries there.

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, especially software 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).

## **Copyright Enforcement**

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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.

As a result of the many legal and enforcement deficiencies, IIPA filed comments (May 15, 2002) with the U.S. government requesting that Tajikistan not be admitted into the World Trade Organization until these shortcomings are corrected. In fact, on December 10, 2002, the U.S. and Tajik presidents signed a joint statement reaffirming the relationship between the two countries and “recognizing the importance of ... the rule of law” as well as pledging to work

together on economic and political reforms. IIPA observes that the government of Tajikistan should, in this spirit of cooperation, and as required by its now ten-year-old obligations under the Bilateral Trade Agreement, amend the relevant IPR laws and engage in effective enforcement.

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 (amended December 1999) with a new Article 158-2 reportedly provides levies, fines, and seizure of illegal copyright and neighboring rights material. IIPA was never provided a copy of this law.

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 audiocassettes, some produced in Tajikistan. The recording industry estimates trade losses for foreign rightholders in Tajikistan were \$5 million in 2002 (up from \$500,000 in 1999); music piracy levels were estimated to be at about 87%. Of 5.4 million cassettes, 4.7 million were pirated copies; for CDs the figures were 600,000 total sales, of which 500,000 were pirated copies.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

# TURKMENISTAN

## **Legal Reforms and Treaty Adherence**

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The U.S. Trade Representative, in his April 30, 2002 announcement placing Turkmenistan on the Watch List said “Turkmenistan has several remaining steps to fulfill its intellectual property rights commitments under the 1993 U.S.-Turkmenistan Trade Agreement” and specifically noted that Tajikistan had neither joined the Berne Convention nor the Geneva Phonograms Convention. In fact, Turkmenistan is not providing any protection or rights to U.S. or other foreign works or sound recordings—ten years after it agreed to make basic changes in its law and enforcement regime. Turkmenistan and Uzbekistan are the two countries in the C.I.S. with the farthest to go to modernize their laws and enforcement regimes at even the most rudimentary levels. By refusing to abide by its trade agreement or international norms, Turkmenistan is creating an environment ripe for organized crime syndicates to commence large-scale operations there or to move them from other countries in the region that are offering some enforcement protection. Turkmen law provides no criminal penalties for IPR violations and essentially no enforcement regime (for example, there is no effective border enforcement). One year after the U.S. government notice above, the Turkmen government has taken no steps to correct these problems.

**History of legal reforms:** 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 (details of the 1993 Trade Agreement are provided in the C.I.S. introductory section, above). That agreement entered into force on October 25, 1993. For almost ten 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.

**Legal reform deficiencies:** 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) 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 basic international norms are lacking. A draft Law on Copyright and Neighboring Rights was under consideration several years ago, but 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 complete more than nine 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 and

preferably 70 years (upon accession to any treaty, the U.S. will provide the same for Turkmen works and recordings) to meet Turkmenistan's bilateral and multilateral obligations, and in order to create an environment for the development of the copyright industries there.

Turkmenistan 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, especially software 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 WTO 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

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The addition into the Turkmen copyright law of basic civil, administrative, criminal and customs remedies is essential to bring the copyright enforcement legal regime up to 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 audiocassettes. The piracy rate is over 90%. Rightholders 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 of trade losses for foreign rightholders in Turkmenistan were (by estimating the possible size of the "legal" market) \$6.5 million in 2002 (up from \$3 million in 1999). In 2002, a total of 5.5 million cassettes and 900,000 CDs were sold in Turkmenistan.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.

# UZBEKISTAN

## **Legal Reforms and Treaty Adherence**

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The U.S. Trade Representative, in his April 30, 2002 announcement placing Uzbekistan on the Watch List, said “Uzbekistan has many remaining steps to fulfill its intellectual property rights commitments under the 1994 U.S.-Uzbekistan Trade Agreement” and specifically noted that Uzbekistan is neither a member of the Berne Convention nor the Geneva Phonograms Convention. In fact, Uzbekistan is not providing any protection or rights to U.S. or other foreign works or sound recordings—nine years after it agreed to make basic changes in its law and enforcement regime. Uzbekistan and Turkmenistan are the two countries in the C.I.S. with the farthest to go to modernize their laws and enforcement regimes at even the most rudimentary levels. By refusing to abide by its trade agreement or international norms, Uzbekistan is creating an environment ripe for organized crime syndicates to commence large-scale operations there or to move them from other countries in the region that are offering some enforcement protection. Uzbek law provides no criminal penalties for IPR violations and essentially no enforcement regime (for example, there is no effective border enforcement). One year after the U.S. government notice above, the Uzbek government has taken no steps to correct these problems.

**History of legal reforms:** 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. That agreement entered into force on January 13, 1994 (details of the Trade Agreement are provided in the C.I.S. introductory section, above).

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 nine years ago. The exception was in December 2000, when two amendments to the copyright law were adopted; however, as noted herein, major deficiencies remain.

**Legal reform deficiencies:** 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 three years ago, Uzbek government officials stated that they did not expect to join the Berne Convention or the Geneva Phonograms Convention for several years. 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) included “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. Unfortunately, the copyright law also contained many onerous provisions that over-regulate the terms and conditions of authors' contracts.

Producers of phonograms are now 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 complete over nine 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 (nine 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 and preferably 70 years (upon accession to any treaty, the U.S. will provide the same for Uzbek works and recordings) to meet Uzbekistan's bilateral and multilateral obligations, and in order to create an environment for the development of the copyright industries there.

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, especially software 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. For the past several years, Uzbek officials reported to the U.S. government and the IIPA that Article 149 would be revised, but that has yet to occur. 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 WTO 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. Almost nine years later, IIPA 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

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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 nine years ago, and is woefully insufficient for any future WTO membership. As a result, IIPA filed comments (May 15, 2002) with the U.S. government requesting that Uzbekistan not be admitted into the WTO until these shortcomings are corrected.

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. The music industry estimates that the piracy rate is over 90%. 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 rightholders in Uzbekistan (by calculating the size of the potential legal market) were \$32 million in 2002. In total, 25 million cassettes and 4.5 million CDs were sold in Uzbekistan in 2002.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 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

## 2003 SPECIAL 301 REPORT

# COLOMBIA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Colombia remain on the Special 301 Watch List in 2003 for its continued difficulties in achieving effective copyright enforcement.

**Overview of key issues:** Piracy levels in Colombia continue to be high. The home video market is 90% pirate, and the industry is working hard to keep cable piracy from escalating. Pirated sound recordings can be easily found in flea markets and on streets in major cities, and the growth of illegitimate CD-R replication continues to undermine what is left of the legitimate music market. Illegal use of business software in small and medium-sized businesses is widespread, with rates higher in areas outside the major cities. Pirating videogame software on all platforms and illegal photocopying of books are widespread. Estimated losses due to piracy of U.S.- copyrighted materials in Colombia amounted to \$117.8 million in 2002.

Enforcement activity at the raiding level has improved somewhat in the last few years. However, delays in prosecution continue to favor the pirate. The Colombian judicial system fails to actively prosecute cases, much less issue deterrent penalties; hence piracy has not declined. With respect to administrative enforcement of cable piracy and signal theft, CNTV's efforts require improvement. The regulatory agencies and the tax authority must improve efforts to enforce Law No. 603, which requires Colombian corporations to certify compliance with copyright laws in annual reports they file with regulatory agencies. The National Program Against Piracy (*Convenio Nacional*) continues to meet and has achieved some limited success in coordinating the fight against piracy, but it is still far from effective. Colombia must ensure that its criminal, administrative, civil and border procedures meet its bilateral and multilateral copyright enforcement obligations (both in substance and in practice).

**Actions which the Colombian government should take in 2003:** Actions which the government should undertake include—

- Having the President instruct the Attorney General, Customs and the Finance Ministry to escalate their investigations and actions to enforce the copyright law by going after infringing activities both in the streets and against larger, organized distributors of pirated materials;
- Granting civil *ex parte* search orders more swiftly;
- Encouraging more actions by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy;
- Expediting prosecutions of criminal copyright cases and issuing deterrent sentences, as permitted under the criminal code;
- Improving efforts by the regulatory agencies (*superintendencias*) and the tax authority (DIAN) to enforce Law No. 603 (a fiscal law which requires Colombian corporations to certify compliance with copyright laws in annual reports which they file with agencies);

**COLOMBIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	90%	40.0	90%	40.0	90%	40.0	55%	38.0	60%
Records & Music	56.3	65%	73.0	65%	60.0	60%	60.0	60%	65.0	60%
Business Software Applications <sup>2</sup>	16.2	50%	19.5	52%	33.2	53%	50.5	58%	68.1	60%
Entertainment Software	NA	NA	NA	NA	39.0	85%	7.0	75%	7.7	78%
Books	5.3	NA	5.3	NA	5.0	NA	6.0	NA	6.0	NA
<b>TOTALS</b>	<b>117.8</b>		<b>137.8</b>		<b>177.2</b>		<b>163.5</b>		<b>184.8</b>	

Colombia is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP), the Andean Trade Preference Act (ATPA) and the recently adopted Andean Trade Promotion and Drug Eradication Act (ATPDEA).<sup>3</sup> All three programs have standards of intellectual property rights which must be afforded to U.S. copyright owners. Responding to the U.S. government's request for comments regarding countries' eligibility for ATPDEA benefits, IIPA reported that Colombia had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.<sup>4</sup> Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Colombia. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Colombia's actions to meet the IPR

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$35.0 million at 53% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> For the first 11 months of 2002, \$177.2 million worth of Colombian goods (or 3.6% 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 228.8% increase over the same time period last year. During this same time period in 2001, \$244.6 million worth of Colombian goods entered under the ATPA program, accounting for a 65.4% decrease from the prior year. For more information on the history of Colombia's status on Special 301, please see Appendices D and E of this submission.

<sup>4</sup> IIPA Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September, 16, 2002, available on the IIPA website at [http://www.iipa.com/rbi/2002\\_Sep16\\_ATPDEA.pdf](http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf).

standards of the ATPDEA before designation was officially conferred. IIPA understands that Colombia indeed made general commitments (a) to reduce piracy and (b) to implement a software legalization decree.

## **COPYRIGHT PIRACY IN COLOMBIA**

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Piracy levels in Colombia exceed half the legitimate market in almost all the copyright sectors.

The audiovisual industry faces two serious form of piracy in Colombia: Television signal theft and video piracy. The Motion Picture Association of America (MPA) reports that both are prevalent and so integrated into the economy that the legal market is seriously threatened. In fact, the incidence of video piracy is so high that some audiovisual producers have abandoned the market, despite the country's potential. At least 90% of the video market is pirate. An increasing number of pirate videos are high quality counterfeits, with high quality copies and packaging intended primarily for sale or rental in video stores. The majority of pirate videos, however, are distributed in street markets. MPA has continued to fight television signal theft piracy. The situation has improved somewhat, however, due to consistent MPA action (over 60 cases brought in the last five years), and since cable operators who received licenses in 1999-2000 have now legalized their signals. Some of these legal operators have also "bought out" pirate systems to increase their subscriber base. There are still uncounted, small unlicensed operators that have built their own pirate distribution systems, although many of these may never pay for their use of signal either because they are very small systems in remote, dangerous areas or because they are legally protected under the Colombian law that allows signal distribution on a "community, not-for-profit" basis. These pirate systems often use gray market decoders (legal decoders used outside of the territory for which they are licensed) to descramble U.S. signals and then distribute them to their own pirate customer base. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Colombia are estimated to be \$40 million in 2002.

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 Bogotá are believed to be much higher than the average national rate. During 2002, the Business Software Alliance (BSA) encountered sophisticated, high-volume software counterfeit production facilities in Bogotá. A series of raids by Colombian law enforcement authorities during last year confirmed that the facilities had manufactured several hundreds of counterfeit software licenses and packaging. In one of the raids, the authorities arrested 19 pirates, completely dismantling the pirate operation facilities. Estimated trade losses due to business software piracy are \$16.2 million in 2002, with an estimated 50% 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 2002, compared to the prior year.

The recording industry reports that in 2002, the estimated level of audio piracy rose to 65%, with estimated losses due to piracy placed at \$56.3 million. This estimated loss is below the 2001 amount mostly due to devaluation. Piracy of music CDs in Colombia continues to increase, mostly due to local CD-R replication. The major problem is the hundreds of stalls in the street markets of San Andrecitos that continue to openly and brazenly sell and distribute pirate and counterfeit product. Street vendors sell pirate CDs on the traffic corners in Bogotá,

Medellin and Cali, and even more vendors sell pirate audiocassettes. Because these vendors move around so much, it is difficult to locate them and get the police to conduct raids in a swift and efficient manner. 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 blank CDRs are brought in to Colombia in containers from the Far East. IFPI also reports that recorded pirate CD-Rs are being smuggled in from Ecuador. 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. As a result of poor enforcement efforts, the legitimate market decreased by 22%, or 2.4 million units, in 2002. This declining trend is likely to continue in 2003. Since 1997, the overall market drop in sales in Colombia has been 60.4%, or 12.8 million units. The record companies have taken steps to compensate their losses by streamlining personnel and local artist rosters. Sadly, tax-paying Colombian citizens and artists are paying the price for this piracy problem.

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. In early 2003, the Colombia Book Association reported that one of the most pirated books in Colombia was the first volume of Nobel literature laureate Garcia Marquez’s autobiography, “Vivir para contarla” which was released in October 2002. Anti-piracy efforts in 2002 generated the seizure of over 114,000 illegal published books, the result of some 85 raids.<sup>5</sup> Commercial piracy has declined somewhat because of enforcement actions, but not photocopying. 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. 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 remained at \$5.3 million in 2002.

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.

## **COPYRIGHT ENFORCEMENT IN COLOMBIA**

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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.

For example, in May 1998, the copyright industries joined an inter-institutional agreement with Colombian government agencies to strengthen the government commitment to fighting piracy which was approved by then-President Samper. On February 25, 1999, then-President Pastrana confirmed the National Anti-Piracy Campaign, which involved a large

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<sup>5</sup> EFE News Service, “Garcia Marquez’s books among the most pirated in 2002,” February 6, 2003.

number of governmental and independent agencies in the fight against piracy.<sup>6</sup> The purpose of this public/private sector organization is to coordinate anti-piracy activities. Under the new administration, the Minister of the Interior has the lead on the national IPR campaign.

In terms of enforcement, 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 seven special prosecutors, 25 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces. In Bogotá alone, there are approximately 25 special prosecutors and 25 special judicial police officers.

## **Police are active but prosecutions are few.**

Given the poor results in actions against home video piracy, MPA has effectively ceased to bring home video piracy cases in Colombia. MPA also is not presently doing any TV cases, although the TV market seems to have fixed itself somewhat. MPA has coordinated with the police unit for signal theft action with good raiding results. After the raids, however, prosecution procedures and sentencing possibilities have not been a deterrent for pirates. Lengthy prosecutions continue to favor the pirate, and MPA is faced with a 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. In the last three years, MPA took 17 criminal actions against alleged television pirates in 2000, 16 such cases in 2001 and eight in 2002. However, MPA's television anti-piracy strategy depended largely on a complementary effort promised by CNTV, which, as noted below, has done virtually nothing.

For business software piracy, BSA reports that it continues to receive strong support in 2002 from the Fiscalia and SIJIN (Judicial Department of intelligence of the National Police), but also from other government authorities such as CTI (Investigation Department of the Prosecutor Office), DIJIN (Direction of Intelligence of the National Police) and National Police. However, DAS (Security Department of the Ministry of Justice) has diminished its level of support substantially during 2002, explaining that it has other priorities. All these agencies proved critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogotá. In 2002, legal actions were conducted against 12 end-user pirates, and more than 299 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, Bogotá and Medellín.

The recording industry reports that there has been good will between the industry and the Colombian enforcement authorities but the good will never contribute to decreasing the high levels of piracy. The industry reactivated its anti-piracy unit (APDIF) in 2002. With limited support from police authorities APDIF has been able to carry out a street level campaign that contributed to cleaning up some high traffic areas in Bogotá. Unfortunately the authorities to

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<sup>6</sup> 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. This 1999 agreement reaffirmed the first anti-piracy agreement (known as CERLALC) which was signed in December 1995.

investigate pirate replication facilities and major distributors have done little, which dilutes the effectiveness of street operations since any seized product is quickly replaced. Of 1,100 raids in 2002 only 130 were directed at labs or warehouses. It is imperative that the police intensify investigations and raids against pirate production and distribution centers to have any hope of reducing piracy levels in Colombia. In addition, the Colombian government has not cooperated in implementing adequate border measures to prevent entry into the country of blank CDRs that are used for piracy purposes or stemming the flow of recorded pirate product coming from Ecuador and Venezuela. The current criminal code also presents an obstacle to fighting piracy because for those few cases that are prosecuted the penalties are so low that, for all intents and purposes, it prevents any type of incarceration and leads to suspension of any sentence.

There has been some enforcement action in Colombia on commercial book piracy, with some 85 actions taking place in 2002. 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. AAP reports that there is no effective anti-piracy enforcement against copyshops, which operate both in and around universities and copy chapters of, or even entire, books.

## **Failure to Impose Deterrent Criminal Sentences**

Even with all the criminal raids, the Colombia system does not result in deterrent penalties or criminal sentences. The Colombian judicial system remains a serious obstacle to effective enforcement. Increasing penalties, as was done in the 2001 amendments to the criminal code, is not enough. It is also important to expedite criminal prosecutions.

The statute of limitations on criminal penalties benefits pirates who are able to remain out of prison on bail during the trial and appellate procedures. In essence, if the jail term to which the defendant is sentenced in first instance is shorter than the time between the commencement of the criminal investigation and the final conviction (after exhausting all appeals), then the statute of limitations expires and the defendant would not be required to serve any jail time. It is well known that in Colombia, it usually takes more than six years between the commencement of the criminal investigation and the final decision of the court; therefore pirates currently do not feel pressure when an action is filed against them.

## **Border Enforcement Measures**

Colombia is faced with a major challenge to improve its border measures. Customs is a key element in the effort to control the contraband of legal and illegal product. Last year, DIAN did engage in several major actions, resulting in significant seizures. Enforcement at the Colombian borders still needs to be improved in practice, especially given the growth of optical media piracy in the region.

Millions of blank CDRs are entering Colombia for the sole purpose of burning pirate music CDs. Some of the shipments are being undervalued and in all likelihood include blank CDRs manufactured in rogue Taiwanese plants that are not licensed by Phillips or pay corresponding patent royalties. It is extremely important for any effective anti-piracy campaign that custom authorities begin to implement measures to prevent entry of these blank CDRs.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2002			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted	8	311	1,168
By police (including tax authorities)	8	299	1,168
By customs		2	0
By CNTV	0		0
Number of cases commenced	8	11	27
Number of defendants convicted (including guilty pleas)	0	6	9
Acquittals and Dismissals	0	3	
Number of cases pending	64		
Total number of cases resulting in jail time	0		1
Suspended prison terms			
Maximum 6 months			
Over 6 months			
Over 1 year			1
Total suspended prison terms			
Prison terms served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total prison terms served (not suspended)			
Number of cases resulting in criminal fines	0		9
Up to \$1,000			
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied	0		\$49,000

## Administrative Enforcement Against Signal Theft Piracy

Despite several years of promising administrative action to enforce copyright, CNTV has been completely ineffective in addressing the problem of piracy in television. Because of the agency's constant constant excuses and its failure to act against piracy, MPA has lost faith in the agency and has no active cooperation at this time. Without cooperation from the responsible authorities, there is little reason for industry to expend its resources in a one-sided fight against piracy.

## Delays in Civil Actions, Including 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 Bogotá. Problems with the Colombian courts tend to be greatest in cities outside Bogotá, 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 2002, conducting only a handful of civil end user actions.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2001-2002		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2001	BUSINESS APPLICATIONS SOFTWARE 2002
Number of civil raids conducted	20	06
Post search action		
Cases pending	18	02
Cases dropped	2	
Cases settled or adjudicated		
Value of loss as determined by right holder (\$USD)		\$30,000
Settlement/judgment amount (\$USD)		\$21,000

## COPYRIGHT LAW AND RELATED ISSUES

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### Copyright Law of 1982 and the WIPO Treaties

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.

Colombia has deposited its instruments of ratification for both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), making it one of the original 30 countries to place both treaties into force in 2002. These treaties raise the standards of copyright protection worldwide, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce. Amendments to the criminal code actually provide sanctions for the circumvention of technological protection measures.

### Fiscal Enforcement Legislation: Law No. 603

In July 2000, Colombia enacted fiscal enforcement legislation (Law No. 603) that requires Colombian corporations to include in their annual reports the compliance with copyright laws and the Superintendency of Companies has the authority to audit the company and penalize it in case of non-compliance. Any corporation that falsely certifies copyright compliance 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 2002, BSA, as part of its awareness campaign in promoting Law 603, conducted a successful seminar addressed to accountants, managers, attorneys and anybody responsible in a corporation for filing an annual report. About 1,000 people participated in this event. BSA is still working closely with the *Superintendencias* and DIAN to have them issue implementing guidelines. To date, 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.

## **Criminal Code and Criminal Procedure Code Revised**

Colombia's criminal code entered into effect in July 2001. It includes copyright infringements as a crime, and increases possible sanctions from a jail term from one-to-three up to three-to-five years. The code also contains provisions on violation of technological protection measures and rights managements, both key obligations of the WIPO treaties. Unfortunately, in piracy cases the penal code allows home arrests or bail during the process and suspends any sentences of up to three years. In practical terms, this scenario translates to no incarcerations for pirates.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the

obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# COSTA RICA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Costa Rica remain on the Special 301 Watch List to address continuing issues related to amending its intellectual property law and improving on-the-ground anti-piracy actions. It was placed on the Priority Watch List in 2001, and on the Watch List in years prior. IIPA believes it is critical that the issues raised in this report be addressed during the U.S.-Central America Free Trade Agreement (CA-FTA) negotiations with Costa Rica. Costa Rica has a strong copyright economy and, at the same time, has significant barriers to effective enforcement.

**Overview of key actions:** It is time for the Costa Rican government to take immediate action to improve intellectual property rights (IPR) enforcement and bring its copyright laws into compliance with TRIPS, as promised by the Costa Rican government last year, as well as meeting TRIPS-plus standards in light of the upcoming CA-FTA, and fully implementing the WIPO Copyright Treaty. The U.S. government should insist that the Costa Rican government immediately address all of the problems identified herein prior to the finalization of CA-FTA. Copyright piracy levels remain high for most industries, with estimated trade losses due to piracy amounting to at least \$17.6 million in 2002.

- Although the Costa Rican government announced encouraging steps to improve IP protection at the beginning of 2002, most of them have yet to be implemented. The few improvements to its copyright protection regime that the Costa Rican government tried to implement, particularly the appointment of IPR “link” prosecutors and official experts, have had little or no effect to date.
- Delays in judicial proceedings and lack of official investigators, public prosecutors and criminal and civil judges specializing in intellectual property enforcement caused serious enforcement problems in 2002, especially to the business software industry.
- In 2000, Costa Rica enacted its “*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*,” intellectual property reform legislation which diverged substantially from TRIPS requirements and actually scaled back the protection afforded to copyrighted materials. Despite the copyright industry’s recommendations, this law has not been modified to adapt it to TRIPS.

**Actions which the government of Costa Rica should take in 2003:** The most urgent measures that should be adopted in Costa Rica are the following—

- Create a Public Prosecutor’s Office specialized in IP matters, and;
- Amend the “*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*” to bring it into full compliance with Costa Rica’s obligations under TRIPS and

the WIPO internet treaties, and to incorporate the copyright industries' recommendations for improvement and achievement of TRIPS-plus standards;

- Reduce unwarranted delays in investigations, prosecutions and sentencing in copyright cases;
- Increase significantly penal sanctions for IPR violations to allow the courts to issue deterrent-level sentences;
- Take a leadership role in the CA-FTA IPR negotiations, advocating high levels of copyright protection and enforcement measures in the IPR Chapter.

**COSTA RICA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1999 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications <sup>2</sup>	8.6	61%	6.9	64%	14.9	68%	9.4	71%
Records & Music	7.0	50%	4.8	40%	3.0	40%	3.0	40%
Motion Pictures	2.0	40%	2.0	40%	2.0	40%	2.0	95%
Entertainment Software	NA	NA	NA	NA	0.2	50%	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>17.6</b>		<b>13.7</b>		<b>20.1</b>		<b>14.4</b>	

For several years, IIPA and its members have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system. For a country which receives significant preferential treatment under several U.S. trade programs, Costa Rica continues to make only sporadic and inconsistent improvement in its IPR enforcement regime.<sup>3</sup>

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$9.0 million at 68% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> Regarding imports during the first 11 months of 2002: \$456.6 million worth of Costa Rican goods entered the U.S. under the CBTPA; \$11.7 million worth of Costa Rican goods entered the U.S. under the duty-free GSP code (representing an 78.7% decrease from the same time period in 2001); and \$608.2 million worth of Costa Rican goods entered the U.S. under the CBI (representing an increase of 12.2% from the same period in 2001). For more details on the history of bilateral engagement on copyright issues with Costa Rica, see Appendices D and E of this filing.

# **COPYRIGHT PIRACY IN COSTA RICA**

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The high level of business software piracy is the consequence of an ineffective judicial system and intellectual property ("IP") protection legislation that fails to deter piracy.

## **COPYRIGHT ENFORCEMENT**

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### **Ineffective Judicial System**

Copyright enforcement in Costa Rica still fails to meet TRIPS and bilateral IPR standards. It takes more than six months from the filing of a criminal or civil case before a software pirate is raided. On one occasion, it took 15 months for prosecutors, the Judicial Investigative Office (OIJ) and judges to raid a software pirate in a criminal case filed by BSA. Judges and prosecutors are not proficient in intellectual property and software matters and official investigations are extremely slow.

Copyright enforcement can be improved in Costa Rica but a serious commitment from the Costa Rican government and the judiciary is necessary. Some of the key recommendations by industry are:

(1) Creation of a Public Prosecutor's Office specialized in IP matters: In June of this year, during a reception organized by BSA for the Costa Rican President, President Pacheco reiterated the Costa Rican government's commitment to improving copyright protection. Going further than the previous administration, President Pacheco promised the enactment of a law creating a public prosecutor's office specialized in IP matters. BSA applauded this announcement as it believes that the creation of a specialized prosecutor's office with nationwide jurisdiction may be the only way to significantly expedite IP criminal cases. Unfortunately, the specialized IP Prosecutor's Office is non-existent. Given the significant delays and lack of proficiency observed by prosecutors, judges and the OIJ, the creation of this office has become even more of a priority.

(2) Creation of the Inter-Ministerial Committee on IP matters by decree: During the first quarter of 2002 an Inter-Ministerial Committee on IP matters was created. This special Committee is comprised of delegates from the Ministry of Justice, Ministry of Foreign Trade, Public Ministry, OIJ, Customs Administration, and Judicial School. This committee was created by resolution of all the aforementioned government agencies. Ratification of this committee through a presidential decree would empower it to act in front of other public agencies and private organizations and would be a further signal of the government's true commitment to IPR protection.

(3) Improve training in IP matters: During 2002 the BSA conducted two training seminars for judges, prosecutors and official experts at the Judicial School. Unfortunately, the government did not itself hold any IPR seminars during that year. It is incumbent upon the government to ensure that all agencies, departments and government officials involved in IPR protection receive the necessary training to achieve a baseline level of knowledge that will allow them to be effective in enforcing IPR. While industry is willing to continue cooperating with the government to achieve this goal, it cannot bear this burden alone.

(4) Eliminate delays and improve the performance of prosecutors, judges and OIJ during the pre-raid procedural stage: Procedural delays in criminal cases could be avoided if prosecutors were to request, and judges were to order, *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs (“querellantes”), as allowed by the Criminal Procedural Code.

## **Delays in criminal and civil procedures and slow and inefficient official investigations of IP crimes are still serious obstacles to efficient IP enforcement in Costa Rica.**

### **(1) Public Prosecutors**

- Specialized “Link” Prosecutors: In February 2002, the Costa Rican General Prosecutor officially announced that 12 specialized “link” prosecutors, one for each public prosecutor’s office in the country, were appointed to handle, “with priority,” intellectual property cases. While this development appeared to be positive, IIPA reported in our February 2002 Special 301 submission that it was premature to comment on whether it would resolve the IP enforcement difficulties that the industry faced in Costa Rica. Another year has passed, and IIPA regrets to report that the IP enforcement issues remain the same as before these announcements were made and before Costa Rica was removed from Priority Watch List in 2002. The Costa Rican Public Ministry did not appoint new “link” prosecutors, but instead commissioned already existing prosecutors who failed to resolve the existing IP enforcement issues.
- Delays in criminal cases: Normally, it takes more than six months for prosecutors to request a raid in a criminal case. A clear example of these delays is the case filed by BSA member companies against a company named AutoMercantil. This company was sued in September of 2001 and was finally raided in November of 2002, more than a year later. This case was handled by the Common Crimes Unit of the Public Ministry and the Second District Criminal Court of San José. The preliminary investigation was conducted by the Common Crimes Division of the Judicial Investigative Office (OIJ). It bears mention that in software piracy cases, failure to act within days on the *ex parte* search request can lead to leaks and destruction of key evidence. The recording industry reports that it takes approximately two to four months to obtain search warrants for a single raid. Consequently information from any investigation becomes obsolete with the movement of pirates.
- Raids ordered based on private plaintiff’s evidence: Public prosecutors usually request an investigation report from official experts at the OIJ before requesting a search and seizure order from a judge. The OIJ’s reports normally do not add substantive information to the evidence previously provided by the copyright holder when requesting the search and seizure order. OIJ’s preliminary investigations do however cause significant delays during the pre-raid procedural stages. The information and evidence provided by private plaintiffs is legally sufficient for public prosecutors and judges to order the raids. The Costa Rican Criminal Procedural Code allows public prosecutors to request, and judges to order, inspections in those cases where a claimant, acting as private plaintiff (“querellante”), submits all the information and evidence necessary for the prosecutors and judges legally to order such inspections. This is similar to the

procedures followed in much of Latin America. Unfortunately, this procedure is rarely implemented in criminal cases because public prosecutors invariably have requested the OIJ's investigation prior to requesting the search and seizure order from the judge.

- Public prosecutors do not allow private plaintiffs to participate in software piracy raids: Despite the fact that private plaintiffs in criminal actions ("querellantes") are parties to the criminal action and thus have standing to participate in all proceedings, public prosecutors and judges normally do not allow private plaintiffs ("querellantes") to actively participate during software piracy raids. Apart from violating procedural due process rights accorded to private plaintiffs ("igualdad procesal del acusador particular"), this practice hampers the effectiveness of the prosecutors and jeopardizes the success of the action, since it prevents the plaintiffs and their experts from providing the much needed technical and licensing assistance that the prosecutors need to determine whether an infringement has occurred.

## **(2) Judicial Investigative Office ("OIJ")**

- Lack of personnel at OIJ: The General Criminal Unit of the OIJ is in charge of investigating intellectual property crimes. As reported in previous IIPA Special 301 submissions, this unit's lack of specialized personnel prevents it from adequately performing its duties. For example, there are four software investigators available to work on crimes which in some way or another may involve the use of software (such as money laundering cases where the records of the illegal activity may reside in a computer's hard disk). These are the same experts that are called upon to act as the sole experts in software piracy cases. Their multiple roles and nationwide jurisdiction more often than not make them unavailable to participate in piracy cases.

Most of the delays in criminal cases filed by BSA against software pirates in Costa Rica in 2002 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 took place, 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 not conducted until 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.

- If the public prosecutors insist on OIJ investigation reports prior to the raid, it will be necessary to appoint at least three additional official experts specializing in software piracy crimes at OIJ.
- OIJ's experts do not have software licensing and legal knowledge, which has caused problems and delays during preliminary investigations and inspections. It is imperative for the government to implement an extensive training program for official experts in these matters, in addition to the training provided by BSA.
- The recording industry reports that very few cases have been carried out by this group because of a lack of resources. Of those few cases processed, only two reached a sentencing phase and were subsequently suspended.



- Lack of resources and budget is still a problem for the OIJ, and the judiciary in general, to properly perform its duties.

### (3) Judges

- Criminal 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.
- 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.
- Civil judges demonstrated in 2001 that they can handle software piracy cases in an expedited manner. However, significant delays were observed in BSA cases handled by civil courts in 2002. For example, it took approximately six months for the 3rd District Court of San José to conduct a raid against a company sued by BSA member companies in April of 2002, the American Business Academy. This despite the fact that the *Ley de Observancia* requires judges to rule on an *ex parte* search and seizure request within 48 hours of its filing.

## COPYRIGHT LAW AND RELATED LEGAL ISSUES

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### The Inadequate Ley de Observancia (2002)

On October 2, 2000, Costa Rica passed an intended TRIPS compliance law, “Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual (‘Ley de Observancia),” which diverges substantially from the requirements to which Costa Rica must adhere under TRIPS. Some of the most harmful provisions of the Ley de Observancia are:

- *Ex officio actions:* The competent authorities in Costa Rica should be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party. Article 43 of the Ley de Observancia provides that criminal actions against intellectual property violations are considered public actions but can be initiated only by private parties (“acción publica de instancia privada”). This means that in the event that a public official detects any intellectual property violations, such official cannot initiate legal action. Only the injured party can initiate legal action.

In BSA’s opinion, this provision may violate TRIPS Article 41 (effective action against infringement). In a country like Costa Rica with a software piracy rate of approximately 64%, the “instancia privada” action, which limits the enforcement authority of public officials, is not an effective action as required by TRIPS. Public officials must be empowered to initiate legal actions for IP violations.

- *Penalties are not at deterrent levels:* Articles 54 and 59 of Ley de Observancia provide a maximum penalty of three (3) years of imprisonment for copyright violations. These articles provide the same maximum penalty for those who fix a work without

authorization and sell infringing materials. Under other provisions of the Costa Rican penal law, sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended), and the defendants never have to serve time. Thus, these provisions violate Articles 41 and 61 of TRIPS (deterrent remedies).<sup>4</sup> Maximum imprisonment penalties should be high enough (four or more years) so as to prevent commutation.

- *Lack of criminalization of some forms of piracy:* Article 70 of the Ley de Observancia provides that the “minor” (“insignificante”) and “without profit” (“gratuito”) use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the law. There is no definition of “minor” use and reproduction, and it is not clear when the use and reproduction of illegal products is considered “without profit.” It may be easy for pirate resellers to avoid liability by simply reproducing and selling illegal software in small amounts, using a variety of CD burners and retail outlets. BSA may 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 various provisions of TRIPS and should be removed.
- *Costa Rican law does not provide for statutory damages:* TRIPS Article 45.2 permits nations to authorize their courts to order payment of “pre-established damages” (e.g., statutory damages). While statutory damages are not mandatory under TRIPS, the adoption of this remedy has proved to be an effective way to deter piracy in other countries, such as Brazil. The adoption of statutory damages provisions in the Costa Rican Legislation would be a significant step toward achieving TRIPS-plus standard in light of the upcoming CA-FTA.

## Bills to Amend the Ley de Observancia

**Proposal by the government:** The Costa Rican Foreign Trade Ministry (COMEX) stated in 2002 that a bill to amend the Ley de Observancia would be submitted by the government to the Costa Rican Congress soon. This has yet to occur. According to reports, the most relevant amendments which will be included in this bill are—

- Article 70 (“Insignificance Principle” or “Principio de lesividad e insignificancia”) will be removed;
- Fines for copyright violations will be added to the Ley de Observancia;
- A special Official Investigators Unit will be created to participate in IP crime-solving;
- A Public Prosecutor’s Office specialized in IP will be created;
- Maximum imprisonment penalties for IP violations will be elevated to five (5) years.

While addressing some of the significant shortcomings of the Ley de Observancia, this proposed bill is missing some key provisions. For it to be adequate, it must also provide that:

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<sup>4</sup> By comparison, Article 212 of the Costa Rican Criminal Code states a maximum penalty of six years of imprisonment for larceny, a kind of theft of physical property. Since intellectual property crimes are a form of theft of intangible property, the lesser sentence applied to them as compared to larceny indicates an inconsistency between the Ley de Observancia and other Costa Rican legislation.

- (i) public officials, not only injured parties, should be able to file criminal actions for IP violations (“acción pública de instancia pública”);
- (ii) the “insignificance principle” in the Costa Rican Criminal Procedural Code should not apply to IP violations;
- (iii) the unauthorized “use” of protected works is a crime; and
- (iv) that any fine imposed for IP violations should be in addition to the prison sentence, and not “alternatively,” as proposed in this bill.

Apparently the bill is supported by the Costa Rican Inter-Ministerial Committee on IP matters, but the bill has not yet been submitted to the Congress because the Government is apparently resolving budget availability issues. A bill which addresses the above-mentioned four amendments should be passed as soon as possible in order for the Costa Rican IP legislation to be TRIPS-compliant.

**Proposal by the Congress:** Also, a new bill to amend the Ley de Observancia was recently submitted to the Costa Rican Congress by five congressmen and published in the Official Gazette on December 18, 2002. This bill should be reviewed by the Permanent Committee of Legal Affairs of Congress. IIPA does not have information regarding whether the bill has already been reviewed by this committee. It is worth mentioning that this bill is different from the one being reviewed by the government, discussed above. Nevertheless, our observations on the government’s bill (above) also apply to this industry-supported bill, except that the issue of “fines in the alternative” was not included in such bill.

Also on December 18, 2002, a bill to create a Public Prosecutor’s Office specialized in IP matters was published in the Official Gazette.<sup>5</sup> This bill was also submitted to the Costa Rican Congress by the same five congressmen that submitted the bill to amend the Ley de Observancia. If passed, the bill to create the Public Prosecutor’s Office will create a better enforcement environment for the intellectual property right industries.

## **Government Software Asset Management**

In February 2002, former Costa Rican President Miguel Angel Rodriguez issued a Government Software Legalization Decree. Its aim was twofold: ensuring that all software in use in the federal government was duly licensed, and establishing and implementing sound and effective software procurement and software asset management policies. During a BSA-sponsored reception for his new administration, President Pacheco reiterated his administration’s intention to fully implement that decree. Both the issuance of the decree and President Pacheco’s reiteration of it are important steps that demonstrate the Government of Costa Rica’s increasing awareness about the value of managing their software assets. We urge the Government of Costa Rica to continue down the path towards implementation of the software asset management practices called for in this decree.

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<sup>5</sup> The Costa Rican government has indicated that it is exploring international funding alternatives for the creation of the Specialized Public Prosecutor’s Office, which the copyright industry hopes is not an excuse to delay its creation.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in both the Free Trade Area of the Americas (FTAA) and the U.S.-Central American FTA (CA-FTA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations such as TRIPS. As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors in both the U.S. and the local markets.

Therefore, IPR chapters in the FTAA and the CA-FTA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# CZECH REPUBLIC

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that the Czech Republic be added to the Special 301 Watch List this year (it has not appeared on the 301 lists for the last two years). Growing problems with optical media piracy, poor border enforcement, delays in criminal enforcement proceedings and remaining deficiencies in the copyright law justify this recommendation.

**Overview of key problems:** The copyright industries had hoped that the amendments made to the Czech copyright law, criminal code, civil code and the customs code during the 1999-2001 time period would improve on-the-ground enforcement actions by Czech enforcement authorities. Sadly, there has not been a significant improvement in resolving both enforcement problems and legislative gaps. Copyright piracy in the Czech Republic remains at high levels for most of the copyright sectors. Optical media piracy, widespread CD-R burning and Internet piracy pose major threats to the commercial development of a relatively strong copyright market. Optical disc production in the country, from three operating plants and one further plant awaiting commencement of production, could be as high as 200 million discs per year—significantly exceeding local demand (the exact capacity figure is difficult to quantify accurately due to one plant's denial of access to industry representatives). Ineffective border enforcement means that the Czech Republic continues to be a source of, or a transshipment point for, pirate materials. The criminal enforcement apparatus remains so slow (especially at the investigative, prosecutorial and judicial levels) that any deterrent effect is severely weakened.

Positive notes include the Czech Republic's accession to the two WIPO 1996 Internet treaties in 2002 (although further amendments on technological protection measures and rights management information to the 2000 copyright law is needed to ensure full and effective implementation). Also, the business software industry reports that the cooperation with Czech police in 2002 has been extremely fruitful, and that the police have significantly increased their activity in the field of software copyright enforcement. Furthermore, the Czech criminal courts have passed some clearly deterring sentences in software piracy cases. During 2002, the Czech government has also successfully implemented a comprehensive software management system covering all software use under the whole state administration. Estimated trade losses due to copyright piracy in the Czech Republic amounted to at least \$57.6 million in 2002.

**Actions that the Czech government should take in 2003:** To correct the deficiencies in the Czech enforcement and legal regimes, the Czech government should:

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority;
- Amend the Copyright Law to effectively implement the WIPO Treaties by strengthening its provisions on technological protection measures and rights management information, and amending other deficiencies which cause the law to be inadequate to combat copyright piracy;

- Adopt optical media regulations to control optical media production and distribution;
- Strengthen border enforcement to stop importation and transshipment of pirated goods, including optical media product;
- Improve the speed of criminal enforcement (at the police investigation, prosecutorial and judicial levels);
- Issue civil *ex parte* orders in a timely manner (now that the legal uncertainty over their availability and their application without advance notice to the target has been resolved);
- Amend the 1996 Broadcast Law to fully protect encrypted satellite signals;
- Improve coordination between the various enforcement bodies (police, customs, prosecutors and the judiciary) so that concrete results in combating piracy is achieved as well as expand their expertise to act against internet piracy. Examples:
  - The Ministry of Interior could issue a directive instructing criminal police and prosecutors to act on *prima facie* cases of piracy within 30 days of receiving a criminal complaint, and for criminal charges to be announced and presented to the public prosecutor for prosecution within 60 days after a raid occurs.
  - A directive could be issued 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.
  - Investigation processes could be improved by amending the law to permit tax inspectors to share information on illegal uses discovered in the course of audits with police and affected copyright holders.

**CZECH REPUBLIC**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Entertainment Software	38.3	89%	54.8	90%	45.0	81%	12.0	NA	NA	NA
Records & Music	7.3	50%	8.4	48%	3.4	35%	60.0	8%	62.0	6%
Motion Pictures	9.0	12%	8.0	10%	8.0	18%	10.0	30%	8.0	35%
Business Software Applications <sup>2</sup>	NA	NA	27.7	43%	36.2	43%	30.2	42%	39.5	49%
Books	3.0	NA	3.0	NA	4.5	NA	4.5	NA	4.0	NA
<b>TOTALS</b>	<b>57.6+</b>		<b>74.2</b>		<b>97.1</b>		<b>116.7</b>		<b>113.5</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 for the Czech Republic are not available; numbers will be finalized in mid-2003. BSA finalized its 2001 numbers in mid-2002, and those figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

The Czech Republic has bilateral obligations to the U.S. under the 1990 Trade Relations Agreement, the 1991 Bilateral Investment Treaty and its participation in the Generalized System of Preferences (GSP) trade program to provide effective copyright protection and enforcement to U.S. copyright owners.<sup>3</sup> The Czech government's substantive and enforcement obligations under the WTO TRIPS Agreement are also in force. Finally, the European Commission too has identified problems with inadequate copyright enforcement in the Czech Republic, and in order to complete its accession to the European Union in 2004, called on the Czech government to intensify measures to combat piracy and counterfeiting, strengthen border controls, and improve coordination between enforcement bodies.<sup>4</sup>

## **COPYRIGHT PIRACY IN THE CZECH REPUBLIC**

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The Czech market reflects sophisticated and diverse forms of piracy, ranging from hard goods, CD-R burning, Internet piracy, business software piracy among computer and CD-ROM resellers, and the significant growth of optical media piracy adversely affecting all industry sectors.

### **Optical Media Piracy**

**CD-R burning:** CD-R burning of copyrighted materials—ranging from music to entertainment software—in private homes, schools and other educational institutions, and in commercial establishments, has become a major piracy problem in the Czech Republic. The recording industry's enforcement statistics indicate that 80% of the seized pirated music discs were in CD-R format, compared to the 40% share in 2001. In response, the music industry has united to combat commercial outlets (called *vypalovny*, or “burning stations”), which allow consumers to burn their own copies of legitimate CDs.<sup>5</sup> Some stores even permit burning illegal copies of copyrighted materials off the Internet. These stations, which first appeared in 1998, exploited the provision in the copyright law that allows owners to make a back-up copy for their own personal use. The recording industry worked with the local authors' society, OSA, to persuade OSA not to renew the contracts (for 2003) it made with some of these stores. In fact, the local recording industry group IFPI-Czech Republic, OSA and Intergram (a collecting society for performers and producers of phonograms and audiovisual recordings) have agreed that OSA will not issue any further contracts to the *vypalovny* nor will they renew old contracts. Many *vypalovny* never had contracts to begin with, such making the entire scope of CD-burning in storefronts difficult. IFPI-CR estimates that some 7.5 million pirated copies with the music content were made last year in the Czech Republic.

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<sup>3</sup> For the first 11 months of 2002, \$271.4 million worth of Czech goods (or 24.2% 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 17.8% decrease from the same time period in 2001. For details on the Czech Republic's bilateral experience under Special 301, please see Appendices D and E of this 2003 Special 301 submission.

<sup>4</sup> To access the European Commission's October 2002 annual report on EU enlargement and the Czech Republic, go to <http://www.euractiv.com/cgi-bin/cgint.exe/?1100=1&204&OIDN=1504033>.

<sup>5</sup> Pavla Kozakova and Mark Andress, “Czech Music Industry Unites Against CD-Burning Outlets,” *Billboard*, October 19, 2002, at 57.

One of the country's plants, Exlmpo, is a significant regional producer and exporter of blank CD-Rs (though it is understood that the plant has not met its royalty obligations for CD-R production with Philips).

The entertainment software industry has similar problems with Internet cafes which allow their customers to burn pirated software downloaded from the Internet, for a fee. Warez sites are now prevalent in the Czech Republic, which only fuels CD-R burning of pirated entertainment software in the country.

**Local overproduction of industrial prerecorded CDs and blank media:** A serious problem in the Czech Republic is the overproduction of optical media (CDs, CD-Rs, DVDs). The manufacturing capacity of the three (3) operating CD plants (one further plant awaits commencement of production) with over 24 production lines could be as high as 200 million discs per year.

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 recording industry reports that while the cases involving pirated discs produced by known Czech plants have decreased, the cases involving the discs with large-scale music content in MP3 format (e.g., in Germany, Switzerland, Poland, the U.S.) produced by non-Czech plants, though mastered in the Czech Republic, continue to increase.

**The need for OD regulations:** The Czech government must swiftly take steps to regulate optical disc plants and improve border enforcement to contain the problem. The Czech Republic must set up plant monitoring procedures to regulate the production, distribution, and export of optical media. 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; manufacturing licenses must require the listing of machinery and equipment and the raw materials used in the production of optical discs; (3) require import and export licenses and enable searches of these licensees; (4) require the plants to apply internationally recognized identifiers on the goods and machinery; to keep records of production, clearance of rights, destination of products, use of raw material; to notify changes in the stock of equipment; 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 willingness of the plants to participate in these procedures is important, as is the government's willingness to enforcement such regulations.<sup>6</sup>

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<sup>6</sup> As a historical example, in 1998, the largest plant (GZ Lodenice) did agree to cooperate with the International Federation of the Phonographic Industry (IFPI) and adopt SID codes; however, the other then-existing plants (CDC Celakovice, Exlmpo 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. However, there are no plans to re-open this case. However, there is an outstanding inquiry from the Polish authorities to Czech authorities (first in October 2001 and again in



## Internet Piracy

In 2000, Internet piracy emerged as an issue in the Czech Republic. At that time, the most urgent challenge involved 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). In 2002, MPA's local anti-piracy organization initiated 40 cases against Internet pirates and successfully prosecuted five defendants who offered pirate hard goods over the Internet. In addition, storefronts (like the *vypalovny* described above) also permit consumers to burn CDs using material accessed from the Internet.

The local recording industry reports a significant increase of the infringing files containing illegal music on the Internet in 2002. IFPI CR identified and sent the "Cease & Desist" notices to 128 infringing sites containing 8069 illegal files, which as a result were removed from Internet. Comparing with the 24 removed sites in 2001, the music piracy on Internet increased over 80% in 2002. IFPI CR co-operates successfully with Internet Service Providers (ISPs). However, the co-operation with the police in tackling Internet piracy leaves a lot to be desired and in fact has not proved to be effective. Thus, none of the Internet piracy cases has reached to the courts.

Warez sites for entertainment software products are becoming prevalent in the Czech Republic; the country is also emerging as a locus for pirate crack or warez groups. Internet piracy for entertainment software products is estimated to have grown to 30% over the last year. A lot of the illegal downloading is occurring in unlicensed Internet cafes which, as stated above, also allow their customers to make copies of illegal material found on the Internet. With growing bandwidth and increasing Internet access, unless the country's laws address enforcement in the online environment, Internet piracy is likely to grow even worse.

In February 2002 a Prague District court sentenced an Internet reseller who had illegally copied and distributed BSA member company software to a two-year suspended prison sentence, converted to three and one-half years' probation. The reseller was also made to pay US\$20,000 in damages to rightsholders and a criminal fine of US\$8,330. This is one of the most severe judgments issued by the Czech courts and one of the few cases where a court has ordered payment of high damages to BSA members. Furthermore, in July 2002, the District Court in Rychnov nad Kněžnou convicted an Internet reseller of copyright infringement for illegal distribution of BSA member company software and sentenced the target to one years probation.

## Piracy continues across all sectors.

Piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) in the Czech Republic continues to be widespread. The Interactive Digital Software Association (IDSA) reports good police cooperation with its

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February 2002) in connection with an investigation into unauthorized production by a Polish plant, with Czech plant involvement. To date, the Poles have not received a response to their request from the Czech authorities.

member companies on raids against retail pirates, but, as with other industries, enforcement is not effective, especially border enforcement, which is almost nonexistent. The major problem confronting IDSA members is CD-R burning (so-called “gold” recordable discs), which accounts for about 80-90% of the pirated entertainment software in the country, largely undertaken by criminal syndicates. Prerecorded silver discs are not as prevalent as they once were. The factory-produced silver discs that do appear on the market are still being imported from Eastern Europe, predominantly Russia, Hungary and the Ukraine. IDSA estimates that the overall value of pirated entertainment software products present in the Czech Republic was \$38.3 million in 2002, with an estimated piracy level of 89%.<sup>7</sup>

The recording industry reports that the most serious cases of music piracy occur mainly in the Western Bohemia and North-Bohemia regions. The most difficult situation is in the districts of Děčín, Teplice, Ústí nad Labem, Most, Chomutov, Karlovy Vary, Sokolov, Tachov, Domažlice and Klatovy. The worst situation of all is in the district of Cheb. The recording industry reports that estimated piracy level due to music piracy has risen over the past three years, up to 50% (in 1999 the level of music piracy in the Czech Republic was only 8%). Trade losses to the legitimate recording industry in 2002 were \$7.3 million. The jump is the result of CD-R materials being produced for the public on a commercial basis and flooding the marketplace. Compared to 2001 the use of CD-Rs for illegal music copying has doubled—80% of all pirated discs seized in 2002 were CD-Rs. 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.

Since the 1996 copyright act amendments, the once-problematic CD rental problem diminished as the number of rental shops declined significantly. Unfortunately, most of these rental shops continue the covert illegal rental activities under the name of “Club of Owners.” As a result of the rejection of the case as irrelevant by court two years ago the establishment of such clubs has increased tremendously, and cause significant damage to the legitimate music industry in the Czech Republic.

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. The law permitted a two-year sell-off period of back-catalog inventory. This means that this back-catalog repertoire lingered as a problem for a number of years and was a significant hindrance to effective enforcement until the material is finally removed from the marketplace. The sell-off period terminated on November 30, 2002.

The audiovisual industry indicates that its main piracy problem facing the Czech Republic is pirate optical discs. VCDs, DVDs, and home-burned CD-ROMs can be found throughout the country at street markets, retail stores, and on the Internet. The Motion Picture Association of America (MPAA) reports that this demand for optical discs is fueled not only by the new technology, but also by the availability of pre-release titles. Titles such as *Harry Potter*, *Lord of the Rings*, and *Spiderman* were available on optical discs days before their theatrical premieres. CPU seized over 46,000 home burned CD-Rs containing movies in 2002. This is a dramatic increase from the 533 pirate optical discs seized in 2001. It is estimated that the optical disc piracy rate is now 15%. The Czech Republic is also experiencing pirate DVDs for

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<sup>7</sup> IDSA has revised its methodology for deriving the value of pirate videogame products in-country. This methodological refinement explains the decrease in the value of pirated videogames between 2001 and 2002.

the first time. These discs are being imported from the Far East and Russia. Traditional videocassette piracy, involving high quality copies, continues to exist in the country, although it is no longer a growing problem (at approximately 8% piracy level). The most popular method of distribution of pirate product is still street markets, which are located throughout the country. In addition, flea markets along the German border continue to cause problems for the surrounding countries. These markets, run by Sino-Vietnamese gangs, are difficult to control and the limited police action to date is not supported by effective prosecutions or deterrent sentences. Statistics show that the sentences being imposed in 2002 are less than the sentences imposed for similar crimes in 2000. The Internet also continues to grow as pirates use networks, chatrooms, and auction sites to distribute their illegal product. Cable and television piracy is also a problem that is seriously impeding the pay-TV market. The most significant problem is the number of cable operators who retransmit foreign (especially German) satellite and terrestrial broadcast signals. Ambiguities in Czech legislation complicate the situation. Pirate smart cards and decoders, used mainly by private citizens, continue to damage the pay television industry. Public performance piracy in video theaters that do not use legitimate products is still a problem. Clubs, video cafes, and long haul buses contribute to the problem. Annual losses to the U.S. motion picture industry due to audiovisual piracy in the Czech Republic were estimated to be approximately \$9 million in 2002 with an overall audiovisual piracy rate of 12%.

End-user piracy, the use of unlicensed software especially in corporate sector, remained a major challenge for the software industry in 2002. In light of this BSA highly commends the Czech government for issuing a comprehensive software asset management decree in 2000 and working on its implementation in 2002. The BSA also encourages the government in its efforts to ensure the completion of the requirements arising from this decree. In relation to HDL cases (Hard Disk Loading is the term for computer resellers installing unlicensed software onto computers being sold) the Czech police tend to limit their investigations only to one test purchased computer. They are not willing to broaden their investigations to past illegal distribution of the unlicensed by inspecting the relevant accounting materials and contacting the customers of the target. This attitude completely fails to realize the true scope of illegal activities surrounding a Hard Disk Loader (HDL) reseller. BSA's estimated annual losses and piracy levels of business software in the Czech Republic are not yet available.

The book publishing industry continues to 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 were \$3.0 million in 2002.

## **COPYRIGHT ENFORCEMENT**

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Despite recent legislative amendments to various enforcement-related laws, the Czech Republic's enforcement regime remains incompatible with its TRIPS enforcement obligations due to: the failure to impose sufficiently deterrent criminal penalties in commercial piracy cases; lengthy delays in bringing and completing both criminal and civil infringement cases; the lack of availability of deterrent civil damages; and ineffective border measures. The 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. The failure of the judiciary to properly apply deterrent penalties has allowed piracy to remain widespread, thus harming the development of legitimate markets for the copyright sectors. Border enforcement also is weak and is ineffective in intercepting transshipments of piratical products.

Cooperation between the music industry (and other groups) and customs must be improved. Despite successes based on good cooperation at the local level, the Central Customs Board has shown itself less than responsive to the approaches from industry. For example, the recent approach of the local IFPI-CR vis-à-vis the Central Customs Board to enquire about the movements of Bulgarian plant equipment associated with pirate production proved to be fruitless. Remarkably, in contrast with the fact that IFPI local industry groups in two other countries had established from their respective customs authorities the movement of the Bulgarian equipment to the Czech Republic, the Czech music industry group was unable to get any co-operation from customs.

BSA believes that overall in 2002 the enforcement program did better both on the level of statistical data (number of judgments, raids etc.) and also on the level of the necessary move to more complicated cases (in 2002, BSA conducted, together with police, the biggest police raid in the Czech Republic ever). On the basis of this it seems to BSA that criminal enforcement bodies are able and prepared to deal with more sophisticated cases than in previous years.

In 2002, the new Act on Czech Trade Inspection came fully into effect, which allows Trade Inspection to confiscate all goods that infringe upon intellectual property rights. As a result the regional inspectorates in České Budějovice, Ústí nad Labem, Karlovy Vary and Plzeň carried out several efficient raids.

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 had suggested years ago 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 as currently configured remains ineffective.

## **Raids and Results with the Czech Police**

The recording industry reports that its principal enforcement complaint is the inability and 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. For example, in one case in July 2000, over 21 million Czech crowns' worth (\$700,000) 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.

Despite the difficulties with investigating the major criminal cases in depth, the local recording industry reports the improvement of co-operation with the police. However, the police in the busiest illegal music production and distribution spots, Western Bohemia and Cheb, remain uncooperative, where police started the internal investigation upon IFPI CR request.

IFPI continues to report large-scale seizures of illegal material, almost all of it in the form of CDs (about 80% of this total is now recordable CDs). Customs officers, trade inspectors and police, together with IFPI employees, initiated 763 criminal cases in 2002 involving pirated sound recordings, including 128 cases involving the Internet. The total number of seized illegal music products was 372,304 units (295,046 CD-Rs, 73,762 CDs, 2441 pirate audiocassettes

and 1,055 pirate DVDs) with a total value of over \$4 million (not including the 128 Internet piracy cases). Criminal actions were initiated against 257 people. As an example of the scope of piracy, some 20,000 pirated CDs worth US\$193,000 were destroyed at the 12<sup>th</sup> INVEX Fair on international information and communication technology in Brno (southern Moravia) in October 2002. In one large-scale anti-piracy action in July 2002 in the Western Bohemian town of Cheb, a task force of police, trade inspection officers and custom inspectors seized some 70,000 pirate CDs and 13,000 pirate DVDs. On December 17, 2002, customs and police investigators seized around 13,000 discs (mainly CD-Rs) and an unidentified number of DVDs and VHSs from the warehouse in Vojtanov, a town in Western Bohemia. As with most of the pirate trading of optical discs on the Czech border, this case involves organized crime elements involving the Vietnamese nationals. The potential defendant in this case will be the mayor of the town, as he is the owner of the warehouse. The case is pending, as the mayor is on holiday in Vietnam.

BSA concludes that police cooperation remained good in 2002 and was much improved over activities in 2001. In May 2002, the Czech police and BSA carried out a joint awareness campaign and sent out 350,000 letters to businesses, informing them of the legal risks related to unlicensed software use. These letters were generally well received and generated over 1500 responses from end-users requesting for information on legal software use and management of software licenses. In November 2002, the police carried out the largest ever police raid in the Czech Republic against a well-known Czech producer of machinery with approximately 500 employees. The raid took two days to complete and involved search of 67 computers. Police officers from at least three different regions took part in this raid in cooperation with experts from the Czech Police Institute of Criminology under the supervision of the Czech Police Presidium.

IDSA member companies are getting good cooperation from the police, who have been very sympathetic to the industry's anti-piracy efforts. However, most of the criminal actions have been against small operations. Law enforcement officers have been reluctant to pursue the bigger operators, claiming that there are no such targets as the prevalent form of piracy in the country is CD-R burning, usually run by small operations anyway.

The Motion Picture Association (MPA) reports that the local anti-piracy group CPU has good cooperation with the police in most cases. It has, however, proved difficult to secure cooperation with certain police departments, especially in western Bohemia. Cooperation with prosecutors and judges has also improved in recent years. In 2002, the CPU, police and customs conducted 509 investigations, 220 raids, and seized over 13,000 pirate videocassettes, 46,000 pirate CD-ROMs, and almost 1,000 pirate DVDs.

## **Delays with the Prosecutors and with the Criminal Courts**

The 2000 amendments to the criminal procedure code require that police investigations must be commenced within either a two- or three-month window, depending on the alleged crime. Furthermore, the entire investigation must be completed within a period of six months (there is a possibility that these deadlines can be extended). 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. 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. Unfortunately, due to the possibility of extending the statutory investigation deadline, the average time of closing the case is around 2-3 years.

The merger in January 2002 between the Office of Investigations and the Czech Criminal Police to create the Office of Police Investigation was purportedly designed to cut down on excess bureaucracy and streamline efficiency in the investigation of crimes like copyright piracy. Unfortunately, despite a four-month transition period, there was confusion relating to the manner in which the legislative changes should have been implemented in the day-to-day work of the two former bodies and there still appears to be little improvement in speed of investigations.

**Recommendations:** These three suggestions reflect previous IIPA recommendations. First, the Ministry of Interior should issue a directive instructing criminal police and prosecutors to act on *prima facie* cases of piracy within 30 days of receiving a criminal complaint, and for criminal charges to be announced and presented to the public prosecutor for prosecution within 60 days after the occurrence of a raid. Second, 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. Third, it is further 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.

During 2002, some industries, notably the motion picture, business software and entertainment software industries, 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 recording industry reports that the improvement in prosecutors' and judges' work is not a general development, but occurs sporadically on case-by-case basis.

The Business Software Alliance (BSA) reports that the overall speed of criminal and civil enforcement still remains a problem despite a more than 60 judgments and criminal orders issued by Czech courts in relation to illegal software end-user and counterfeiting cases to date. BSA reports that in the initial stages of enforcement, delays are caused by slow police investigations and post-raid "expert reports" which should be issued before a criminal accusation can be issued against a suspect under Czech law. Although small- and medium-sized companies get regularly investigated by the police for software piracy, there has been a noticeable lack of investigations targeting larger companies in recent years. However, BSA reports that this situation has been slightly improving. For example a well-known Czech manufacturer of machinery was raided in November 2002 and this case clearly represents one of largest raids in the history of BSA's Czech enforcement program. Unfortunately, expert reports continue to delay investigations as they often take months to get finalized and by that time cases have often become stale. BSA reports, however, that there still were encouraging developments in the number of formal criminal accusations filed by prosecutors: In 2002, 28 criminal lawsuits were filed against illegal end-users. Police and prosecutors are getting more proactive in conducting raids and filing criminal accusations against both reseller and end-user infringers, according to BSA. 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 as a regular practice during 2003 as this should result in a much more efficient procedure.

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. BSA was aware of at least 11 criminal

judgments for software infringement in 2002, with some of the most severe judgments ever issued by the Czech courts, including an illegal software reseller sentenced to two years in prison, suspended to three and a half years probation and another sentenced to 20 months suspended imprisonment, with probation for three years.

MPA reports that CPU's cooperation with prosecutors and judges also improved in recent years. The prosecutors and judges have been willing to attend CPU trainings and appear to be eager to adapt to the challenges presented by Internet pirates. The lack of deterrent sentencing continues to be a frustrating issue and there does not appear to be an improvement in the time it takes for a case to be completed. These continuous delays are well known to the pirates and therefore the filing of a criminal case has little impact.

IFPI also reports that in addition to slow prosecution and judiciary, the imprisonment sentences are routinely converted to the conditional imprisonments. In general, the imposed penalties are at the lowest level, reaching the maximum of 100,000 – 150,000 Czech korunas (\$3,500 – 5,100).

## **Criminal Sentencing Not Deterrent**

There was some improvement in 2002 in the enforcement situation in the Czech Republic. In some instances, larger fines have been imposed, and the implement on piracy (PCs and CD-burners) have been confiscated. Although criminal sentences were routinely converted into suspended sentences as in previous years, such suspended sentences were of a slightly more deterrent character in 2002. The recording industry reports that there were only two imprisonment sentences in music piracy cases in 2002. CPU conducted a survey of their cases in 2002 and found that the defendants are currently receiving more lenient sentences than were being imposed in 2000. BSA also notes that criminal fines continue to be low. 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.

## **Civil Cases and *Ex Parte* Search Orders**

The Czech government has clarified that *ex parte* searches are available to right holders when it amended its Civil Procedure Code, effective January 1, 2001. Only in 2002, it's the first *ex parte* search application by BSA was accepted. The Court of Appeal finally clarified that a civil *ex parte* searches can be granted by the Czech courts without prior notification to the target. Already before this ruling, it was clear that searches could be conducted, but it was unclear whether suspects would be given advance notices of these searches (advance notice obviously often leads to destruction of evidence difficulties in conducting an effective search). BSA will continue to monitor how courts throughout the country apply this ruling and if this interpretation of Czech law will be broadly accepted.

BSA reports that the average length of time for a decision before a civil court has been in the range of one to three years, with a second-level decision taking an additional six months to a year. The most time consuming are larger end-user cases involving hearing of several witnesses.

## **Inadequate Border Enforcement**

The Czech border remains porous, with pirated optical media products exiting the country. However, after the adoption of the new Czech "anti-counterfeiting" law in September

2002, which replaced the useless 1999 law on anti-piracy border measures,<sup>8</sup> the anti-piracy activities of the local customs officials have improved. In light of the significant export and transshipment of illegal products from and through the Czech Republic, it is crucial that the Czech government guarantee the effective enforcement of the new law. The successes of repeat actions on retail piracy in border market towns, which are ready suppliers of pirated goods to the Czech Republic's neighbors, are noted and encouraged. There remains a need to provide more training and resources to aid the country's customs personnel in addressing the cross-border movement of pirate products.

## ENFORCEMENT TAKEN BY THE COPYRIGHT INDUSTRIES IN THE CZECH REPUBLIC

### Criminal Enforcement Actions: 2002

CRIMINAL ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted	220	32	635
By police		32	192
By customs		-	83
By trade inspection	94/120	137	360 (no offenders caught)
Number of cases commenced / administrative	143	24	635
Number of defendants convicted (including guilty pleas)	8	-	199
Acquittals and dismissals	165/19	88	
Number of cases pending		14	118
Total number of cases resulting in jail time		14	
Suspended prison terms		7	
Maximum 6 months		3	8
Over 6 months		4	30
Over 1 year		14	10
Total suspended prison terms		-	48
Public works		-	10
Prison terms served (not suspended)		-	
Maximum 6 months		-	
Over 6 months		-	2
Over 1 year		4	
Total prison terms served (not suspended)		1	2
Number of cases resulting in criminal fines		1	17
Up to \$1,000		2	
\$1,000 to \$5,000		US\$20,724	
Over \$5,000	220	32	
Total amount of fines levied		32	700,000 CZK (~US\$24,000)

<sup>8</sup> Act No. 191/1999 Coll. (Customs Act) of July 29, 1999 on Measures Concerning Entry, Export and Re-Export of Goods Infringing Certain Intellectual Property Rights and Amending Some Other Acts, effective November 1, 1999.



## Civil Copyright Infringement Actions: 2002

CIVIL ACTIONS	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	2
Post search actions	
Cases pending	2
Cases dropped	
Cases settled or adjudicated	
Value of loss as determined by rightholder (\$USD)	
Settlement/judgment amount (\$USD)	

## COPYRIGHT LAW AND RELATED ISSUES

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In 2002, the Czech Republic acceded to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), being one of the 30 countries which put both treaties into force. This accession is to be commended. However, existing provisions in the copyright law must be revised to fully implement the WCT and WPPT, especially by strengthening its provisions on technological protection measures and rights management information. A summary of recent legislative changes and requests for amendments follow.

### The 2000 Copyright Act Needs Refinement

The 1965 Czech Copyright Act (Law No. 35/1965) was amended numerous times in the 1990s. In April 2002, the new law entitled "Copyright, Rights Related to Copyright and on the Amendment of Certain Laws" was promulgated as Law No. 121/2000 Coll. of 7 April 2000. Amendments to other laws were also made in the 1999-2000 time frame in order to enhance enforcement measures. For example, amendments made to the customs law which granted customs officials broader *ex officio* authority to seize suspected important amendments in 1999 were infringing copies of intellectual property, including copyrighted material, and providing heavy fines of up to 20 million Crowns (U.S.\$ 691,455) for importing or exporting pirate product (Act No. 191/1999 Coll.). Amendments in 2000 were 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\$69,155)).

The 2000 Copyright Act entered into effect on December 1, 2000. These 2000 amendments corrected a severe legal shortcoming (and TRIPS violation) by providing a guarantee of protection for pre-existing sound recordings (and works). Other amendments aimed at complying, in part, with the new WIPO treaties, that is, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). While the Czech government insists its law is now fully compatible with TRIPS and the European Union Directives, there are a variety of shortcomings in the 1999 copyright law (as amended), which require renewed attention.<sup>9</sup> For example:

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<sup>9</sup> Similar IIPA summaries of the deficiencies in the Czech copyright law have appeared in IIPA's 2001 and 2002 Special 301 submissions.

- Certain aspects concerning the circumvention of technological protection measures should be modified at the earliest possible opportunity. 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, a new provision on 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 WCT Article 11 and WPPT Article 18.
  - In the area of technological protection 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.
  - Furthermore in Article 43, “technical devices” should be interpreted broadly, consistent with the WIPO treaties (WCT Article 11 and WPPT Article 18). 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 rights holders] 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.
  - There is also the need to ensure that a legal regime exists that creates legal incentives for ISPs to promptly remove infringing materials, and penalties for failure to do so, such that copyright owners can expeditiously address copyright infringement on-line in as effective manner as possible.
- In addition, rights 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. 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 rights holder as prescribed in WCT Article 12.2 and WPPT Article 19.2. Nonetheless, although Article 44 does not explicitly mention that rights management information includes information on the author or other rights holder, it is believed such as interpretation would be taken by a Czech court given the language in the provision.

- The 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 source of production.
- 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 extend to digital copying of works or sound recordings. Nor should any private copying exception (or any other exemption) interfere with the ability of rights holders to protect their works and sound recordings using technological protection measures.
- Currently, one of the main obstacles to effective enforcement is created by cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rights holders. The cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights enables defendants to delay judicial proceedings, and in some cases even escape justice, even when it is clear from the outset that the plaintiff owns the copyright or neighboring rights in question. This issue has become particularly problematic now that hundreds of thousands of different infringing optical discs (CDs, CD-ROMs, VCDs, DVDs) are regularly seized during raids. The Czech Republic should introduce a presumption of ownership for phonogram producers.

IIPA and its members may have additional views regarding legal reform once the Czech government initiates copyright reform efforts.

## Criminal and Civil Codes Reforms in 2000

**Criminal code:** Criminal code amendments were adopted in 2000, which increased the maximum possible penalties for copyright infringements to five years of imprisonment and a fine of 5 million Crowns (US\$172,820). The copyright industries had hoped that these amendments would speed up the resolution of criminal proceedings and reduce the court backlog of cases in 2002, when the changes first become effective. Unfortunately, as a matter of practice, these amendments have not yet had the desired effect. The recording industry's experience is that the imposed penalties are at the lowest level, reaching the maximum of 100,000 – 150,000 Czech korunas (\$3,500 – \$5,100).

**Civil code and *ex parte* search orders:** In 2000, amendments to the Code of Civil Procedure were finally adopted to make *ex parte* search applications less difficult to obtain, and as a result, the provisions—on-paper—complied with Czech's TRIPS Article 50 obligations. Prior to this change, Czech officials contended that the Code of Civil Procedure (Act No. 99/1963) permitted a rightsholder to obtain a civil *ex parte* search order.<sup>10</sup> Under the amended civil code, rightsholders are permitted to cause a search for securing evidence without the presence of an adverse party. Although the amendments became effective at the beginning of 2001, it has taken almost two years for the Czech courts to confirm the full extent of the civil *ex*

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<sup>10</sup> The software industry did test the civil code provisions prior to their amendments and achieved very mixed results. BSA reported that 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.

*parte* authority. BSA obtained its first civil *ex parte* search order in 2002; the Court of Appeals clarified that a civil *ex parte* search can be granted by the Czech courts without prior notification to the target.

## **Broadcast Law 1996**

In addition to the copyright law 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. Also, MPAA reports that the Telecommunication Law contains only general provisions relating to piracy and does not adequately address the issue of smart card piracy. 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.

## **Government Software Management**

The Czech government, with the support and cooperation of the Business Software Alliance, has issued a resolution on the software asset management procedures in government offices. The resolution is comprehensive and contains practical and detailed rules on the government software use, rules regarding the training of government employees, and rules on implementation of the resolution, including deadlines for full compliance with the resolution. This resolution, effective January 1, 2002, is one of the most comprehensive in Europe. BSA highly commends the government for its efforts on working towards efficient software asset management. BSA also now encourages the Czech government to focus on monitoring the implementation process, not only to comply with the law but to make the most out of its investment in information technology.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# ECUADOR

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Ecuador be added to the Special 301 Watch List due to the government's continued inability to achieve effective copyright enforcement (in administrative, criminal and civil cases) along with a dangerous provision in a 1999 education law which purportedly grants unwarranted licenses for software. Ecuador currently does not appear on any 301 lists, but has fluctuated between no-listing, the Watch List and the Priority Watch List since 1992.

**Overview of key problems:** The copyright industries continue to confront high piracy levels in Ecuador due to insufficient IPR enforcement in the country. Estimated 2002 trade losses due to piracy were approximately \$25.8 million. Some of the problems that the copyright industries face in Ecuador include:

- Dramatic decreases in IPR enforcement since 2001.
- Delays in the creation of specialized IP courts despite the requirement in the 1998 law mandating its creation.
- Reluctance by the courts to issue *ex parte* warrant searches, requiring the aggrieved party to submit direct evidence of intellectual property infringement.
- High judicial bonds or the lack of criteria for posting bonds before granting a seizure order creating disincentives for rightsholders to seek judicial action.
- Courts have recently required copyright owners to file their petitions for civil *ex parte* action through the random assignment process despite the fact that current regulations provide otherwise (in addition, the random assignment process presents problems with leaking of information).
- Regarding administrative copyright enforcement, the National Copyright Authority (IEPI) has little or no presence within the Ecuadorian community, making its enforcement ability very weak.
- The software industry is very 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.
- The recorded music market is 90 percent pirate.
- The lack of any type of enforcement promotes local piracy and also exports to neighboring Colombia.

**Actions which the government of Ecuador should take:** To improve IPR enforcement in Ecuador, the government should take the following actions in 2003:

- Request the National Judiciary Council to appoint specialized judges for intellectual property matters as provided by law.

- Implement and execute the tools and remedies provided in the Copyright Law of 1998 and regulations in which the petitions for *ex parte* civil orders are excluded from the random assignment process.
- Educate judges on intellectual property issues until the specialized IPR courts are created.
- Urge IEPI to have and maintain adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a better salary structure.
- Amend the provision of the Education Law of 1999.
- Create special police anti-piracy task forces in Quito and Guayaquil that will address the problems of pirate street vendors, distributors and manufacturers.

**ECUADOR**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications <sup>2</sup>	5.5	59%	6.9	62%	8.2	65%	20.5	71%	12.7	73%
Records & Music	18.0	90%	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%	N/A	95%
Entertainment Software	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Books	2.3	N/A	2.3	N/A	N/A	N/A	N/A	N/A	N/A	N/A
<b>TOTALS</b>	<b>25.8</b>		<b>27.2</b>		<b>N/A</b>		<b>N/A</b>		<b>N/A</b>	

Although Ecuador currently does not appear on any of the Special 301 lists, it does receive preferential trade benefits under two U.S. trade programs, both of which contain IPR

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$9.5 million at 68% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

standards.<sup>3</sup> Responding to the U.S. government's request for comments regarding countries' eligibility for ATPDEA benefits, IIPA reported that Ecuador had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.<sup>4</sup> Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Ecuador. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Bolivia's actions to meet the IPR standards of the ATPDEA *before* designation was officially conferred. One of the key discretionary criteria of these programs is that Ecuador provide "adequate and effective" protection of intellectual property rights to U.S. rightsholders.

## **COPYRIGHT PIRACY IN ECUADOR**

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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 \$5.5 million in 2002, with an estimated piracy level of 59%.

The music industry contacted police authorities in Quito and Guayaquil to organize a campaign against piracy. Unfortunately, nothing was done during the course of the year and piracy continues to strangle the local market, with estimated trade losses due to music recording amounting to \$18 million. In addition, Ecuador also serves as a base to replicate and export pirate product to Colombia. Local customs authorities have shown no interest in developing border measures to prevent exports of illegal product.

## **COPYRIGHT LAW IN ECUADOR AND RELATED ISSUES**

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### **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, as well as semiconductor chip protection, 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

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<sup>3</sup> For the first 11 months of 2002, \$69.6 million worth of Ecuadorian goods (or 3.7% 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 181.7% increase over the same time period in 2001. In the first 11 months of 2002, \$69.3 million entered under the ATPA, representing a 67.6% decrease from the same period in 2001.

<sup>4</sup> IIPA's September 16, 2002 Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries are available on the IIPA website at [http://www.iipa.com/rbi/2002\\_Sep16\\_ATPDEA.pdf](http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf).

certain acts regarding technological protection measures against infringement and electronic rights management information. The IPL's provisions relating to computer programs and enforcement are TRIPS-compliant. The IPL also generally incorporates obligations of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and creates a set of enforcement mechanisms.

Finally, the IPL declares that the protection and enforcement of IP rights is in the public interest, and 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.

Even though Ecuador's current substantive copyright legislation meets its bilateral (the IPR agreement with the U.S.), multilateral (TRIPS) and regional (Andean Pact Decision 351) obligations, the performance of Ecuador's judiciary remains deficient, in that the courts continue to interpret the law in such a way as to not enforce it. This, in turn, creates an environment of uncertainty for rightsholders.

## **The 1999 Education Law**

Ecuador passed its Education Law in 1999 which includes a poorly drafted provision that purports to grant free software licenses to high 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 unconstitutional 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 publicly announced its opposition to Article 78 and 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. However, to date, no opinion has been issued.

## **COPYRIGHT ENFORCEMENT IN ECUADOR**

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### **IEPI's anti-piracy enforcement efforts are weak and must improve.**

The IEPI was created by the 1998 copyright law to implement the country's intellectual property laws. The 1998 copyright law provides IEPI with its own budget and with autonomy in financial, economic, administrative and operational matters. Since its creation, IEPI has been functioning with a small staff whose average income is lower than comparable entities. IEPI's



administrative structure to raise salaries is deficient and during the last two years, IEPI employees have not received salary increases. During 2002, IEPI employees decided to go on strike in order to put pressure on the government. The government has not yet resolved IEPI employees' petitions. Even though IEPI employees resumed work after two months, it is still possible that another strike could take place in the near future.

Since IEPI started its operation, it has performed some enforcement activities in Quito, but rarely outside the city. 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 *ex officio* actions, IEPI has not carried out any administrative *ex officio* actions due to its lack of experience and lack of an adequate number of personnel. In order to change this situation, IEPI needs adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a much better salary structure.

Due to IEPI's lack of knowledge about software piracy issues, BSA has worked with IEPI, mainly in the area of education. BSA organized a two-day seminar which addressed software piracy and ways to identify counterfeit software products; during the second half of 2002 BSA organized an International Seminar on Intellectual Property issues with the sponsorship of USPTO. On the enforcement side, BSA has provided leads to IEPI for inspections. IEPI has conducted only a couple of inspections during 2002. A few others were not conducted due to its employees' strike. BSA expects IEPI to conduct more inspections during the first quarter of 2003. BSA believes that IEPI will only be successful if the Ecuadorian government supports IEPI as an autonomous institution with the power to increase the salaries of its staff and provide training.

## **Judicial action is still a barrier in effective enforcement.**

The IPL provides for specialized courts for intellectual property matters; however, to date, due to operative, political and financial reasons, the National Judiciary Council has not yet created them. Thus the petitions for civil *ex parte* actions are brought before civil courts which have neither the knowledge nor the expertise necessary to attend these types of petitions. Due to this situation, seizure orders are either not granted, or are delayed.

An effective judicial system is necessary for adequate and effective copyright protection in Ecuador. During 2001 a few judges consistently applied the IPL in enforcement procedures with good results; however, during 2002 the situation worsened dramatically and enforcement remains a serious problem. Due to generalized court corruption, lack of knowledge of intellectual property matters by the Civil Courts 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. Thus, before granting a seizure order, judges have required that copyright owners submit direct evidence of intellectual property infringement, pay high judicial bonds, and file civil *ex parte* actions through a random assignment process despite the fact that the regulation states otherwise. Few copyright infringement cases made it through the Ecuadorian judicial system last year and therefore no judicial decisions have been issued recently.

In 2001, BSA filed five civil complaints against end users. Since then, some of the experiences that BSA's local counsel has had with the judiciary while filing these petitions include the following:

- Even though the current regulation 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 here 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. In general, judges determine the bond amount as the same amount requested as damages by rightsholders, which discourages rightsholders to pursue the actions.
- According to the IPL, a judge shall grant a precautionary measure (such as a search and seizure raid) when a rightholder 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.

During 2002, based on the experience of the previous year, BSA brought some cases before IEPI and a couple before the civil courts. One civil court denied the precautionary measure requested on the grounds that copyright owners need to show direct evidence of a copyright infringement before a seizure order could be granted. Currently, the case is under appeal. The other court still has not made any decision. In August 2002, BSA filed a second petition for civil *ex parte action*; to date the civil court has not granted the precautionary measure.

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. Due to the current situation, it is a high priority for BSA to keep working on the education of the civil judges on intellectual property issues until the specialized courts are created.

The BSA is very concerned about these trends in the Ecuadorian courts that amount to the arbitrary application and enforcement of the Ecuadorian copyright law.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions

which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis, the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# ESTONIA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** For the second year in a row, IIPA recommends that Estonia be added to the Special 301 Watch List. While Estonia has completed some legal reforms and the authorities have undertaken some anti-piracy actions in conjunction with the industries, the piracy situation in Estonia continues to be bleak and the absence of deterrent enforcement warrants placement on the Special 301 lists.

**Overview of key problems:** Estonian officials must act decisively to stop Internet piracy, hand-to-hand piracy, large-scale organized crime operations in the markets, and the collectively large-scale losses caused by poor border enforcement. Internet piracy is on the rise in Estonia, including direct download piracy (like warez sites), mail order piracy, streaming and peer-to-peer and files sharing networks, as well as CD-R burning. The problems at the border and in the markets remain of serious concern despite the fact that several years ago the Estonian government correctly identified and agreed to crack down piracy on open-air markets and to secure its borders. Unfortunately, as a consequence of successful police efforts to combat piracy in the notorious Kadaka market in Tallinn in 2000, the pirates simply moved to other markets (e.g., Merekeskus in the passengers' harbor of Tallinn, which is the gate to Finland and other Scandinavian countries) and turned to Web-based piracy distribution. More anti-piracy actions must be taken against pirated goods distributed in other channels, such as via the Internet, "hand-to-hand" piracy and the tourists-related "suitcase" piracy in the known shopping malls for (Finnish) tourists, Merekeskus and Sadamarket in Tallinn. Estimated U.S. trade losses due to copyright piracy in Estonia for 2002 were at least \$16.7 million.

Effective enforcement includes expeditious prosecution and deterrent sentencing, and this has not occurred. Last year, Estonia reformed its criminal legal system by adopting a new Penal Law and Misdemeanor Act; this abolished the old Soviet administrative legal system. Although some Estonian officials have cooperated with the copyright industries, recent efforts have been sporadic and inconsistent. Despite progress in reforming its legal regime in recent years, several critical problems in the copyright 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. Furthermore, despite of the fact that Estonia finally took the political decision after three years of the strong international pressure and changed (not withdrew) its full reservation to Article 12 of the Rome Convention, the U.S. record producers are not protected equally with the Estonian and other international producers, and thus, in the discriminatory situation. Nevertheless, this step eventually eliminated the major concern of foreign phonogram producers—the lack of remuneration for the broadcasting and communication to the public of their recordings. However, in order to provide adequate and full protection for sound recordings in electronic environment, further amendments to the copyright law are needed to elevate its standards up to those found in the two 1996 WIPO treaties, which Estonia has still not ratified.

**Actions which the Estonian government should take in 2003:** To correct the deficiencies, the Estonian Government should take the active concerted actions on the enforcement and the legislative front, including—

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority;
- Improve border enforcement inspections and seizures;
- Improve criminal enforcement by increasing the number of police actions, bringing prosecutions, and issuing deterrent sentences;
- Encourage enforcement authorities to actively use new simple criminal enforcement measures and the issuance of deterrent fines provided in the new Penal Law and the Misdemeanor Act;
- Amend the law to provide for civil *ex parte* searches, as required by TRIPS;
- Amend the law to provide statutory damages, a TRIPS-compatible remedy which assists courts' in awarding damages in civil copyright infringement actions;
- Urgently ratify the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty and fully implement those into its national law, in consultation with the copyright industries.
- Encourage the Estonian police to enter into a Memorandum of Understanding with industry groups EOCP and BSA; this MOU will highlight the important issues regarding intellectual property crime and encourage more cooperation.

**ESTONIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	9.0	60%	9.0	60%	9.0	60%	9.0	70%	8.0	85%
Motion Pictures	2.0	30%	1.5	40%	2.0	60%	NA	60%	NA	60%
Business Software Applications <sup>2</sup>	5.7	52%	3.3	53%	NA	69%	NA	72%	NA	NA
Entertainment Software	NA	NA	NA	90%	3.7	98%	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>16.7+</b>		<b>13.8+</b>		<b>14.7+</b>		<b>9.0+</b>		<b>6.0+</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$800,000 million at 69% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

Estonia is a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program which requires beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners.<sup>3</sup> 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 never entered into effect. Estonia joined the World Trade Organization (WTO) in 1999 and is obligated to have implemented both the letter and the spirit (performance) of the TRIPS Agreement. The European Commission too has identified problems with inadequate copyright enforcement in Estonia and called on that government to intensify measures to combat piracy and counterfeiting, strengthen border controls, and improve coordination between enforcement bodies.<sup>4</sup>

## COPYRIGHT PIRACY IN ESTONIA

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CD-R and Internet piracy is growing rapidly, especially because Estonia has a very high computer literacy rate and widely available Internet broadband connections. The Estonian Organization for Copyright Protection (EOCP)<sup>5</sup> reports that the videogame, film and recording industries all report that the CD-R and Internet piracy phenomena are continues growing rapidly in Estonia.

### Optical Media Piracy in Estonia

**Optical disc (OD) piracy:** There are still no known CD plants operating within Estonia (Lithuania is the only Baltic nation known to have an industrial CD plant). The Estonian market remains flooded with illegal OD product manufactured in other countries, notably Russia, Ukraine and Belarus via other Baltic States. BSA reports that CD piracy is still at the “cottage industry” stage in Estonia, and does not appear to be well-organized, to-date. There has been a decrease in the influx of entertainment software products.

As the result of the failure of the police to use its *ex officio* authority 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 the tourists-related “suitcase” piracy in the passengers’ harbor in Tallinn, would provide effective. Unfortunately, customs raids against “suitcase” piracy are extremely rare and sporadic to be effective tool to stop the import and transit flow of pirate material.

Customs and EOCP’s joint raids in Tallinn’s harbor on Finnish tourists showed some positive results. In 2000, Estonian and Finnish anti-piracy organizations organized “warning banners” for the harbor in 2000; this had a big impact and was widely discussed in the Finnish

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<sup>3</sup> For the first 11 months of 2002, \$13.6 million worth of Estonian goods (or 8.7% 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 4.4% increase over the same time period last year. For more information on the history of Estonia under Special 301 review, see Appendices D and E of this submission.

<sup>4</sup> To access the European Commission’s October 2002 annual report on EU enlargement and Estonia, go to <http://www.euractiv.com/cgi-bin/cgint.exe/?1100=1&204&OIDN=1504033>.

<sup>5</sup> ECOP is an anti-piracy organization comprised *inter alia* of representatives from the Motion Picture Association, (MPA), the International Federation of the Phonographic Industry (IFPI), and Sony Interactive Corporation.

and Estonian media. After two years, the anti-piracy organizations decided to take the banners down because the anti-piracy message had been successfully delivered. According to BSA, Estonian customs was successful, especially at the border with Latvia, the Tallinn seaports and airports, and the portion of the Russian border adjacent to St. Petersburg. EOCP reports that as a general trend the import of pirated goods is decreasing due to the substantial growth of locally produced illegal CD-Rs.

**Transshipment:** EOCP and customs have not yet discovered how widespread and systematic is the transshipment of pirated goods through Estonia. Its Baltic neighbor, Lithuania, is the regional leader in transshipment (in part due to its geographical location combined with ineffective border controls). 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 Estonian customs. The recording and motion picture industries confirm that the main transshipment location is Finland. From there, the pirated products are allowed unfettered access to other Western European countries within the borders created by the Schengen Treaty. Joint industry and customs investigations into the sources of possible transshipment sources continue.

## **Internet Piracy**

Rapidly increasing Internet piracy in Estonia continues to be a growingly serious concern the copyright industries. Internet piracy comes in various shapes and forms, most prevalent of those are: (1) mail order piracy, which involves the Internet to access marketplace (e.g., online auction houses) and uses mail order distribution to deliver illegal goods; (2) direct download piracy, which would include IRCs and file transfer protocols (FTP) as well as compression techniques (like MP3 and MP4); (3) peer-to-peer and file-sharing networks such as Napster, Gnutella, KaZaA, StreamCast (formerly MusicCity.com, operator of Morpheus), and Grokster; and, (4) digital streaming piracy like digital jukeboxes to the lesser extent. MPAA reports that it is Internet piracy which is the biggest problem facing the motion picture industry in Estonia.

EOCP reports that it sent the total of 226 cease and desist letters to the websites consisting of illegal material in 2002. As a result and in co-operation with the Internet Service Providers (ISPs) the total of 340 sites on Internet consisting illegal files and offering illegal CD-Rs for sale were closed in 2002. During 2002, BSA also identified 136 sites based on Estonian ISP reports; 134 warning letters were sent, 90 pages were taken-down by the ISPs and 37 by the content providers themselves. Estonia has been in the press recently because three Estonian software programmers developed the file-sharing KaZaA software, having been commissioned to do the work by a company based in the Netherlands, which in turn sold the software to another company based in. Copyright infringement litigation brought by U.S. film and record companies against Sharman Networks Ltd. (the current owner of KaZaA software) has been filed in the United States.

In April 2001, the private sector (including EOCP) concluded a Memorandum of Understanding (MoU) with Estonian Internet Service Providers (ISPs) that enables the effective survey (notice) and removal (takedown) of infringing materials from the Internet. This MoU has been essential thus far in the fight against Internet piracy. And at the same time, due to the massive piracy in FTP servers, this MoU needs to be updated. In order to combat this new piracy form, the copyright industries (EOCP and BSA) need in particular: (1) free and 24-hour access to all FTP servers, including passwords, etc; (2) the immediate removal of pirated files

(the current MoU requires 48 hours' response time, and (3) the identification of FTP users by ISP company.

## **Piracy Levels Are High Across All Copyright Sectors**

Piracy of sound recordings and music remains widespread in Estonia. The rapid growth of CD-R piracy of music has overshadowed the existing import problem of pirated sound recordings with pre-recorded repertoire. In 2002, the share of illegal CD-Rs of all seized optical discs containing music was around 50-60%, which is more than doubled if compared to 2001, when the same equivalent was 20-30% CD-Rs. The estimated level of music piracy remained constant, at 60% also for 2002. 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 2002 were \$9 million. Recorded musical works are being widely distributed on the Internet and copied hand-to-hand (mainly CD-Rs), and are still (albeit to a lesser degree) being sold in the main markets in Tallinn (the Kadaka Market, Merekeskus and Sadamarket also near the passengers' harbor in Tallinn as a newcomer in 2002), and along the Eastern Estonian border with Russia. The local anti-piracy group EOCP continues to assist the police in developing production identification systems and preparing legal actions and evidentiary material. EOCP also works together with BSA in running educational seminars for police and customs officials.

The Motion Picture Association of America (MPAA) reports Estonia is a country of considerable concern for audiovisual piracy because of its geographic proximity to Russia. Pirate Russian products are particularly affecting the eastern part of Estonia. As the production of pirate materials in Russia increases, the amount of pirate product being sold to tourists in Estonia rises. Estonia has long been considered by Finnish tourists to be a place where they can stock up on counterfeit goods at the numerous street markets located in and around Tallinn. Retail piracy exists, but most pirates tend to distribute their product at street markets, through mail order, and over the Internet. At the present time, the rate of video piracy is estimated to be approximately 30-35%. Optical disc audiovisual piracy levels are about 5%; bringing the overall audiovisual piracy rate to 30%. EOCP is also worried about the influence of Moscow DVD factories. As Estonia does not have any optical media production facilities, and DVD-R technology is not so widespread, the influence of Moscow DVD factories is feared to become significant. EOCP emphasizes the need of customs control on border to be more effective and well-organized. False contracts, especially Russian "sub-license agreements," remain a problem and create issues in determining legitimacy. The main piracy centers are located in Tallinn and in towns in the northeast. However, piracy at the Kadaka and two other shopping malls in Tallinn passengers' harbor (Merekeskus, Sadamarket) has been largely controlled. The situation will change further in early 2003 with the planned reorganization of the Kadaka market as its displaced suppliers migrate to the Tallinn harbor area to be closer to the tourists. Internet piracy, in the form of both web-based marketing and illegal downloading, is becoming a serious concern. The Internet is also being used for the sale of pirate smart cards. Through cooperation with the police and ISPs, several hundred infringing sites and links have been closed down. Cable and satellite television (smart cards) piracy are also present in Estonia (with estimated piracy rates of 20% and 95% respectively). Annual losses to the U.S. motion picture industry due to audiovisual piracy in Estonia were estimated to be approximately \$2 million in 2002.



The business software industry estimated that 52% of business software in use in Estonia was unauthorized in 2002, a slight decrease from the prior year. The Business Software Alliance (BSA) estimates that the U.S. trade losses due to software piracy in Estonia increased to \$5.7 million in 2002.

The entertainment software industry reports that Internet piracy is the primary form of piracy for its products in Estonia. There appears to be very little “silver” discs in the market, although flea markets do continue to be a source of the factory-produced discs that is available. There are now numerous warez sites offering pirated entertainment software for CD-R burning operations. The move to the Internet is in part attributed to the increased number of street market raids run by Estonian police. The EOCP has contributed to better enforcement, providing training programs for addressing piracy problems of the entertainment software industry.

## **COPYRIGHT ENFORCEMENT IN ESTONIA**

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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 and bilateral obligations. The Estonian Government should express the political will to implement effective IPR law enforcement and include this in its list of priorities.

Simply stated, Estonian officials, working with industry, must act to halt internet piracy. A keen example of the problem in Estonia occurred when the motion picture industry and the recording industry attempted to obtain discovery from persons in Estonia with important knowledge about illegal P2P (file distribution) utilities. In the summer of 2002, the plaintiffs in the MGM v. Grokster case (pending in the U.S. District Court for the Central District of California) submitted a letter of request to the Estonian central authority for the taking of testimony and documentary evidence from the Estonian company, Bluemoon Interactive, and its principals. Information in the record of the U.S. case showed that Bluemoon played a key role in the development and operation of the computer system and service that the defendants were using to facilitate and profit from millions of users’ infringement of plaintiffs’ copyrights in the United States. The record also indicated that, owing to its key position, Bluemoon was in the possession of critical evidence (including the source code of the defendants’ FastTrack system and other related documentation) that otherwise would probably be unavailable to the plaintiffs. In October 2002, after hearing argument about Bluemoon’s objections to the letter of request, the Tallinn City Court totally denied plaintiffs’ request to take any of the requested discovery despite their clear importance to the copyright industry.

Furthermore, Estonian enforcement officials, working with industry, also must act to stop “hand-to-hand” piracy, large-scale organized crime operations in the markets and the collectively large-scale losses at the border. Customs officials responsible for the on-ground enforcement initiated unacceptably few anti-piracy enforcement activities in 2002. 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. Although most of the copyright industries reported good cooperation by the police in running some street market raids, the police activities remain insignificant when combating with piracy. Furthermore, judicial enforcement was almost nonexistent. EOCP

together with other copyright industries organized the total of eight educational seminars for the police, customs, prosecutors and judges in 2002.

## **Ineffective Border Enforcement**

The Estonian Government needs to take more assertive actions to halt the illegal imports of pirated 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 Russia and Belarus via Latvia and Lithuania 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. Most of the material is produced elsewhere in the region, principally in the vast optical media production facilities now operating in Russia. 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.

**The suitcase problem (piracy):** This “suitcase” problem (piracy) involves foreign tourists purchasing pirated material in Estonian shops and then exiting the country. The tourists-related “suitcase” piracy problem is prevalent in the known shopping malls for (primarily Finnish) tourists in Merekeskus and Sadamarket in Tallinn. The 2001 announcement by the Estonian customs authorities that they would seize the suitcase material was a positive step toward addressing the border enforcement problem. Both the 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. 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. However, the local anti-piracy organization EOCP reports that customs anti-piracy are almost non-existent and seized quantities reach up to 10-30 pirated units per raid, which is unacceptably out-of-balance with the scale of the piracy problem in Estonia. 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. The new 2002 Penal Law also affects customs, which has to impose the penalties following the new law. However, the new law does not affect the core enforcement of customs.

**Invalid licenses:** Customs officials report that there are many shipments of Russian materials that are entering Estonia, with the Russian distributor claiming the same invalid license to distribute the material 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. Most importantly, these materials are legally regarded as pirated copies according to Article 80 of the Copyright Law, and those cases should be dealt similarly to the piracy cases.

**Punishment for storeowners:** 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 in most cases, nor are their business licenses revoked; either of these measures would represent important additional steps toward proper copyright enforcement and should be addressed by the inter-ministerial officials responsible for IPR enforcement. EOCP and other copyright industries report that the 2000 adopted Licensing Law has not been used effectively to revoke the business license of stores that have been caught selling pirated material. Police should be more active in officially requesting from local city authorities the revocation of the trade licenses of pirates as an additional penalty for the storeowners.

## **Police Raids and Coordination Efforts Should Be Improved**

**The open market problem has diminished; however, the restructured Kadaka Market needs to be monitored:** The illegal open markets first appeared in the 1993-1994 time period. In October 2000, the government of Estonia pledged to deal with the dual problems of the open illegal markets and lax border enforcement. As a result of police and private industries action, the number of stalls selling illegal material in the Kadaka Market was dramatically reduced. The Kadaka Market was restructured in October 2002 and operates as one supermarket chain. There are still five or six kiosks operating in the premises of the previous Kadaka Market; however, the traditional “under-the-counter” piracy problem continues. The Kadaka Market falls under the jurisdiction of one of Tallinn’s police districts, which generally does not initiate any activities to close the kiosks. Now the successful decrease of pirate activities in the Kadaka Market in 2002 must be repeated in eliminating the remaining piracy in the Kadaka Market, other markets and other cities. These markets not only hurt the local copyright market, but also, cater to tourists, thus contributing to the tourists-related “suitcase” piracy.

**Police cooperation with industry was mixed in 2002:** Unfortunately, the amount of police raids to combat piracy has not increased during the past years. EOCP reports that police organized the total of 36 raids in 2002. These raids were organized jointly with EOCP and concerned music, film and interactive games piracy. EOCP reports that in 2002 it conducted the total of 56 expert reports for the total of 17,069 pirated units (of those 6,618 CDs, 2,454 CD-Rs, 342 audiocassettes, 5,075 VHSs, 469 VCDs, 302 DVDs, 1915 PlayStation® carriers). In July 2002, EOCP and the Estonian Central Criminal Police Department conducted a raid in the Merekeskus market which result in the seizure of over 3,000 pirate music CDs, 600 pirate videotapes, 1,000 copies pirated videogame software, and almost 200 pirated DVDs; two people were arrested. This was a particularly successful raid in that not only was there a considerable amount of pirate product seized, but the officers showed great initiative in locating a pirate warehouse on the premises that stored additional product. The case is still in the police.

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.

MPA reports that police cooperation has been improving in Tallinn, but that it has proven difficult to motivate officers in Eastern Estonia and other parts of the country. Most activities in 2002 either involved the Internet or piracy at the street markets. Videocassette piracy still exists, but is no longer the primary concern for the industry as Internet and optical disc piracy have grown substantially in importance. The vast amount of CD-Rs available on the market indicates that discs are burned locally. EOCP and BSA has proposed a Memorandum of Understanding with the police that will highlight the important issues regarding intellectual property crime and encourage more cooperation. It is hoped that this memorandum will serve to define and prioritize the issues facing the police so that they can better direct their efforts.

BSA reports that the disappointing trend of dramatically reduced police action regarding end-user piracy continued in 2002. Between January and October 2002 no police enforcement action took place in respect of end-user piracy in Estonia. This is especially damaging for BSA as the absence of an effective civil search remedy means that the lack of police enforcement activity is especially damaging. In November 2002, BSA discussed the chronic lack of software piracy enforcement with the Ministry of Internal Affairs, which undertook to authorize enhancing enforcement activity in the end-user piracy area. This apparent reverse in policy has resulted in a certain amount of encouragement. In October-December 2002, a total of three end-user enforcement actions were undertaken by the police in the Tallinn area. The current situation is encouraging; in January 2003, four police actions took place across Estonia. In 2002, 16 reseller related raids took place against small-scale illegal resellers of business software products across Estonia. In total, 3,686 CDs were seized, many of which included illegally copied software programs.

## **Prosecutorial Delays and High 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. 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.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS ESTONIA IN 2002		
ACTIONS	EOCP <sup>a</sup>	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	46	21
By Police	36	20
By Customs (unofficial by EOCP)	About 10	1
Number of cases commenced (including Internet cases)		21
Number of defendants convicted (including guilty pleas)	NA	1
Acquittals and Dismissals	NA	0
Number of Cases Pending	NA	20
Total number of cases resulting in jail time	1	0
Suspended Prison Terms	1	1
Maximum 6 months	1	0
Over 6 months	0	1
Over 1 year	0	0
Total Suspended Prison Terms	1	1
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	NA	0
Up to \$1,000	NA	0
\$1,000 to \$5,000	NA	0
Over \$5,000	NA	0
Total amount of fines levied	NA	0

<sup>a</sup> 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. EOCP does not have separate statistics for criminal and misdemeanor cases. However, the Ministry of Justice confirmed to EOCP that the courts' archives will be digitized, which will make the stats available to the general public.

## Few Judicial Sentences Are Issued

Since the various amendments to the criminal code and the border code, there have been very few prosecutions, few criminal convictions and a few fines. As has been true in years past, judges still dismiss cases because pirates present false contracts as evidence of their good intentions. However, there are relatively few court cases due to the continuous legal reforms in the criminal law. BSA does have approximately 20 cases current pending before Estonian courts.

## No Civil *Ex Parte* Search Authority and No Statutory Damages

Civil remedies in Estonia are extremely weak. Estonia's failure to provide *ex parte* civil procedures also is a significant shortcoming. Furthermore, there is virtually no jurisprudence regarding the calculation of damages in intellectual property cases. 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. BSA mounted an inconclusive test case in 2002, which did not result in a definite ruling on the existence or otherwise of the remedy.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS ESTONIA IN 2002		
ACTIONS	EOCP	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	1	0
Post Search Action		0
Cases Pending		0
Cases Dropped		0
Cases Settled or Adjudicated	1	0
Value of loss as determined by Rightholder (\$USD)		0
Settlement/Judgment Amount (\$USD)	\$1,000	0

## New Misdemeanor Law Replaces Administrative Proceedings

Administrative proceedings in Estonia were widely used by the copyright industries were a rather effective tool, given the difficulties with the criminal and civil enforcement regimes. As of September 1, 2002, Estonia started to apply new criminal law regime by bringing the new Penal Law into force. The new law abolished the whole old administrative procedure as such. Instead, there is more modern misdemeanor procedure for primary offences of distribution of pirated copies. The repeated offence will be prosecuted by criminal law. The maximum penalty for misdemeanor copyright offence is the fines amounting 18,000 kroons (US\$1,234) for private person and 50,000 kroons (US\$3,427) for legal person. The new Penal Law provides for a maximum three years' imprisonment or up to 25,000,000 kroons (US\$1.7 million) in fines.

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 be charged under the Estonian criminal code. Penalties under the code vary, according to the level of the offense. As noted above, the potential maximum fines are high.

## COPYRIGHT AND RELATED REFORM IN ESTONIA

**Overview:** 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. 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). In 2000, Estonia acceded to the Geneva Phonograms Convention (effective May 28, 2000) and the Rome Convention (effective April 28, 2000). New penal code amendments entered into force on September 1, 2002. The Estonian Copyright Law was amended (entered into force November 2002) in order to harmonize the provisions of the copyright license agreements with the Obligations' Law.

**Ratify the WIPO treaties:** Estonia should urgently start the ratification of the two 1996 WIPO digital treaties and to adopt provisions to implement them in order to protect sound carriers in the electronic environment against Internet piracy and other forms of digital piracy. Most importantly, the Copyright Law should include the effective protection of technological measures and rights management information. Estonia was a signatory to both treaties in 1997, and preparatory work was undertaken in the Ministry of Culture to draft legislation to implement the treaties. IIPA encourages Estonia to move quickly with this ratification and implementation. Estonia plans to implement the EU Copyright Directive in 2003.

## Copyright Law Developments

**The 1999 amendments:** 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

**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.<sup>6</sup> 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, below.

**2002 amendments to the Copyright Act:** The Estonian Parliament adopted the amendments to the Copyright Law in order to harmonize the provisions of the copyright license agreements with the Obligations' Law. The abovementioned amendments entered into force in November 2002.

**Future amendments needed:** A set of copyright amendments was originally scheduled for consideration in 2000 to fulfill Estonia's remaining obligations for compliance with TRIPS, the EU directives, and the two WIPO treaties. However, these amendments for digital treaty ratification and implementation were delayed and reasoned to await the final completion and implementation by the members of the European Union of the Copyright Directive. As a result, Estonia will start relevant legislative efforts in spring 2003 and expects to implementation to be completed by the end of 2003.

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<sup>6</sup> "Estonia: New Laws Enacted to Control Importation of Counterfeit Goods," World Intellectual Property Report, Sept. 2001 at p. 7.

Estonia should be encouraged to further amend its relevant national laws to:

- 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;
- Expressly afford civil *ex parte* search authority;
- 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;
- Add a right of presumption of authorship for sound recording producers (currently afforded only to “works”). Currently, one of the main obstacles to effective enforcement is created by cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rights holders. The cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights enables defendants to delay judicial proceedings, and in some cases even escape justice, even when it is clear from the outset that the plaintiff owns the copyright or neighboring rights in question. This issue has become particularly problematic now that hundreds of thousands of different infringing optical discs (CDs, CD-ROMs, VCDs, DVDs) are regularly seized during raids. Estonia should introduce a presumption of ownership for phonogram producers. The principle of presumption of ownership is not, in fact, a new phenomenon in Latvia’s legislation. Estonian Copyright Law includes the same principle for authors.
- Delete Article 62(2), the author’s rights “safeguard clause” which is unnecessary and inconsistent with the Rome Convention (Article 1).

In particular, with respect to WIPO treaties’ implementation, Estonian law must:

- Ensure that the right of reproduction covers temporary copies;
- Adopt an exclusive right of communication to the public, including a right of making available
- Allow rightsholders 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 circumventing devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention.
- Allow rightsholders 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 Rome Convention Reservation Must Be Withdrawn**

The Government of Estonia finally made the laudable political decision to start protecting the foreign repertoire. On November 6, 2002, after two and one-half years of strong international pressure the Parliament finally adopted the law amendment to change the full reservation to Article 12 of the Rome Convention. The amendments entered into force on December 14, 2002, and the Estonian Ministry of Foreign Affairs deposited the relevant instruments in the U.N. Secretariat on January 9, 2003.



However, Estonia did not withdraw the full reservation, but changed it with the so-called “reciprocal treatment reservation”, which gives the foreign repertoire the same protection as the other Member States of the convention protect Estonian repertoire in their territories. This means that the broadcasting and public performance rights of the U.S. nationals are still not protected. Therefore, the Estonian government should be urged to withdraw its other reservation to Article 5(3) of the Rome Convention and apply the simultaneous publication criteria. This would enable to protect the sound recordings of those U.S. nationals, who have released their recordings within 30 days after the first release date in the U.S. in any of the Member States of the Rome Convention.

## **Criminal, Civil and Administrative Remedies**

**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\$10,290 to \$17,155) for the “use,” including installation, of computer programs. These administrative remedies also include fines between 20,000 and 50,000 kroons (US\$1,370 to \$3,430) for copyright infringements of any work or sound recording by legal entities. The fines increase to 250,000 to 500,000 kroons (US\$17,155 to \$34,310) 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 and misdemeanor law:** As of September 1, 2002, Estonia started to apply new criminal law regime by bringing the new Penal Law into force. The new law abolished the whole old administrative procedure as such. Instead, there is more modern misdemeanor procedure for primary offences of distribution of pirated copies. The new Penal Law creates a distinction between categories of offenses along a “crime/misdemeanor” model. Industries 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\$3,430 to \$1.7 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\$14 to \$1,235) for living, natural persons, 50,000 to 500,000 kroons (US\$3,430 to \$34,310) for legal entities.

**Civil procedures code:** A new civil procedure code has been drafted, and we understand that a civil *ex parte* remedy is provided.

## **Border Measures (2001)**

In June 2001, the Parliament adopted legislation that improves border measures regarding pirated and counterfeit goods. This new legislation, entitled “The Prevention of Import and Export of Goods Infringing Intellectual Property Rights Act of 2001,” entered into force on September 1, 2001.<sup>7</sup> Estonian officials must significantly improve their on-the-ground enforcement efforts at the border, as discussed above. In addition, the Estonian government should completely implement the October 2000 decision by customs officials to seize parallel import material with effective border enforcement.

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<sup>7</sup> *Id.* IIPA does not have the text of this legislation on importation measures and therefore cannot provide more detailed comments at this time.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# GUATEMALA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Guatemala remain on the Special 301 Watch List. Guatemala has been on the Watch List for the past four years without significant improvements in the overall piracy rate due to the continuing problems in IPR enforcement. Keeping Guatemala on the Special 301 Watch List will send a strong signal that a better effort is required of our potential FTA partners as the U.S. government works on the U.S. Central America FTA (CA-FTA) this year.

**Overview of key problems:** Although IPR enforcement has improved since the creation of the Special Prosecutor's Office for intellectual property crimes last year, Guatemala continues to experience high piracy levels. Estimated trade losses due to piracy were \$23.8 million in 2002. The time is now for the Guatemalan government to take immediate action to improve its IPR enforcement. In fact, the U.S. government should insist that the Guatemalan government immediately address all of the problems identified in this submission, including those highlighted below, prior to the finalization of CAFTA. Some of the problems in Guatemala include:

- Substantially decreased criminal penalties as a result of the amendments to the copyright law passed in 2001.
- Lack of statutory damages provision for civil copyright infringement. Also as a result of the amendments to the copyright law passed in 2001, this provision was abrogated.
- Legal remedies in civil actions are practically unavailable because information is often leaked and the surprise element of the *ex parte* search is lost.

The copyright industries are concerned that the current Guatemalan Congress may also amend other intellectual property laws, such as the copyright law, in a manner not consistent with relevant provisions of international treaties to which Guatemala is a member. For example, recent amendments (Decree No. 76-2002) suspended the patentability of pharmaceutical and chemical products and practically eliminated data protection, in contravention to international norms.

**Actions which the government of Guatemala should take in 2003:** To improve IPR enforcement in Guatemala, we recommend the following actions—

- Increase criminal penalties and reinstate the statutory damages provision for civil copyright infringement in its entirety.
- Amend the Civil Procedure Code to allow the filing of civil copyright infringement actions under seal.

**GUATEMALA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications <sup>2</sup>	14.5	67%	14.1	73%	12.3	77%	12.7	80%	8.0	82%
Motion Pictures	2.0	60%	2.0	60%	2.0	60%	2.0	70%	3.0	70%
Records & Music	4.8	NA	NA	NA	4.0	60%	4.0	60%	4.0	60%
Entertainment Software	NA	NA	NA	NA	0.1	60%	NA	NA	4.0	85%
Books	2.5	NA	2.5	NA	2.3	NA	2.5	NA	2.5	NA
<b>TOTALS</b>	<b>23.8</b>		<b>18.6</b>		<b>20.7</b>		<b>21.2</b>		<b>21.5</b>	

In April 2002, the USTR noted some of these copyright enforcement difficulties in Guatemala, stating: “[T]he amendments [to the 1998 copyright law] decreased criminal penalties in the case of infringement of intellectual property, and the provision for statutory damages was removed.”<sup>3</sup> Guatemala is also a beneficiary country of three U.S. trade programs.<sup>4</sup>

## **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 2002 was 67%, 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 \$14.5 million in 2002. BSA

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$13.4 million at 75% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> Press Release 02-48, Office of the United States Trade Representative, “USTR Releases Super 301, Special 301 Report of Global Intellectual Property Protection,” April 30, 2002. Guatemala was kept on the Watch List in April 2002.

<sup>4</sup> Regarding Guatemala's use of these trade programs during the first 11 months of 2002: \$16.7 million worth of Guatemalan goods entered the U.S. under the duty-free GSP code (representing a 45.2% decrease from the same time period in 2001); \$300.5 million worth of Guatemalan goods entered under the CBI, representing a 38.5% increase (or 11.8% of Guatemala's total imports to the U.S.); and \$644.5 million entered under the CBTPA, representing 25.3% of Guatemala's total imports to the U.S. during this period.

believes that these losses are largely due to the fact that Guatemalan law (as discussed below) fails to establish effective deterrents for infringing acts.

During 2001, the Prosecutor's Office conducted, at BSA's request, ten raids against end-users and three raids against resellers of illegal software. All of these cases were settled out of court. In 2002, the Special Prosecutor for IP crimes conducted, at BSA's request, six criminal raids against end-users and six criminal raids against resellers of illegal software. These cases were also settled out of court.

Through July 2001 to September 2002, the Motion Picture Association's (MPA) anti-piracy program in Guatemala initiated more than 50 criminal actions. Only 15 raids were actually conducted. Unfortunately, in many cases, judges take a long time to grant the appropriate orders, a situation that favored the leak of information. In other cases, the IP Prosecutor entered into direct negotiations with infringers before a planned raid took place (without previously consulting the rightsholder) and even suspended the continuation of the procedure, thus weakening the expected deterrent effect of the criminal procedures.

## **COPYRIGHT ENFORCEMENT IN GUATEMALA**

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Copyright enforcement still remains inadequate in Guatemala despite a significant improvement since the creation of the Special Prosecutor's Office for IP crimes.

### **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 minimum level of criminal fines sends the wrong message to the Guatemalan public and to the judiciary about the importance of protecting copyrights from unauthorized exploitation. Importantly, this does not satisfy the TRIPS Article 61 standard of providing for deterrent "criminal procedures and penalties to be applied" in piracy cases.

### **Inadequate and Ineffective Civil Enforcement**

Because criminal enforcement is not always feasible or appropriate, copyright rightholders often use civil enforcement procedures—particularly civil *ex parte* search authority—to combat piracy. In Guatemala, however, this legal tool is practically unavailable because there is no way to maintain the confidentiality of the *ex parte* search petition. Court records are public and there are several companies that on a daily basis report the new cases that have been filed with the court. Unfortunately, under Guatemalan law a case cannot be filed under seal.

In addition, rightsholders also encounter 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 for a single case, 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). They in essence block access to the civil legal system, leaving rightsholders with just one avenue for legal action: the criminal process. For these reasons, during 2000, 2001 and 2002, 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.

Less than one (1) year after those amendments went into effect, the Guatemalan Congress repealed the statutory damages provision by eliminating it from the copyright law through a subsequent amendment. Now a rightsholder 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**

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### **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 rightsholders were forced to initiate and prosecute criminal copyright infringement cases on their own initiative under a process that was established and designed for crimes against honor and therefore represented an obstacle to effective prosecution of IP infringements. 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 was the result of a three-year effort to strengthen Guatemalan copyright law and to correct the omission of the “public action” in the criminal code. In brief, the law:

- 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 rightsholders 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 recently deposited its instruments of accession to the new “digital” treaties of the World Intellectual Property Organization: the WIPO Copyright Treaty (WCT)<sup>5</sup> and the WIPO Performances and Phonogram Treaty (WPPT)<sup>6</sup>.

*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

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<sup>5</sup> Guatemala deposited its instrument of accession to the WIPO Copyright Treaty (WCT) on 4 November 2002. This treaty entered into force, with respect to Guatemala, on February 4, 2003.

<sup>6</sup> Guatemala deposited its instrument of accession to the WIPO Performances and Phonogram Treaty (WPPT) on 8 October 2002. This treaty entered into force, with respect to Guatemala, on January 8, 2003.

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, audiovisual 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.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiation process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will help countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in both the Free Trade Area of the Americas (FTAA) and the U.S.-Central American FTA (CA-FTA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations under TRIPS. As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, IPR chapters in the FTAA and the CA-FTA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains in intellectual property protection for U.S. and local copyright creators can be achieved.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# HUNGARY

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Hungary be placed on the Special 301 Watch List in 2003. Hungary has made great strides in modernizing its copyright legal regime over the past several years, including extensive legislative revisions and amendments to its criminal code. However, copyright owners report mixed results at best with on-the-ground enforcement operations and persistent prosecutorial issues in a market that could otherwise sustain good growth. Hungary currently is on the Priority Watch List, primarily for patent and data exclusivity problems.

**Overview of key problems:** Estimated trade losses due to copyright piracy in Hungary were \$50.2 million in 2002. The main problems adversely affecting the copyright industries in Hungary include—

- Continued prosecutorial delays;
- Failures in moving criminal cases forward;
- Low fines and generally weak sentences fail to provide sufficient deterrent;
- Failure to fully comply with TRIPS Agreement enforcement obligations (such as issuing non-deterrent penalties and the lack of a civil *ex parte* provision);
- Poor border enforcement; and
- Rapid growth of CD-R piracy and Internet piracy.

**Actions which the government of Hungary should take in 2003:** The minimum remedies the Hungarian Government should take to improve the situation include—

- Streamline the prosecutorial systems to counter delays and increase effectiveness of legal investigation;
- Highlight and develop the importance of IPR issues at the prosecutorial level;
- Impose higher penalties and harsher sentences to deter copyright pirates;
- Fully comply with its TRIPS obligations in countering copyright piracy;
- Strengthen the effectiveness of the border police;
- Fully enforce the 2001 Act on Electronic Commerce and Information Society Services and relevant new provisions in the Criminal Code to effectively combat Internet piracy through new legislation;
- Adopt optical media regulations to combat and control the optical media production and distribution;
- Launch a joint IPR campaign together with the copyright industries targeted to increase the public awareness detrimental effects of CD-R burning, especially in educational institutions (schools, colleges, universities).

**HUNGARY**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications <sup>2</sup>	22.2	47%	21.3	48%	33.3	51%	30.1	52%	30.8	57%
Motion Pictures	18.0	30%	18.0	40%	18.0	40%	22.0	40%	19.0	40%
Records & Music	6.0	30%	4.5	30%	3.0	20%	4.0	20%	7.0	20%
Entertainment Software	NA	NA	43.3	90%	9.6	86%	NA	NA	13.2	75%
Books	4.0	NA	4.0	NA	4.0	NA	4.0	NA	4.0	NA
<b>TOTALS</b>	<b>50.2</b>		<b>91.1</b>		<b>67.9</b>		<b>60.1</b>		<b>74.0</b>	

## COPYRIGHT PIRACY IN HUNGARY

For a country with a well-developed legal system like Hungary, piracy remains surprisingly high, and exacerbates the overall regional piracy problem due to poor border enforcement and remarkable prosecutorial delays.

### Optical Media Piracy

The problem of illegal optical media production and distribution in this region continues to grow. Hungary continues to be a haven for the importation of pirate CDs—primarily music CDs and entertainment software—which being produced in and imported from Ukraine. The flow of lower quality musical cassettes and CDs from Romania and Bulgaria has lessened from previous years, however; these are gradually being replaced by recordable CD (CD-R) pirate materials because of the relatively low prices of CD burners and blank CD-Rs in the Hungarian market. For the recording industry, the copying or “burning” of CDs by private users is responsible for the majority of the local illegal CD production. In addition to burning by private users, students and small retail operations, IDSA reports that the trade in locally burned CD-Rs of entertainment software products is now becoming controlled entirely by organized crime syndicates.

Pirate DVDs, mostly imported from Russia and Ukraine, are another emerging problem, involving mainly pre-release titles carried in personal luggage to supply street vendors operating in the largest flea market in Budapest (Petöfi Hall). Pirate DVDs have also been found in retail outlets that were not previously known to be pirate and that now seem to be offering pirate DVDs as a “trendy” complement to their existing catalogue. Copies of DVDs on videocassette have also been encountered by ASVA (the local audiovisual anti-piracy

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

organization) investigators. VCDs (imported by the local Chinese community mainly from Malaysia and Thailand) and locally burned CD-Rs containing audiovisual content remain a persistent problem. In addition, locally burned DVD-Rs are also beginning to appear in the market.

Criminal syndicates appear to be moving in on the illegal CD-burning action, and are beginning to control all aspects of the duplication and distribution of entertainment software. The once small operations are expanding into sophisticated operations with runners, wide distribution reach, and organized groups of sellers being directed by others higher up in the organization. This controlled distribution is also taking place in locations such as Petöfi Stadium, which belongs to the local municipality. Products found at the stadium are also being found throughout the country, indicating that the same criminal groups are expanding distribution beyond the stadium into the surrounding region (one IDSA member company notes that pirate copies of its products have been cited in Germany).

In years past, there was some evidence that the production of pirate materials by CD plants in Hungary was 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 improvement in this area. The entertainment software industry does report that exports of pirated product from Hungary are making their way in to Germany. At the present time, Hungary's two known replication facilities appear to use source identifying (SID) codes on their manufactured CDs. The manufacturing capacity of the two operating CD plants, with a total of eight lines, is estimated to be around 35-40 million discs per year.

In order to regulate the production, distribution, and export of optical media, the Hungarian government must set up plant monitoring procedures. There are several key elements necessary for inclusion in any such regime in order for it to be effective; see the detailed discussion regarding OD regulations at the end of this report.

## **CD-R Piracy and Internet Piracy**

Pirates increasingly and massively are using the Internet to market infringing product. Pirate VCDs and CD burners are starting to appear throughout Hungary in greater quantities. The Internet is also being used to market technical equipment for circumventing copyright protection technologies. This is despite the 1999 copyright act amendments that contained important anti-circumvention provisions, as well as sanctions for signal theft. There are now more home-copied CDs appearing in markets and shops alike due in part to the falling prices of CD writers and CD-Rs. In addition, locally burned DVD-Rs are also beginning to appear in the market.

Internet piracy continues to be a growing problem in Hungary. The recording, audiovisual and business software industries have, to date, received good cooperation in Hungary from Internet service providers (ISPs). For the audiovisual industry, Internet piracy in the form of hard goods sales is a growing concern with pirates finding Hungarian dubbing or subtitles on websites located in neighboring countries, in order to burn pirate CD-Rs in DivX format. Furthermore, phonogram producers, performers and authors have concluded a joint co-operation agreement with the biggest ISPs in the country. The local recording industry group MAHASZ is monitoring illegal files on the Internet on regular basis. In 2002, MAHASZ sent out 120 "Cease & Desist" notices to the sites with the infringing files, and as a result ISPs closed 99% of these sites. The "take-downs" also included the closure of two popular websites, DLJ.hu and MP3Portal, the latter of which received wide media attention. Both cases are currently under criminal investigation, based on the complaints MAHASZ filed. As a rule, however, due to lack of knowledge and experience, police forces have not been effective nor cooperative in tackling new forms of piracy. Unfortunately, so far the 2001

Act on Electronic Commerce and Information Society Services has not been properly enforced.

## **Business Software Piracy**

The Business Software Alliance (BSA) was generally pleased by a number of encouraging signs indicating that Hungarian authorities are beginning to take intellectual property protection seriously, from police to judges. In 2002, the piracy level for business applications software remained relatively constant, at 47%, and estimated trade losses were \$22.2 million.

The police conducted twelve criminal raids on end users during 2002. Additionally, the Prime Minister's office and the Ministry of Finance have each in previous years issued software asset management orders requiring the use of licensed software in government offices. This demonstrates that the Hungarian government has shown awareness of the value of managing software assets in a systematic and thorough manner, not only to comply with the law but to make the most out of its investment in information technology. The predominant concerns for the software industry are fourfold: (1) no effective civil *ex parte* measures to secure evidence of suspected infringements; (2) generally slow criminal and civil proceedings; (3) inadequate sanctions imposed in many cases; and (4) a growing tendency in the courts to compute damages caused to right holders as less than the retail value of the products concerned. According to the BSA, the average duration of court proceedings is approximately two to four years for civil or criminal claims; 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. The experts took one year and nine months to prepare an opinion in one of the software industry's largest end user cases. 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.

## **Record and Music Piracy**

The recording industry estimates the level of music piracy in Hungary in 2002 was 30% of the market. Trade losses to the music industry in 2002 were \$6 million, the third year of increasing losses. This rise is due to the growth of CD-R piracy in the country. MAHASZ reports that, in 2002, the total number of seized pirated music CD-Rs was 37,000 units, which is around three times more than in 2001, when around 14,500 CD-Rs with pirated music content were seized.

## **Audiovisual Piracy**

As described above, pirate DVDs, mostly imported from Russia and Ukraine, are an emerging problem, involving mainly pre-release titles carried in personal luggage to supply street vendors operating in the largest flea market in Budapest (Petöfi Hall). Pirate DVDs have also been found in retail outlets that were not previously known to be pirate and that now seem to be offering pirate DVDs as a "trendy" complement to their existing catalogue. Copies of DVDs on videocassette have also been encountered by ASVA (the local audiovisual anti-piracy organization) investigators. VCDs (imported by the local Chinese community mainly from Malaysia and Thailand) and locally burned CD-Rs containing audiovisual content remain a persistent problem. In addition, locally burned DVD-Rs are also beginning to appear in the market. Internet piracy in the form of hard goods sales is a growing concern, with pirates finding Hungarian dubbing or subtitles on websites located in neighboring countries, in order to burn pirate CD-Rs in DivX format. Although progress has been made, there is still a high level of pay-TV signal theft through the use of pirate smart

cards and cable/satellite decoders. Local television and cable companies regularly transmit titles for which they do not have broadcast or retransmission rights. In some cases, pirate videocassettes are also broadcast, especially by small cable providers owned by local authorities in small villages.

## **Book Piracy**

The book publishing industry continues to report that piracy of education texts, and in particular, their unauthorized photocopying, remains a problem. Estimated trade losses due to book piracy were \$4.0 million in 2002.

## **COPYRIGHT ENFORCEMENT IN HUNGARY**

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### **Criminal Enforcement**

The ongoing high levels of piracy in Hungary are the result of ineffective criminal enforcement by Hungarian authorities. As they have for many years, rightsholders continue to report good police cooperation conducting raids and seizing infringing product. However, as a general rule police take action only upon the request of the rightsholders, therefore failing to carry out *ex officio* actions in copyright cases as set in Article 2 of the Criminal Procedure Law (Basic Principles of Criminal Procedure).

The local recording industry group MAHASZ reports that some local police officials (in Budapest as in other parts of Hungary) have shown some signs of corruption as several raids to tackle with the physical piracy (open markets, record shops) and the infringements of public performance right (public places, notably discos) have failed despite (or after) careful preparation and coordination with the local police. However, MAHASZ continues to raid the Petöfi Stadium in Budapest together with the police officials roughly twice in a month (MAHASZ and police conducted 25 raids on this stadium last year), and seize around 2,000–3,000 illegal optical discs with various contents (music, films, software) per raid. As a result of these regular raids the share of illegal music discs has substantially decreased. In total, police and customs officials conducted 296 raids (274 led by police, 22 led by customs) and seized a total of 61,600 pirated units (of those, 13,400 CDs, 37,000 CD-Rs, 11,200 MCs) in 2002. The largest amount seized in 2002 was 6,000 CDs from a private apartment in Budapest, where two persons made a regular business out of illegal reproduction of copyrighted products (the quantity of music albums alone was several thousands units), advertising the respective catalogue on the Internet. The case is currently under investigation.

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 under a very stringent standard, police searches at private residences have now become more systematic. When decided by the prosecutor, the Tax Administration also gets involved in the investigation process. Hungarian police have been active in a number of raids and seizures.

BSA reported that police cooperation in connection with crimes involving software infringement was good in 2002. The Hungarian police are willing to take action also against larger targets, unlike in many other countries in Central and Eastern Europe. BSA reports that in May 2002, the Sopron Police Department raided four companies suspected of using unlicensed software. During the investigation, the police discovered that all companies had been using illegal BSA member software on their business computers.

## **Prosecutorial and Judicial Delays, No Deterrent Penalties**

Hungarian prosecutors and judges are 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.

BSA reports 23 criminal law suits against end users in 2002 and 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. As an example, in a case in Győr in 1997 against a target accused of software piracy, the sentence was only issued by the court in 2002. Another case against a software pirate involves a crime committed in 1995. The first instance sentence against the target was handed down in 2001 and the case is now on appeal. The software industry reports that prosecutions that reached final judgment, generally resulted in probational sentences 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 generally remain below US\$500 in cases involving software piracy. Obviously, these penalties are not deterring commercial piracy. For example, in one software piracy case, the target was fined only US\$400; the police had found 62 CD-Rs in the target's home loaded with illegally copied BSA member software programs with a retail value of approximately US\$28,000.

The recording industry reports that 180 of its criminal cases were pending in the courts in 2002. Fines are rarely in proportion with the damages caused. The average damage of one infringement is between 300,000 – 400,000 HUF (US\$1,316–2,634), whereas the average fine reaches only as high as 30,000 – 60,000 HUF (US\$132–264).

MPA confirms that the audiovisual industry's biggest issue in Hungary is inadequate enforcement. Indeed, despite generally good cooperation from the police, prosecutors and judges remain very reluctant to treat copyright infringements as serious crimes, and securing adequate prosecution and deterrent sentencing from the courts remains a very difficult problem. Despite the latest laws providing for tougher penalties (up to eight years' imprisonment for video piracy and two years for signal theft), prosecutorial indifference remains a major impediment to combating 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 with 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.

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, 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 legislation providing for effective civil *ex parte* search orders. The 1999 copyright law amendments did not introduce new civil *ex*

*parte* provisions because Hungarian authorities insisted that such provisions already existed in the civil code. Since the 1999 revisions made no changes, the software industry tested the provisions in the Hungarian civil code even though these were 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. These uncertain and imprecise provisions did not prove effective and the test cases failed. In one case, the application was simply refused by the court and in another case, the court order proved unenforceable after the target refused to permit the entry of an independent expert executing the order. In the second case, a criminal raid was subsequently carried out. The software industry is convinced that new provisions are needed in the Copyright Act to obtain civil *ex parte* searches. As the slow criminal procedure currently is the predominant legal method of combating software piracy, effective civil *ex parte* provisions would significantly improve the situation.

Nevertheless, the BSA did manage to achieve some positive civil litigation results in 2002, similar to the situation in the last two years. BSA initiated 22 civil lawsuits, obtained one judgment against and reached 16 settlements with end users during 2002.

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS</b> <b>In HUNGARY: 2002</b>			
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
Number of Raids conducted	322	14	296
Led by Police	312	14	274
Led by Customs	10		22
Number of cases commenced	108	105	259
Number of defendants convicted (including guilty pleas)	105	25	255
Acquittals and Dismissals	49	49	63
Number of Cases Pending	316	237	180
Total number of cases resulting in jail time	0	0	9
Suspended Prison Terms	2	0	8
Maximum 6 months	1		5
Over 6 months	1		3
Over 1 year	-		-
Total Suspended Prison Terms	14 months		52 months
Prison Terms Served (not suspended)	-	0	1
Maximum 6 months	-		1
Over 6 months	-		-
Over 1 year	-		-
Total Prison Terms Served (not suspended)	-	0	6 months
Number of cases resulting in criminal fines	2	17	46
Up to \$1,000	2	15	46
\$1,000 to \$5,000	-		-
Over \$5,000	-		-
Total amount of fines levied	US\$1,000	US\$6,336	US\$10,000

## LEGAL REFORM AND RELATED ISSUES

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### Copyright Law (1999)

On June 22, 1999, Hungary adopted amendments to its copyright law; the provisions entered into force on September 1, 1999. 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 the software, rental/lending, satellite, duration and database directive), plus the new WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. Previously, 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. 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 piracy. 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) to clearly provide such protection for pre-existing foreign works as well as sound recordings. 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 rightsholders to protect their works and sound recordings using technological protection measures. 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. However, the BSA has not noted any positive effects arising from this development.



- 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, some of which have been highlighted in previous Special 301 reports by IIPA. The Hungarian Government should correct the following deficiencies in its copyright legal regime:

- 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.
- Currently, one of the main obstacles to effective enforcement is created by cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rightsholders. The cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights enables defendants to delay judicial proceedings, and in some cases even escape justice, even when it is clear from the outset that the plaintiff owns the copyright or neighboring rights in question. This issue has become particularly problematic now that hundreds of thousands of different infringing optical discs (CDs, CD-ROMs, VCDs, DVDs) are regularly seized during raids. Hungary should introduce a presumption of ownership for phonogram producers.
- The Copyright Act currently does not have provisions for the calculation of damages; the act only refers to general civil law rules on damages, which will not help to adequately compensate copyright owners or producers of sound recordings for infringements.
- The Act also broadens the scope and reach of obligatory collective management to an alarming extent. Article 27 denies rightsholders in certain literary and musical works the ability to determine the proper exercise of their exclusive rights on an individual basis, instead obligating them to submit to collective management—all in violation of Article 9 of the Berne Convention (the right of reproduction) and therefore the TRIPS Agreement, as well as Article 8 of the WIPO Copyright Treaty (the right of communication to the public). The extension

of obligatory collective management to interactive making available to the public of all literary and musical works conflicts with Hungary's international obligations. Article 27 must be amended to allow copyright owners to "opt out" of the collective management scheme, in the manner provided for other works in Article 91(2) of the Act.

- The law also requires the obligatory collective management of all exclusive public performance rights in musical works. Such provisions originally appeared in the communist-era 1969 Hungarian Copyright Act (Article 40(1) and (3) of Act III of 1969), and have been incorporated into the 1999 Act as Article 25(1) and (3), without any change whatsoever. These provisions have long been criticized as conflicting with the Berne Convention (Article 11(1)(i)) and TRIPS, and now conflict with the WIPO Copyright Treaty, too. Articles 25(1) and 25(3) also must be amended to allow copyright owners to "opt out" of the collective management scheme, in the manner provided for other works in Article 91(2) of the Copyright Act.
- 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 (1993)**

While the existing Hungarian Criminal Code is relatively good, it still 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\$47,400) and jail sentences of up to five years. In January 2000, Hungary further amended the 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. These amendments also provided evidentiary presumptions of copyright ownership. In December 2001, the criminal code was amended once more 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, in addition to criminal provisions regarding copyright and neighboring right violations, the code now also covers database infringement.

## **Optical Media Regulations**

The Hungarian government should craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following 11 points:

- 1) Licensing of facilities: Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and "production parts" (including "stampers" and "masters"), including requirements like production must take place only at the licensed premises, a license only be granted to one who has obtained "manufacturer's code" (e.g., SID code) for optical discs and production parts, the licensee must take measures to verify that customers have copyright/trademark authorization of the relevant rightsholders, etc.

- 2) Licensing of export/import of materials: Centralized licensing of export of optical discs, and import/export of production parts (including “stampers” and “masters”), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- 3) Requirement to apply manufacturer’s code: Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer’s code, and to cause each optical disc and production part to be marked with manufacturer’s code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer’s codes (including making, possessing or adapting an optical disc mould for forging manufacturer’s code; altering, gouging or scouring a manufacturer’s code on or from a mould or any disc; selling a production part not marked with manufacturer’s code, etc.).
- 4) License record keeping requirements: Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) Registration requirement for commercial optical disc duplication: Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such “commercial optical disc duplication,” giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.
- 6) Plenary inspection authority: Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for rightsholder organization to assist; etc.
- 7) Search and seizure authority: Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.
- 8) Government record-keeping requirements: Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- 9) Criminal penalties for violations: Violation of any significant aspect of the regime is subject to criminal sanctions, including individual liability (fines and/or imprisonment).
- 10) Possibility of withholding, suspending, or revoking a license for prior copyright infringement, fraud in the application process, or violation of the Optical Disc Law.
- 11) Possibility of closure of a plant.

The copyright industries look forward to working with the Hungarian authorities to draft, implement and enforce comprehensive optical disc regulations.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# ITALY

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Italy be retained on the Watch List for 2003.<sup>1</sup> Estimated trade losses in Italy in 2002 were \$800.8 million.

**Overview of key problems in Italy:** Incorporating meaningful deterrence into the Italian enforcement system has been, and still remains, the key issue for the copyright industries. The passage of the Anti-Piracy Law amendments to the Copyright Law in 2000 has, however, finally led, in 2002, to important improvements in enforcement with the promise of further gains if the course begun in 2001 continues in 2003 at increased levels. The nature of piracy is changing in Italy, with organized criminal syndicates assuming even more importance, with CD-R and DVD-R burning increasingly becoming the major problem, with manufacturing and distribution migrating to even smaller, harder to detect forms, and with Internet piracy growing. There remains the continued threat that courts will be reluctant to take on software end-user piracy cases. Piracy rates in Italy continue to exceed 20% and are high across the board—still among the highest rates in Western Europe. There is no question that the new tougher penalties, if they continue to be imposed at these new levels, will eventually result in a drop in these rates.

A recent Supreme Court case may have removed the threat that the absence of SIAE “stickers” will prevent enforcement against software piracy. However, Italy continues to fail to completely exempt software from this stickering requirement and, despite procedures put into place designed to prevent seizures of unstickered legitimate software, these seizures continued in 2002. Judicial reform is still needed to speed up both criminal and civil enforcement, so that Italy can meet its TRIPS enforcement obligations. While higher penalties have been imposed for piracy in 2002, many judges, and the public as a whole, continue to believe that piracy is not a serious offense and need not carry deterrent penalties.

**Actions to be taken by the Italian government:**

- Announce a nationwide anti-piracy campaign focusing on all types of piracy, including Internet piracy;
- Fully implement the AP Law with increased raids, prosecutions, and in particular the imposition of deterrent penalties;
- Institute judicial reform to speed up criminal and civil proceedings and to remove backlogs;
- Eliminate the stickering requirement on computer software;
- Fully implement the provisions of the EU Copyright Directive.

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<sup>1</sup> For a history of Italy’s involvement in the Special 301 process, see Appendix E.

**ITALY**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	140.0	20%	140.0	20%	140.0	20%	160.0	25%	200.0	30%
Records & Music	42.0	23%	40.0	23%	50.0	25%	60.0	25%	60.0	20%
Business Software Applications <sup>3</sup>	380.4	45%	338.8	45%	327.0	46%	338.4	44%	276.5	45%
Entertainment Software	215.4	55%	NA	74%	NA	65%	60.9	52%	58.2	50%
Books	23.0	NA	23.5	NA	23.5	NA	23.0	NA	21.0	NA
<b>TOTALS</b>	<b>800.8</b>		<b>542.3</b>		<b>540.5</b>		<b>642.3</b>		<b>615.7</b>	

## COPYRIGHT PIRACY IN ITALY

### Piracy Levels Remain Too High Across All Industry Sectors; Optical Disc and Internet Piracy Grows

While piracy rates in Italy across all industries remain at 20% or higher, as has been true for the last 10 years, 2002 was the first year that the 2000 Anti-Piracy (AP) Law saw meaningful implementation. The result has been generally more aggressive raiding, more seizures and, most importantly, the beginnings of the imposition of deterrent penalties by the judicial system. As IIPA noted in its previous submissions, the 2000 AP Law contains all the elements necessary to start a 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. Last year, IIPA and its members praised the Italian government for finally taking this important legislative action and for beginning the process of implementing the law. At that time, the copyright industries remained concerned about such implementation and the failure to fix certain deficiencies that seriously impact on the business software industry. These deficiencies continue to plague the business software industry, but, on the positive side, enforcement actions by the authorities in 2002 have not only increased, but stiffer penalties have actually been imposed (see enforcement section, below).

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$285.0 million at 43% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

The recording industry was particularly pleased with progress in 2002, as detailed in the enforcement section. Piracy continues to impact a now-declining audiocassette market and an increasing CD market characterized by the production of pirate CDs moving from larger operations to much smaller venues using commercial CD-R burners. The local anti-piracy organization, FPM, believes that there are at least ten copies of burned CDs for every legitimate copy sold in Italy. Organized criminal operations continue to control a sizable portion of the production/distribution chain but the growth of only 8% in the number of CD burners seized in 2002 suggests that CD-R production that is controlled by these syndicates may not be growing as fast as in prior years. The newest phenomenon is the wholesale downloading and burning of copies of CDs in offices, with employees then selling burned copies to their colleagues. There is a growing sense that the Internet may be replacing street vendors and markets as the major source of pirate product, though this is by no means the case yet. Piracy accounts overall for 23% of the market in Italy, but in the south of Italy, the figure is closer to 50%. Most important, however, is that the authorities increased raiding operations by 124% and the number of CDs seized in 2002 rose 74% to more than 2 million.<sup>4</sup>

Video piracy before and during the film's Italian theatrical release 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 2002, the same as in 2001, though enforcement has certainly improved. The video piracy rate is around 20%, and increasingly this is not piracy of VHS cassettes but CD-Rs and DVD-Rs that began to appear at the end of 2001 and showed major growth in 2002. The piracy rate continues to remain in the 30%-40% range in southern Italy. Organized criminal groups continue to dominate the pirate OD market, from production to distribution. However, due to pressure from increased enforcement, the crime gangs have centered their activities in a larger number of small private duplication facilities, including private homes, using commercial CD-R and DVD-R burners. These appear to be located in poorer areas and the output of each site is relatively low, though the number of such sites has increased significantly. As in so many other countries, the pirate product is then picked up by couriers, or "postmen" who then pass them on for sale, usually through street and local market sales by illegal immigrants. This insulates the pirates somewhat from the large seizures that in 2002 have resulted in some significant and deterrent convictions. As an example, in June 2002, a raid was run on a small apartment in Casorla and 80 CD burners were seized, as were 63,000 optical discs and approximately 20,000 DVDs.

DVDs—produced by the syndicates using DVD-R technology—are now quickly supplanting traditional VHS piracy, though the latter is still prevalent in rental outlets. A good example is three raids run in March and April 2002 in Naples which resulted in the seizure of 135,000 optical discs (this was one of the larger operations described above) of which 58,000 were DVDs. 37 people were arrested. The operations were all linked and clearly established the connection between the criminal gangs and the illegal immigrant distribution and sale network they run. MPA expects DVD piracy to grow over the next year, necessitating increased vigilance by the police and deterrent sentences by the courts.

While Internet piracy is prevalent as a source of pirate product (using the Internet as a source of pirate DVDs and videocassettes and circumvention devices, like pirate smart cards), it has not yet become as damaging to the film industry as to the recording industry. Abundant pirate video product remains widely available through street vendors, kiosks and local markets.

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<sup>4</sup> "Italian Pirates were hit hard in 2002," *Billboard*, February 1, 2003, p. 53

Back-to-back copying in video shops continues as a problem both in the south of Italy (Campania and Lazio) and in the north (Veneto and Lombardia). However, this type of piracy is in rapid decline.

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 all too common in 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 or DVDs 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 Guaranties in Communication and has been making steady progress in reducing this type of piracy, particularly following the creation by that agency of Regional Communication Committees.

With the introduction of commercial pay television in Italy, satellite signal theft piracy grew at a strong rate. The Telepiù terrestrial and satellite channels, as well as other encrypted satellite channels from abroad, were being 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. While the trade in illicit smart cards had increased significantly over recent years, the recent introduction of a new encryption system (Seca 2 Media Guard) following the merger between Telepiù and Stream, is likely to reduce this kind of piracy significantly in the next few years.

Piracy of entertainment software has continued at high levels, both in sales of hard copies of PC and console games, and through persistent Internet piracy. This piracy is also under the tight control of organized crime, not just in the south (like Naples) but also throughout Italy. Illegal immigrants are also used to distribute these pirated products. The entertainment software industry also experiences the highest 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. CD-R piracy of entertainment software products has also greatly increased. With increasing access to high-speed Internet connections, Internet piracy is likely to become a significant problem as well. 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, or be subject to seizure by law enforcement. This issue is discussed in greater detail below. Estimated 2002 trade losses due to software piracy in Italy amounted to \$380.4 million, with a 45% 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 allows photocopying of up to 15% of a work but only upon payment of remuneration to SIAE that is used by publishers to collect these royalties. An accord was signed between the copy shops and the Italian Publishers' Association on December 18, 2000, setting payments at \$0.029 per page after January 1, 2001. This increased to \$0.038 per page from September 1, 2000 and increases every year until 2005, when it will be \$0.061 per page. In June 2001 an agreement was reached with the Ministry of Education over photocopying in state school libraries open to the public and finally, after months of negotiation, an agreement was signed with the university libraries. Both deals involved lump-sum payments based on a fee per student. Despite these welcome and long-sought-after arrangements (solidified in the AP Law), illegal photocopying of excerpts far exceeding the 15% quota, including in many cases entire texts continues at high rates, due in part to lack of enforcement of the SIAE agreements. Estimated losses due to book piracy in Italy last year were \$23 million.

## **COPYRIGHT ENFORCEMENT IN ITALY**

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While piracy levels remain high in Italy, and optical disc and Internet piracy are making rapid inroads, the AP Law has already started to work a major change in the attitude of law enforcement toward piracy. More raids are being run, more pirate product is being seized and more prosecutions brought. There has been increased media coverage and greater public awareness of piracy crimes. Even some judges, historically unwilling to impose serious penalties on pirates, have begun to see the light and have imposed some significant sentences on pirates. However, despite these positive signs, the judicial system is still in dire need of reform so that caseloads can be reduced and both criminal and civil cases more quickly brought to final judgment. More Italian judges and magistrates must take seriously the need to set deterrent-level fines and, in particular, significant jail time for major organized crime figures. With the increased penalties in the AP Law, the judges have the tools. The question is whether they will be used to their fullest extent.

Because of high piracy rates, low penalties imposed on pirates and a woefully slow and inefficient judicial system, Italy has not been in compliance with its WTO TRIPS enforcement obligation for years. The full implementation of the AP Law and judicial reform are key: First, the new higher penalties must be applied in practice. Second, judicial reform and public education must be taken seriously. As IIPA has recommended for the last two years in its Special 301 submission, Italy should pursue and maintain a national, well coordinated anti-piracy campaign. 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 emphasize with enforcement authorities and the public of the damage being done to the Italian economy from failing to effectively fight piracy.

### **Criminal Enforcement**

The new AP Law raised maximum fines from US\$1,450 to US\$14,500. 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 US\$168.

These salutary changes accomplished by the 2000 Anti-Piracy Law must compete against years of enforcement neglect, non-deterrence and judicial stagnation. These problems remain despite recent improvements.

Before the new AP Law, Italian courts did not impose even close to the maximum penalties then available, resulting in minimal deterrence to infringement. This was often the result of plea bargains agreed to 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 increases in penalties. IIPA reported in past submissions a recording industry example of one person in Naples having been denounced 84 times. And the software industry still 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.

It still can take 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 or 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. Reported below are a number of recent cases that proceeded quickly to judgment with deterrent penalties. This must continue.

### **Criminal Enforcement in Practice Under the AP Law**

The recording industry reports that 2002 was one of their best years ever with almost 1500 arrests—an almost three-fold increase from 2001 when 510 people were arrested, which itself was a 431% increase over 2000. As noted above, raids increased by 124% and the number of CDs seized increased by 74% to over 2 million, up from 1.23 million in 2001.

Most of these actions were taken by using both the criminal and 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 2002, 78% of which involved street vendors. In cases of recidivists, jail terms of one year have also been imposed. The fast track procedures have meant the immediate convictions of the defendants with sentences imposed of more than six months in jail. However, almost all first convictions will

be, and have been, suspended. Most of the defendants dealt with in this way have been immigrant street vendors.

In December 2002, a court in Naples convicted an infamous crime family, the Frattasio Brothers, to four and one half years in jail for music piracy and for participating in a criminal enterprise. The Frattasio father received three years. A total of 17 people were sentenced in one of the biggest investigations in Italy in the last ten years. Sentences totaled 39 years. The Frattasios ran a major pirate network supplying the whole of Southern Italy with pirated audiocassettes and CDs. The lab was located in Naples. The CDs were imported from Eastern Europe and Southeast Asia. The family's revenue was reported to exceed \$50,000 per week! This action will send a strong message to the crime syndicates that they can expect severe punishment if they stay in the piracy business.

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 100% of the cases involving FAPAV (the local anti-piracy organization). The media coverage and greater awareness by the public has been an unexpected bonus. In the 14 criminal cases in which FAPAV appeared as a civil party in 2002, 100% of them resulted in a prison term (the 17 defendants received an average of 6 months imprisonment). Fines of up to \$1,000 were also imposed in all 14 cases.

On 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.

The business software industry continues to report positive developments on the criminal enforcement front following adoption of the AP Law. In 2002, the *Guardia di Finanza*, the national fiscal police, continued its strong support, conducting 223 criminal raids nationwide (mostly on a regionalized basis), and seizing over 108,000 illegal products. Local police also engaged in substantial criminal enforcement activities. In November 2002, the *Guardia di Finanza* conducted synchronized raids across nine Italian provinces, closing down an Internet piracy ring with revenues estimated at over \$60 million per year.<sup>5</sup> All types of pirated products were seized including millions of dollars worth of pirated business software including CAD/CAM software worth \$5000 to \$20,000 per title. BSA reports that this ring is known to have links to organized networks in other countries. The three websites being used to advertise this pirate material have been shut down and replaced with the *Guardia's* logo!

BSA continues to experience difficulties with judges in criminal cases, however. Magistrates still occasionally rule that criminal remedies do not apply to end-user cases even though the AP Law was written to clarify this point. Magistrates have found other reasons to deny criminal relief in end-user cases. 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 only to organized crime. There is no support in the law for either of these conclusions. A third magistrate ruled that the GdF lacks

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<sup>5</sup> "Busting Software Pirates" Time/Europe, November 18, 2002.

competence to pursue criminal end-user piracy under the new law, as that power is granted to SIAE, the royalty collections agency. The latter is another disturbing example of the adverse impact on the software industry of the SIAE stickering requirement.

BSA is also concerned about the continuous threat of further legislative efforts to decriminalize certain acts of piracy or to issue further amnesties excusing defendants from punishment for piracy offenses for which they have been convicted.

The SIAE stickering program has long been a thorn for the software industry in conducting effective criminal enforcement. When the AP Law was passed, it was feared that Article 171*bis* of the AP Law might be misinterpreted to legalize all pirate software that merely uses an SIAE sticker. Fortunately, a recent Supreme Court opinion has held that unauthorized copying of unstickered software constitutes copyright infringement. 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.

The stickering program has also resulted in the authorities seizing unstickered legitimate software products. The regulations allow right holders to declare that standard business software products are exempt from the stickering requirement, but in December 2002 (and in December 2001 as well), the police, in coordination with SIAE officers, seized legitimate software despite a valid declaration having been made. BSA has urged that software be completely exempt from any stickering requirement.

The enforcement statistics below give an idea of the state of criminal enforcement in Italy in 2002.

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002</b>				
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>SOUND RECORDINGS</b>	<b>BUSINESS SOFTWARE</b>	<b>TOTALS</b>
Number of Raids conducted	137	796	223	1,156
Number of cases commenced	8	NA	81	89
Number of defendants convicted (including guilty pleas)	17	1,496		1,513
Acquittals and Dismissals	-	NA		
Number of Cases Pending	34	NA	81	
Total number of cases resulting in jail time	14	1,496		1,510
Suspended Prison Terms	5	80% (estimated)		
Maximum 6 months	5	5% (estimated)		
Over 6 months	-	15% (estimated)		
Over 1 year	-	5% (estimated)		
Total Suspended Prison Terms	2 years and 8 mo.	NA		
Prison Terms Served (not suspended)	8 years and 4 mo.	NA		
Maximum 6 months	9	NA		
Over 6 months	5	NA		
Over 1 year	-	NA		
Total Prison Terms Served (not suspended)	5 years and 8 mo	NA		
Number of cases resulting in criminal fines	14	NA		
Up to \$1,000	14	NA		
\$1,000 to \$5,000	-	NA		
Over \$5,000	-	NA		
Total amount of fines levied	\$ 7,000	NA		

<b>COPYRIGHT ENFORCEMENT STATISTICS IN ITALY: CRIMINAL CASES</b>						
<b>ACTIONS</b>	<b>MPA</b>		<b>IFPI</b>		<b>BSA</b>	
	<b>2000</b>	<b>2001</b>	<b>2000</b>	<b>2001</b>	<b>2000</b>	<b>2001</b>
Number of Raids conducted			151	355	257	233
Number of indictments filed			309	1056	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 Needs Continued Improvement

In 2002, major amendments were made to the Italian Civil Procedure Code to set strict time limits on processing civil litigation. While proceedings started under the previous law could drag on for years with defendants obtaining specious continuances and other postponements, the new law imposes specific and stricter deadlines. Further, the law provides for effective interim measures, including, particularly, civil search and seizure orders, which are usually granted one to two weeks after the petition has been filed. The law also provides that first instance decisions are enforceable. Yet despite the above-mentioned improvements, in some cases—depending on the workload and the attitude of the judge—civil copyright cases continue to be too slow, and in some cases, cumbersome and difficult. Furthermore, many Italian courts still award civil damages based on the amount of a “reasonable royalty” or “license fee” that the right holder should have expected to receive. This criterion lacks any deterrent effect and actually rewards the defendant for not purchasing legal software. Fortunately, however, other courts in Italy have recognized this critical flaw and have awarded damages based on the full retail price of the software and an additional amount for compensation for moral damages.

A bill was introduced into the Parliament in the summer of 2002 to create 12 specialized IPR courts under the auspices of the Justice Ministry. The Bill was then adopted and the provisions are now Articles 15 and 16 of Law December 12, 2002 n. 273 in the O.J. of December 14, 2002. While this development is positive in theory, in practice it is likely to prove less than useful. It is our understanding that the designated courts will still be able to continue to handle existing (non-IP) cases while also assuming responsibility for IP matters—and will take all this on without any allocation of new resources. This could result in even further delays in rulings in copyright cases. BSA also is concerned about the location of these courts’ not reflecting the locus of major infringements and otherwise not meeting the needs of industry.

Civil case statistics from the business software industry are shown below.

### **COPYRIGHT ENFORCEMENT STATISTICS IN ITALY: CIVIL CASES**

<b>CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2002</b>	
<b>ACTIONS</b>	<b>2002 BSA</b>
Number of civil raids conducted	6
Post Search Action	4
Cases Pending	6
Cases Dropped	1
Cases Settled or Adjudicated	7
Value of loss as determined by Right holder (\$USD)	\$ 255,000
Settlement/Judgment Amount (\$USD)	\$106,000

<b>ACTIONS</b>	<b>2000 BSA</b>	<b>2001 BSA</b>
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 <sup>6</sup>	\$106,851
Judgment Amount (\$USD) in how many cases (e.g. \$XXX in Y cases)	\$20,900; 4	\$106,851; 3
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**

### **Italy Should Properly and Fully Adopt the EU Copyright Directive**

A legislative decree was adopted on December 20 to implement the Directive and submitted to the Parliament. As of this submission, it appears that all the controversial issues have been eliminated. Italy should complete this process as soon as possible. However, Italy's implementation of the E-Commerce Directive risks hampering online enforcement efforts by requiring a court order before takedown can occur. This renders impossible the expeditious takedown of infringing material and violates Italy's obligations under the Directive and, to the extent effective Internet enforcement cannot be undertaken, violates Italy's TRIPS enforcement obligations as well.

<sup>6</sup> Inclusive of cost awards; also note that one of four judgments reported provided for no damages, as discussed in the accompanying text.

## Need to Eliminate the SIAE Sticker Requirements for Software

As discussed in passing above, 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." Legitimate right holders who fail to sticker their software products may find their products subject to seizure and their being subject to criminal fines. As described above, the Italian police have on a number of occasions seized such shipments of legitimate product.

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.<sup>7</sup> 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. Distribution of such products is arguably illegal and subject to seizure (and has been seized) by Italian authorities.

The stickering regime established in the law and its implementing regulation may violate the TRIPS Agreement, namely Articles 9 and 41. 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, represents a prohibited formality. 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 quasi-public royalty collections agency charged with implementing the stickering regime), nor do business software copyright owners receive any royalties from this agency. In addition, it appears that SIAE has distributed this sticker without conducting any investigation into the legitimacy of the products to be stickered—

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<sup>7</sup> The SIAE issued a circular letter in December 2001 stating that the consent should be deemed granted if not expressly refused within 10 days following the filing of the declaration. However, such circular cannot replace the silence of the law; also, it has been proved that the prior filing of the declarations with SIAE does not guarantee protection against criminal seizures.

meaning that counterfeiters have been able to obtain stickers, granting their products a seal of legitimacy and undermining the entire objective of the stickering regime. As opposed to that, legitimate non-stickered (albeit regularly declared) software products have been seized.

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 two years to develop a consensus that would implement the exemption contemplated in the AP Law. Industry has also sought the support of USTR, the U.S. Embassy, and representatives of the European Union. Intensive negotiations in early 2002 resulted in assurances from the Italian government that the Regulation would be amended to exempt software. The proposed amendments were subsequently rejected, however, with the accompanying explanation that the regulation could not be changed without a parallel amendment of the Copyright Act itself. BSA proposed a further compromise designed to minimize the burden of filing a product identification declaration. This compromise was ultimately adopted by the government and came into force in January 2003. The compromise does not exempt software across the board, however, and Italy's proposed legislation implementing the EU's 2001 Copyright Directive does not include any changes to the 2000 Copyright Act provisions governing stickering.

In one positive development, also discussed above, the Italian Supreme Court recently held that unauthorized copying of unstickered software is a copyright infringement. This ruling is useful, as the act itself could be interpreted to suggest that right holders who do not sticker their product forfeit their right to pursue criminal remedies against those who infringe their works. This is obviously not a solution to the problems outlined above, however.

### **Stickering Cost 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

## 2003 SPECIAL 301 REPORT

# KENYA

### EXECUTIVE SUMMARY

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Kenya should be placed on the Watch List.<sup>1</sup>

As the U.S. government moves to enhance trade with African countries, it is important to address a full range of trade issues, and to call out significant breaches of international and local law in the form of heavy trade losses due to overall poor copyright enforcement and legislation. Further, it is important that the U.S. government target resources to those markets that will have the most impact on overall trade growth in the region. Kenya is such a market, being the largest market in the East African region and a leader in economic policy directions. Kenya serves as a distribution point for goods into countries such as Ethiopia, Rwanda, Tanzania, and Uganda. As such, piracy in Kenya has the potential to damage markets throughout East Africa. On the other hand, strong leadership in protection of copyright industries can incubate local talent and raise Kenya's role as a leader in this segment of the economy.

There are two major areas of concern in Kenya: weak enforcement and inadequacies in the law. In order to improve the piracy situation in Kenya, action items for 2003 should include:

- Enforcement and Related Issues
  - Encourage relevant government agencies to develop and implement an aggressive action plan to tackle piracy in Kenya, including training for appropriate officials on IP enforcement, and take steps to assure regularization of judicial/other legal procedures.
  - Bring a specific number of target cases to criminal prosecution in 2003.
  - Consider development of a specialized intellectual property (IP) court and a specialized cadre of prosecutors to handle IP cases, and foster the imposition of deterrent penalties.
  - Develop workable and effective border measures to prevent the entry of piratical goods.
  - Encourage and seek commitments from the government to act as a model business software user and intellectual property leader for the country.
- Copyright Law and Related Issues
  - Address deficiencies in the Copyright Act, especially in the area of strengthening enforcement remedies.
  - Clarify presumptions, particularly subsistence requirements, so that they ease and do not unduly hinder enforcement efforts against piracy.
  - Ratify and deposit the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).

Piracy levels for business software were 78%, the highest piracy rate of any of the African countries surveyed by the business software industry in 2002.

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<sup>1</sup> The U.S. government recognized the importance of addressing intellectual property issues in Kenya in the 2002 National Trade Barriers' Foreign Trade Barriers report, noting that the Kenyan manufacturing sector reported losses of some \$254 million in direct sales and \$16.5 million in tax revenue due to counterfeit goods. Given such statistics, IIPA believes copyright piracy in Kenya has reached sufficient proportions to merit its designation under Special 301.



## PIRACY IN KENYA

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Business software and music piracy damage the domestic market, and threaten neighboring markets as well. All forms of business software piracy (namely, retail piracy, corporate end-user piracy of business software, and government use of unlicensed software) are present in the Kenyan market. In addition, there is some pirate photocopying of published materials, mainly reprints of published materials intended for the market in India.

Retail piracy runs rampant in Kenya. The quality of counterfeit goods available in Kenya is quite extraordinary and of great concern to the industry. Most computers are sold with business software installed for “free” (so-called “hard-disk loading piracy”). Pirated copies of business software products are available in stores for no more than the price of the physical medium. The Business Software Alliance has attempted to address the issue of retail piracy in 2002 through education and technical support to the government (e.g., in drafting copyright amendments). Some BSA member companies have taken legal actions in Kenya against retail pirates, but government action is necessary to effectively tackle this issue.

Corporate end-user piracy of business software (for example, when a business uses unlicensed software or exceeds the number of users for which a license is authorized) is also a significant concern in Kenya. BSA’s efforts in 2002 to educate corporations as to the illegality of using unlicensed software have had little effect. Corporate end-users know the government will not enforce the law. Even if the government chooses to enforce the law, a sufficient number of loopholes and complexities exist for piracy to be worth the risk to end-users.

A third form of business software piracy facing Kenya today involves the illegal or unlicensed use of business software by government entities. In each case noted above, industry has an important role to play in educating the general public and businesses. Both groups of consumers must understand the value of software to business and to the illegality of using unlicensed software. Governments can play an important role in this process, not just through strong enforcement, but also through leading by example.

Finally, Kenya has become a dumping ground for all kinds of pirated and counterfeit goods, including pirated music. For instance, since June 2002, Kenya’s Customs & Excise department has seized over 100,000 music CDs coming into Nairobi. A further 15,000 music CDs were seized in Mombasa. During the same period of time, industry reported meager legitimate sales of approximately 15,000 music CDs.<sup>2</sup>

## ENFORCEMENT EXPERIENCES IN KENYA

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Enforcement failures, from raid to prosecution in the courts, as well as in regard to border procedures, make it virtually impossible for right holders to protect their rights in Kenya. Police, customs, and other enforcement agencies are reluctant to pursue raids against copyright violations, sending a message to the pirates and the general public that there is no negative consequence for engaging in acts of piracy. Systemic bureaucratic failures also contribute to an overall ineffectiveness in the enforcement system. Lack of legal knowledge further exacerbates the problems.

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<sup>2</sup> Notoriously, pirates do not pay taxes. This phenomenon is borne out by the failure of pirate manufacturers of music to register with the Kenya Bureau of Standards and the Value Added Tax (VAT) Department of the Kenya Revenue Authority. Yet, copying or duplicating in Kenya is done “while you wait,” without the imposition of the VAT.

For example, raids are generally run by the Police in Kenya, but as copyright is not a subject covered in police training, police officers have little knowledge or understanding of the law, and have difficulties writing up charging documents. A “Special Crime Prevention Unit” was even established recently by the Commissioner of Police to handle copyright cases, but the officers of that Unit never received training. The judicial system in Kenya is slow and expensive, and cases rarely if ever result in deterrent sentencing. Attempts to reign in piracy, such as a stickering system, fail due to lack of legal knowledge among authorities and sometimes even mismanagement.

## **Raids Fail to Materialize, But Even When They Do, Cases Are Not Brought for Prosecution**

Despite the general reluctance of the Kenyan authorities to take actions against piracy, the Business Software Alliance has secured the assistance of the Police and the Kenyan Revenue Authority to conduct three actions against resellers since 1999. The first two actions were against companies offering business software for “free,” while charging customers only for the purchase of new hardware (so-called “hard disk loaders”). Despite convincing evidence seized in the raids, no follow-up has ever been taken by the government to prosecute or levy fines against either company.

A third action was taken in September 2000 with the assistance of the Kenyan Bureau of Standards and the Revenue Authority against a reseller for sale of counterfeit business software. The investigation and subsequent raid were extremely disturbing as the quality of the counterfeit goods was very high. Further investigation revealed that this product had been imported from Taiwan and that the store was engaged in re-export to Dubai. It is believed that the reseller was exporting to other East African markets as well. Again, as with the other raids, no follow-up has occurred nor, to our knowledge, is any planned.

Even when raids are carried out, problems with follow-up abound. First, results of raids are often marred by frequent movement of personnel from one department to another, meaning cases sometimes get “dropped,” or files “lost.” Newly shifted enforcement personnel have no incentive to take up actions taken by predecessors, meaning cases languish even before proceeding to court. Police prosecutors, who are authorized to carry out prosecutions against copyright infringement, are generally ill-prepared to handle such cases. Meanwhile, the Copyright Office in Kenya (part of the Department of the Registrar-General under the Attorney General) is helpless, since it has no authority to prosecute copyright cases under the Copyright Act.

## **Courts Fail to Provide Relief Against Piracy for Copyright Owners**

Business software and music industry experiences with the Kenyan judicial system have proved disappointing. The courts in Kenya have provided little relief against piracy. Until 1999, copyright cases were heard by the High Court or the Resident Magistrate’s Court.<sup>3</sup> The establishment of a special commercial court in 1999, the Milimani Commercial Court in Nairobi, was intended to relieve the backlog of commercial cases and provide a more effective avenue for dispute resolution. However, little has changed from the past, resulting in cases that take

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<sup>3</sup> It would appear that the majority of such magistrates have little or no knowledge of copyright law, and are unwilling to take the time to learn about it. Ignorance of the law has meant enormous wastes of time and right holder resources, since sometimes a subordinate court realizes it has no jurisdiction and throws the case to the High Court, where proceedings start again.

several years to reach judgment and costly court proceedings in even the most straightforward infringement cases.

The Business Software Alliance's member companies have filed several cases under the 1966 law, experiencing long, drawn-out proceedings (exacerbated by the deficient subsistence provisions in Kenyan law); a general backlog of commercial cases; lack of familiarity by the judiciary with copyright cases; and totally non-deterrent results, among other problems.<sup>4</sup> While no cases have been brought by the business software or music industries under the new copyright law, we anticipate the same systemic problems encountered in previous cases.

In one case,<sup>5</sup> Microsoft Corporation pursued action against a local system builder, Microskills Kenya Limited, accused of illegally preloading business software on hundreds of computers. Although the court found that the defendant was liable to damages of KES 25 million (around US\$325,310) the defendant merely applied for a "winding up" of the company, thereby leaving Microsoft with expensive legal bills and costs, and an "empty" victory.<sup>6</sup> Today, it is believed that the defendant still operates in the East African market. This clearly illustrates that the court judgment was not an efficient deterrent.

In another illustrative case,<sup>7</sup> Microsoft has brought action against a computer reseller accused of illegally preloading business software on personal computers they build and distribute (so-called "hard-disk loading" piracy). The matter is currently being litigated in court. Microsoft's local counsel estimates the case could take as long as three years to litigate, as the defense has proceeded with bringing technical and frivolous arguments to the court. The total cost of this action could exceed US\$30,000, which is relatively expensive in Kenya. Given the costs involved to the right holders, and given a poor track record of achieving acceptable recoveries for piracy cases, litigating is of questionable benefit, and either way, pirates win.

## **Lack of Coordination and Lack of Knowledge of Procedures Hinders Enforcement Efforts in Kenya**

Lack of enforcement coordination and knowledge of procedures remains a major problem in Kenya. One illustrative example involves Kenyan Customs' handling of IP infringement claims. When industry has alerted Kenyan Customs that a consignment of pirated/counterfeit CDs is coming into the country, standard procedure should allow the goods to be inspected by Customs and the Kenya Bureau of Standards (KBS)—no other department or body would be needed. However, oftentimes Customs officers have declared that they are not in a position to determine whether or not goods are pirated/counterfeit and that they will not

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<sup>4</sup> In music cases, problems abound. One problem has been the perpetuation by the General Manager of the Music Copyright Society of Kenya, a person deemed an authority on the subject of copyright in Kenya, of the misconception that copyright in a sound recording is held by the performing artist alone. Right owners in sound recordings have found it difficult to overcome this view, while defense lawyers have taken full advantage, demanding production of contracts between artists and international recording companies, resulting in dismissals of perfectly sound claims for copyright infringement if the company is or the local licensee has been unable to produce such documents.

<sup>5</sup> HCC No. 323 of 1999, Microsoft Corporation v. Microskills Kenya Limited.

<sup>6</sup> The defendants managed to avoid attaching liability for any outstanding issues. Further, it is unclear that in the bankruptcy process, that Microskills Kenya's existing corporate assets were properly reported.

<sup>7</sup> HCC No. 810 OF 2001, Microsoft Corporation v. Mitsumi Computer Garage Ltd.

be responsible. As the pirated/counterfeit discs technically meet KBS standards, the goods are released unless the Commissioner of Customs, in his discretion, calls on industry experts to assist. Customs officials in Kenya are also unsure of how to deal with suspected pirated or counterfeit goods. For example, they are unclear whether to release the goods or put them into bond; whether it is acceptable to charge duties on illegal goods; on how storage charges will be paid if an infringement case fails; who would indemnify them if an importer sued them for wrongful detention of their goods; and the like. Such lack of knowledge of the law and agency procedures does not help right holders to defend their rights in Kenya.<sup>8</sup>

## **The Kenyan Government Should Take Steps to Legalize Business Software Usage by Government Entities**

In both retail and corporate end-user piracy, industry plays an important role in educating the general public and businesses. Both groups of consumers must understand the value of software to business and the damage done by illegally using business software. However, governments must also play a role in the process, not just through strong enforcement, but leading by example. One area in which governments can directly lead by example is in the use of business software by government entities. Some of the greatest business software success stories worldwide involve countries whose governments lead public and corporate efforts to legitimize business software usage. For example, when governments issue executive orders instructing their agencies to: (1) conduct audits; (2) assess business software needs; (3) budget for those needs; (4) purchase properly licensed business software and support services, industry tends to follow suit. This role of government as a leader in proper use of business software is critical to demonstrate leadership in a host of other IT related areas. IIPA understands the Kenyan government, recognizing this important role, already is reaching out to industry. We commend efforts already made and strongly encourage the government to move forward.

## **COPYRIGHT LAW AND RELATED ISSUES**

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On December 31, 2001, the Kenyan Parliament passed the Copyright Act of 2001, replacing the Copyright Act of 1966 (as amended). The new Kenyan law went into effect on February 1, 2003. Many deficiencies of the 1966 Act were addressed in the revision, bringing Kenya's law closer to compliance with Kenya's international obligations under the TRIPS Agreement. In addition, the law deals with certain aspects of protection of copyright in the digital age, including several of the requirements of the WIPO "Internet" treaties, the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), which went into effect in 2002.<sup>9</sup>

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<sup>8</sup> Indeed, it can be said that right holders in Kenya now aim somewhat blindly to obtain enforcement under any legal regime that is plausible and available to address their issues. At a recent seminar on this issue, the Attorney General pointed to four possible avenues by which right holders can seek redress against infringements: the Copyright Act, the Kenya Bureau of Standards (KEBS), the Trade Descriptions Act, and the Trademark Act. Obviously, it is most crucial that the government of Kenya begin serious enforcement of the Copyright Act, but the recording industry is also looking at the Trade Descriptions Act under the Department of Weights & Measures, Ministry of Trade & Industry (headed by the Hon. N. Biwott) as a potential supplemental path to get pirated product off the streets of Kenya. The Kenya Revenue Authority (KRA) has also set up a Counterfeit & Sub-Standard Committee. This Committee is supposed to liaise with all relevant departments to look into taking action against counterfeits.

<sup>9</sup> The WPPT went into effect on May 20, 2002, while the WCT went into effect on March 6, 2002.

Several important weaknesses remain, particularly in the area of enforcement, that leave Kenya's law TRIPS-incompatible. Most importantly, the law lacks adequate penalties to deter piracy. The business software and recording industries raised concerns throughout the legislative process, and continue to raise concerns with government officials subsequent to the Act's passage. The following are some of the key deficiencies noted.

- **Presumption of Subsistence of Copyright Remains Weak:** The presumption of subsistence of copyright in the 2001 Act allows a defendant to place the question of subsistence into issue, without a requirement that a defendant produce evidence that copyright does not subsist in order to rebut the presumption.<sup>10</sup> This procedural issue must be addressed, since a defendant's ability to put into issue the presumption of subsistence of copyright can significantly raise the costs of bringing a copyright case to court by forcing a plaintiff to spend inordinate amounts of time and resources proving factual matters unnecessarily.
- **Civil and Criminal Remedies and Penalties Must Deter and Compensate:** The Copyright Act provides for civil remedies and criminal penalties. This was an important step forward for Kenya. However, the fines envisaged in the Act are so low as to be no more than a "cost of doing business" for business software pirates.<sup>11</sup> In addition to the absence of a deterrent impact, the fines are impractical in terms of implementation, since right holders must apparently prove how many copies were made in order to meet the "reasonable royalty" payment in Section 35(4)(c). In the digital world, presenting "proof" of copies made is a challenging task. Since proving actual damages in a digital world is difficult at best, the government of Kenya should enact "statutory damages" which can be elected by a right holder proving that illegal copying has taken place. A fixed amount or range of amounts of money can be awarded by the court to the plaintiff for each act of infringement proven to have been committed by the defendant. This remedy provides an appropriate approximation of damages adequate to compensate the right holder for injury, and serves as an effective deterrent to infringements.
- **Customs Authorities Should Receive *Ex Officio* Powers:** An important part of the fight against piracy is the role of customs authorities in searching and seizing potentially infringing copies intended for import, export or transshipment. The Copyright Act should

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<sup>10</sup> Section 35(8) of the Act currently reads (emphasis added):

In an action under this section . . . a) copyright shall be presumed to subsist in the work or other subject matter to which the action relates, ***if the defendant does not put in issue the subsistence of copyright therein*** and . . . b) where the subsistence of copyright is proved, admitted or presumed by paragraph a), the plaintiff shall be presumed to be the owner of the copyright if he makes a claim thereto ***and the defendant does not dispute that claim***.

<sup>11</sup> For example, Section 38(4) provides for fines "not exceeding four hundred thousand shillings" (US\$5,500) and/or "imprisonment for a term not exceeding ten years." Section 38(5) provides for fines "not exceeding one hundred thousand shillings" (US\$1,400) and/or "imprisonment for a term not exceeding two years." Section 35(4)(c) provides that, "in lieu of damages, the plaintiff at his option, [may] be awarded an amount calculated on the basis of reasonable royalty which would have been payable by license in respect of the work or type of work concerned." Section 35(6) provides for the imposition of additional damages where the Court is satisfied that effective relief would not otherwise be available to the plaintiff. It is questionable, and will have to be borne out in practice, whether the combination of Sections 35(4)(c) and 35(6) will adequately compensate a right holder for the injury caused by the infringement, as required by Article 45 of TRIPS. It is believed that courts may employ these provisions to mete out small fines and damages that constitute no more than a nuisance for large-scale producers of pirate software and corporate end-user pirates of software.

therefore grant customs authorities *ex officio* powers to search and seize copies that they suspect may be infringing.<sup>12</sup> Further, right holders and organizations mandated to enforce their rights have developed expertise in combating piracy and should be authorized to participate in such actions.

- **Point of Attachment:** One possible deficiency involves the lack of express point of attachment in the 2001 Copyright Act. The 2001 Act, unlike the 1966 Act that it replaced, fails to expressly protect foreign works. However, Section 49 of the new Act allows the Minister to issue a regulation to extend the Act to foreign works (including sound recordings). Section 52 further provides that regulations issued before the Act shall continue to have effect. It is therefore our understanding that protection for foreign works provided under the previous law is extended under the Copyright Regulations, Ref 1991 Cap 130. It would be useful for the Kenyan government to confirm this.
- **Banderole System Should Be Monitored:** The 2001 Copyright Act provides for a system of “banderoles” (stickers) to be overseen by the Kenya Copyright Board. IIPA members have not generally found banderoles to be helpful in the fight against piracy. Such systems interfere with right holders’ abilities to lawfully distribute in countries, since they require placement of the banderole underneath the shrinkwrap, and many members do not manufacture inside Kenya, imposing a significant burden on those affected industries. Banderole programs are also difficult for governments to administer, costly, and subject to possible fraud and abuse. Most important, the government of Kenya must not view a banderole system as a substitute for sustained enforcement against piracy, but only as a supplemental tool in the fight against piracy.

As noted, the new Act deals with many requirements of the WIPO “Internet” treaties, which just went into force in 2002. For example, the Act provides express protection under the reproduction right for certain temporary reproductions.<sup>13</sup> The Act also attempts to address a most important aspect of the treaties—the requirement that countries provide protection against the circumvention of technological protection measures (TPMs). While these provisions are not perfectly aligned with the requirements of the WIPO treaties or are in need of some clarification, they are an important first step toward providing key protections in Kenya to right holders’ uses of TPMs to enable healthy electronic commerce.<sup>14</sup> One glaring omission from the 2001 Act is the

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<sup>12</sup> Sections 39-42 of the Act reportedly grant certain authorities *ex officio* powers to conduct inspections and to seize evidence of suspected infringements, but these provisions may not grant explicit *ex officio* powers to customs authorities.

<sup>13</sup> 2001 Copyright Act, § 2 (interpretation of “copy”): IIPA is concerned that the definition may not be technologically neutral, since the definition includes “transient storage of a work in any medium by computer technology or any other electronic means.”

<sup>14</sup> The provisions cover both the act of circumvention [Section 35(a)] as well as the business of manufacturing and distribution of circumvention devices [Section 35(b)]. Importantly, it appears that the term “protect works” within the Section is broad enough to contemplate both TPMs that control access to a work, as well as TPMs that prevent unauthorized exercise of rights under copyright. Section 35(b), however, is not fully WIPO treaties-compatible. To make it so, other forms of “trafficking” would need to be added such as importation, offering to the public, providing, otherwise trafficking in circumvention devices, or offering a circumvention service to the public. In addition, the language in the Kenyan Act would need to make clear that the prohibition on devices extends to component parts. In addition, Section 35(b) does not provide indirect methods of discerning an illegal purpose, instead prohibiting only those devices “which are primarily designed or produced for the purpose of” circumvention. Other methods of proof, such as how a device is promoted, advertised or marketed, or whether the device has only a limited commercially significant purpose or use other than to circumvent, should be included in the statute. Finally, the internal limitation on what TPMs are covered should be removed. Sections 35(a) and (b) appear to limit coverage of the statute to TPMs

absence of a WIPO treaties-compatible “communication to the public” right, and some other provisions may require revision.<sup>15</sup> Kenya should take the opportunity provided by the regulatory process (or by the opportunity to update the Copyright Act) to meet the remaining requirements of the WIPO treaties, so that it can join the growing list of countries that now adhere to these treaties (as of February 2003, there were 39 members of both the WCT and WPPT). Ratification and full implementation of the WIPO treaties will ensure that the legal framework is in place in Kenya to fight digital piracy, as well as to ensure the protection of Kenyan right holders in foreign territories and support the development of electronic commerce in Kenya.

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“designed to” protect works. The test should be objective, such as whether the TPM, in the normal course of its operation, controls access to or protects the work, without regard to the purpose of its design, which adds an unnecessary element.

<sup>15</sup> For example, one key WIPO treaties’ requirement is to provide protection against unauthorized alteration of so-called “rights management information,” which is information that enables the identification of works in digital and other media in order to facilitate use and licensing of works. The definition of rights management information should be amended to refer to all categories of protected information (such as the title of the work; identity of the author, producer or performer; terms and conditions of use) and indicate that the information is attached to the work or appears in connection with an intangible use. The definition of “rights management information” should be added as follows:

“Rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of the use of the work, and any numbers or codes that represent such information, when any of these items is attached to a copy of the work, or appears in conjunction with the communication or making available of a work. Nothing in this section requires the owner of any right in the work to attach rights management information to copies of it, or to cause rights management information to appear in connection with a communication of the work.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# LATVIA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Latvia remain on the Special 301 Watch List in 2003 (where it has been since 2000) because of widespread piracy compounded by ineffective and inadequate enforcement of criminal, civil, administrative and border measures.

**Overview of key problems:** Copyright protection is still not on the list of priorities of the Latvian government. There is no political will to efficiently enforce the IPR legislation and thus enforcement still continues to be virtually non-existent in practice. Latvia's poor copyright enforcement, both in-country and at its border, has resulted in high levels of piracy, exceeding the 50% level in all copyright sectors. The biggest challenge Latvia faces is making its copyright enforcement regime effective. Estimated trade losses due to piracy in Latvia amounted to almost \$16 million in 2002.

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 generally 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). The majority of the Municipal Police claim that copyright protection does not fall within its competence. This incomprehensible argument clearly conflicts with the fact that the Municipal Police has the right to confiscate illegal goods (i.e. pirated goods) and ban the illegal trading. The only positive news so far is that the Municipal Police in Riga, who have proved to be more active than their counterparts in rest of the country, conducted various raids and initiated the administrative cases in Riga since 2001. Unfortunately, the result of these successful raids continues to be seriously hindered by the: (a) poor cooperation with the prosecutors in moving cases forward; (b) onerous evidentiary requirements which only cause further delays; and (c) courts which are generally reluctant to proceed the copyright cases. The penalties for copyright infringements are from deterrent (usually comparable to fines for minor administrative offences such as parking fines, etc.) and courts have the unfortunate tendency to return the infringing goods to the pirates. As a result, the Riga's Municipal Police and all other law enforcement officials are rapidly losing their motivation to initiate any anti-piracy actions.

A major weakness in the Latvian enforcement regime remains the lack of effective border enforcement, especially the failures of customs officials to commence actions without court order and to target materials transshipped through (and stored in) Latvia for other territories. Transshipment in Latvia of pirated optical media product causes significant problems for all the copyright industries (but not as serious as the transshipment in Lithuania). Latvia is fast becoming a dumping site and transit point for the distribution of pirated copyright material, especially entertainment software, produced by Russian syndicates. Latvia's 2000 copyright



law, while relatively modern, still contains several key deficiencies, including no provision for civil *ex parte* search procedures.

**Actions which the Latvian government should take in 2003:** To correct the deficiencies, the Latvian government should take concerted actions on the following issues—

#### Enforcement

- The government must publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority by instructing all Latvian enforcement agencies to make copyright piracy a priority issue for action;
- Latvian enforcement authorities must commence criminal raids and prosecutions, as well as implement administrative actions, including against operations run by organized crime elements;
- Customs officers must strengthen their activities to intercept pirate product and act on their own initiative, *ex officio*, as permitted under the law;
- Administrative remedies (like removing business licenses and issuing fines) must actually be imposed (but not as a substitute for criminal actions, as appropriate);
- The Latvian judiciary must relax its onerous evidentiary burdens regarding the preparation of expert reports in criminal cases involving sound recording and audiovisual piracy;
- The Latvian judiciary must improve the speed of the proceedings in copyright cases and impose deterrent penalties;
- Improve cooperation between customs and the police, and as well as the police, prosecutors and the judiciary. Intensive educational training for enforcement bodies including judges and prosecutors has started and needs to continue.
- Establish better cooperation with Estonian and Lithuanian customs agencies.

#### Legislation

- Amend the relevant Latvian law to provide for a civil *ex parte* search order, as required by TRIPS Article 50;
- Amend the criminal code and the Administrative Offenses Act to increase the level of criminal and administrative sanctions in copyright cases to levels which deter piracy, as mandated by TRIPS;
- Pursue further refinement of the copyright law in order to fully and effectively implement Latvia's obligations under the two 1996 WIPO treaties by amending the deficiencies which cause the law to be inadequate to protect copyright holders' rights, especially in online environment.

**LATVIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1999 – 2002 <sup>1</sup>**

INDUSTRY	2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	NA	85%	1.5	NA	1.5	85%	NA	100%
Records & Music	8.0	67%	NA	NA	4.0	65%	4.0	65%
Business Software Applications <sup>2</sup>	7.9	57%	NA	59%	NA	77%	NA	84%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	15.9+		1.5+		5.5+		4.0+	

Latvia is a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program, which requires beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners.<sup>3</sup> In addition, Latvia signed a Trade Relations and IPR Agreement in April 1994, which required significant legal changes in Latvia's IPR regime by the end of 1995, and later signed a Bilateral Investment Treaty with the U.S. in January 1995. Latvia joined the World Trade Organization (WTO) in 1999 and is obligated to have implemented both the letter and the spirit (performance) of the TRIPS Agreement. The European Commission too has identified problems with inadequate copyright enforcement in Latvia and called on that government to intensify measures to combat piracy and counterfeiting, strengthen border controls, and improve coordination between enforcement bodies.<sup>4</sup>

## COPYRIGHT PIRACY IN LATVIA

### Optical Media Transshipment and Other Forms of Piracy in Latvia

There are no reports of optical media production in Latvia at this time; Latvia does not have an industrial capacity optical disc plant. The only Baltic state known to have an OD plant is Lithuania.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> For the first 11 months of 2002, \$10.3 million worth of Latvian goods (or 7% 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 30.2% increase over the same time period last year. For more information on the history of Venezuela under Special 301 review, see Appendices D and E of this submission.

<sup>4</sup> To access the European Commission's October 2002 annual report on EU enlargement and Latvia, go to <http://www.euractiv.com/cgi-bin/cgint.exe/?1100=1&204&OIDN=1504033>.

Weak border control and lack of co-operation between the enforcement agencies and judiciary continues to encourage the flow of pirated goods through Latvia. The country's geographic location surrounded by three countries known to export pirated sound recordings (CD, audiocassettes) and audiovisual carriers (VHS, DVD), game cartridges and optical media products—Lithuania, Belarus and Russia—places Latvia at great risk for being overwhelmed by large quantities of pirated product which has nearly crushed the market for legitimate product. Due to the relatively small Latvian market, pirated products are further distributed to Scandinavia, Eastern and Western Europe. Pirated material, such as pirated audio CDs, CD-ROMs containing business software, videos, audiocassettes, and videogame cartridges, regularly enters Latvia from Lithuania. The recording industry reports that significant amount of the illegal pre-recorded optical media material containing sound recordings comes to Latvia from Russia. However, CD-Rs with the illegal music content are mainly produced locally and targeted for the local market.

**Imports:** The motion picture industries note that the same legitimate Russian-dubbed video selling in Russia for under US\$3 is marketed in Latvia for \$5.50 to \$7.50. The business software industry estimates that some 99% of illegal software on CD-ROMs found in Latvia have entered from the borders, yet Latvian customs have yet to seize a single shipment. The entertainment software industry reports that all product shipped into Latvia comes from Russia.

**Transshipment:** The recording industry reports that Latvia (together with Lithuania and Estonia) transships pirate CDs into the European Union by using sea links with Finland and the other Scandinavian countries. The transshipment involves moving material into and out of other parts of Central and Eastern Europe as well as Russia. Of the three Baltic States, Lithuania is the most egregious source of transshipment. This transshipment problem indicates the importance of effective border enforcement measures in Latvia, and the rest of the Baltic countries. For the entertainment software companies, largely those publishing PC games, it is not sufficiently clear how much of the Russian pirate product is shipped beyond Latvia. However, the quantities that are not shipped onward are enough to drive local piracy rates for entertainment software product to 95%.

**CD-R piracy and Internet piracy:** The recording industry reports that MP3 piracy in Latvia is a fast-growing concern. There are many illegal sites hosted offering illegal musical material in MP3 format as well as the material offered for sale on the Internet that is distributed as physical discs through the mail (e.g., <http://mp3.matrix.lv>; [www.dancebox.2000.lv](http://www.dancebox.2000.lv)). The same problems are faced by the entertainment software industry, with “warez” sites offering pirate videogames for direct download as well as for use as a “master” copy from which to burn CDs.

Some illegal sites are operating also in government-controlled servers. The recording reports that in 2002, IFPI identified and sent 57 “cease and desist” notices to 167 infringing sites estimated to contain around 46,000 illegal files. As a result, 72 of those sites (i.e., 43%) were removed from Internet. Despite the increasing figures, several websites have been operating with impunity for over three years without any prosecutorial action to shut them down. To date there are also no court cases dealing with Internet piracy. BSA endorses the view that Internet piracy is increasingly prevalent in Latvia. The Latvian enforcement authorities have not addressed piracy on the Internet at all, which resembles their inactivity to combat the physical piracy. This makes the proper and effective implementation of the WIPO treaties vital.

**Records and music:** Piracy of sound recordings and music is widespread in Latvia. The local recording industry group LaMPA reports that due to the ineffective enforcement the estimated level of music piracy continues to rise, reaching the 67% of the music market in 2002

(in 2000 and 2001 the levels of music piracy were 65% and 65% respectively). Estimated trade losses due to the piracy of sound recordings and musical compositions in Latvia in 2002 were \$8.0 million. The biggest distribution points are in the Latvia's capital, at two bazaars in Riga, which have 60 to 100 sales points that sell pirate audio product. The prices of the pirate music CDs are approximately US\$4.50 for international repertoire and US\$5.00 for local repertoire. Most of the CDs with international repertoire are imported from Russia, Belarus, Poland and Lithuania, and are further distributed to Scandinavia, Eastern and Western Europe. Local repertoire is pirated on CD-Rs, which is a new piracy trend in Latvia constituting around 3% of the overall music piracy. In addition to the illegal distribution of traditionally pirated sound carriers, LaMPA has identified the illegal import of the sound carriers made for the legal distribution in Russia only. According to Article 148 of the Criminal Code, such distribution of legal copies not authorized by the rights holders is considered to be a copyright crime in Latvia. Another continuous disturbing trend outside Riga, notably in the city called Ventspils in Western Latvia, is the pirated music carriers being sold under the counters of the supermarkets and in the legitimate retail shops in those supermarkets.

One particularly disturbing and rapidly developing piracy form is the hardly detectable so-called "hand-to-hand" piracy, i.e., the illegal sales of pirated sound carriers offered upon the catalogue by the physical persons. Pirates in Latvia are known to justify "hand-to-hand" piracy vis-à-vis the enforcement authorities with the incompatible argument the products they are selling are made for the private use. This practice does not comply with the TRIPS Agreement enforcement standards and must be eliminated as an excuse for the police (Economic, Municipal) and prosecutors to permit illegal activity from continuing. In general, the recording industry reports that the police have not taken decisive action against the open markets; there are not seizures or raids, much less prosecutions. The recording industry together with all the other industries believe that the Latvian customs authorities must take *ex officio* action when they detect border trade and domestic enforcement violations and they must work in cooperation with the European Union and Russian customs authorities to improve their efforts to stop the trafficking of material.

**Business software:** The Business Software Alliance (BSA) reports that almost all of the infringing software enters Latvia from Russia, Belarus, or neighboring countries. Poor border enforcement and the lack of cooperation between neighboring countries (especially Estonia and Lithuania) are problems that need the most attention. BSA estimates that business software piracy in Latvia is 57%, causing approximately \$7.9 million in trade losses in 2002.

**Audiovisual piracy:** The Motion Picture Association (MPA) reports that the video piracy rate in Latvia continues to be estimated at approximately 85%. Corruption and organized criminal activity are major problems. Although piracy is not as overt as it has been in the past, some street traders still discreetly solicit customers with pirate catalogues. Pirate copies are also available in video rental stores as early as two months before their Latvian theatrical release. Latvia has a sizeable Russian minority (almost 50%), which often purchases pirate and unauthorized Russian-language product. Web-based piracy is also starting to appear. Pirate sites marketing hard goods have been discovered and are expected to be a growing problem in the upcoming years. There are no available figures for the broadcast piracy or theatrical piracy rates.

**Videogame piracy:** The entertainment software industry (Interactive Digital Software Association, IDSA) concurs that border enforcement is a major problem in Latvia. They note that this problem must be addressed to cut off the flow of material from organized crime syndicates in Russia shipped into or through Latvia. The country has now become a base for

the distribution of illegal material into neighboring countries. Entertainment software companies also have to deal with the problem of piracy at Internet cafes. In Latvia, only 10% of the Internet cafes used licensed products in their shops. As mentioned above, the Internet and warez sites are being used to distribute pirated games. CD-burning is another piracy phenomenon adversely affecting this industry.

## **COPYRIGHT ENFORCEMENT IN LATVIA**

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### **Improve Centralized Coordination and Communication**

Latvia has taken legal and some structural actions to improve its enforcement mechanisms, including organizational efforts. Unfortunately, the restructuring has generally not proven to bring the desired results. Structural changes are merely enforced and are more formal steps to confirm to the general public that the government takes anti-piracy actions. For example, the Minister of the Interior, who is authorized to enforce the copyright law and other laws on intellectual property used to hold meetings on IPR protection with the well-known people from the copyright industries. These meetings were held under the framework of the Society Consultative Council, which in addition to IPR enforcement covers also other fields. As stated above, these meetings were very formal, with no actual follow-up actions. Furthermore, there is no information of the occurrence of those meetings since June 2002, i.e., before and after the Latvian parliamentary (and the government) elections in October 2002. Furthermore, so far the new government has not demonstrated any signs that would confirm an interest and willingness to address IPR protection issues in their agenda. In June 2002, a dedicated IPR enforcement division of state police was established; it is chronically understaffed (three people only) and under-resourced. This does not indicate the Latvian government's dedicated plan to effectively fight with piracy.

### **Weak Border Enforcement**

Given that much (but not all) of the piracy problem in Latvia is due to the heavy importation of infringing materials from Russia, Belarus and Lithuania, it is essential that border measures be enforced in practice. As part of Latvia's WTO accession package in 1999, several laws and decrees were passed to improve substantive border enforcement measures. Two laws form the basis for Customs enforcement measures in Latvia: (1) the 1997 Customs law (of June 11, 1997); and (2) a Cabinet of Ministers Regulation on Customs measures for IPR protection (of February 9, 1999) which entered into force on July 1, 1999. Unfortunately, there have been no signs of progress with border enforcement since these measures were adopted.

The Latvian government ruled an additional 20 new customs regional officials and 2 additional persons to the Customs Head Office solely for IPR protection in spring 2002. Unfortunately, these 20 new customs officials have been occupied with other fields and *de facto* not dealing with IPR protection. Thus, customs has failed to enforce the government ruling.

An ongoing problem has been that customs has refused to seize suspect product without a court order (*ex officio*), and customs officials have admitted problems with the detection of illegal material. The customs officers are not using the *ex officio* even though the legislation allows it. Customs officials have the authority for *ex officio* actions under the Government Regulation No. 420 for customs to apply control measures for IPR protection.

Furthermore, the culture ministry is pushing *ex officio* for customs also to the forthcoming changes to the Administrative Offense Act.

One step the Latvian government could take to improve enforcement would be to establish better coordination of customs authorities between Latvia's neighbors in Estonia and Lithuania. This would be especially helpful to stem the tide of pirated Russian material entering Latvia (and the other countries). Russian customs officials have agreed to cooperate and share cross-border information beginning in 2001.

## **Police Raids and Results**

The recording industry reports that in 2002 the Economic Police made a total of 263 raids and seized the total of 40,620 pirated products (of those 30,850 audio CDs and CD-Rs, 2,821 audiocassettes, 5,974 VHS tapes, 975 DVDs, 424 VCDs), which is unacceptably low in comparison with the high piracy levels in Latvia. The Economic Police issued 235 administrative protocols for the IPR infringements and initiated 30 criminal cases. These are total figures, which the Economic Police cannot specify further, i.e., itemizing cases related to music, film, software and piracy, and counterfeiting (e.g., trademarks). Regretfully, there is no information of the development of those cases.

There is also no information on the activities of the Municipal Police in 2002. As rightly feared a couple of years ago, due to the prosecutorial and judicial delays and obstacles, the Municipal Police have lost their motivation to initiate any anti-piracy activities. Yet in 2001, the Municipal Police in Riga distinguished themselves from counterparts in the rest of the country by conducting several raids in Latvia's capital, which in fact were not followed up on by the prosecution.

## **Prosecutorial Delays and Obstacles**

Criminal prosecutions take a considerable time amount of time in Latvia. While administrative cases are described as relatively simple and can proceed in two to four months, criminal cases take 18 months to two years just to begin the trial. This is because criminal cases must proceed through three stages: first, the police review the preliminary records; second, there is a police investigation; and finally, the prosecutor must review and then get the Prosecutor's Office to issue a formal charge before the case can commence. Once the case has started, the procedures are complicated and delays are the usual result. In sum, the slow pace of criminal enforcement activity at the prosecution stage accounted for the poor quality of enforcement. Contrary to expectations, the Latvian enforcement authorities have merely used the existing and relatively sufficient enforcement legislation to combat piracy.

The Business Software Alliance (BSA) reports reasonable cooperation, albeit on a limited number of cases, from the Economic and Finance Police; mostly, this has focused on end-user raids. The Economic and Finance Police conducted a total of 24 raids in 2002 with the cooperation of BSA; 18 of these concerned end-users, 6 were of resellers. BSA was pleased to note that larger targets were the subject of these raids. As a result, three criminal cases, and seven administrative cases, were initiated. The administrative cases have resulted in in low fines at an average level of 100 Lats: The criminal cases have yet to be resolved.

## No Civil *Ex Parte* Search Provision

A glaring deficiency of the 2000 copyright law is that it fails to provide for a TRIPS-required civil *ex parte* search remedy. This omission must be corrected immediately. The lack of a civil *ex parte* search remedy is particularly harmful for BSA. In end-user piracy cases, the civil *ex parte* remedy is an essential enforcement tool, the absence of which leaves BSA overly dependent upon police cooperation in such cases. This cooperation has been, for practical and policy reasons, difficult to secure.

## Inadequate Administrative Penalties

Copyright infringement cases in Latvia are often pursued as administrative offenses. Criminal cases take too long and certain civil tools (like the *ex parte* search) are not even available to copyright owners. Businesses, especially illegal kiosks and stores that sell pirated material, should be fined or their business licenses revoked; either of these measures would be important first steps toward proper enforcement of the copyright law. Unfortunately, convicted pirates can only be fined a minimum of 50-100 Lats and, in case of repeated infringement, a maximum of 250 Lats (US\$435), which are far from being deterrent.

## Judicial Obstacles and Delays

The main reason for the slow and burdensome proceedings in IPR cases is that, due to the lack of relevant knowledge, the judiciary has literally created its own rules on IPR procedures using the former Soviet procedural codes as a basis. That explains the burdensome and excessive procedural requirements in IPR cases (e.g., burdensome expert opinions; see next paragraph). Even if the police and/or prosecutors have managed to get the courts to proceed with a case and take a decision, the sentence for IPR infringement (if any) is in virtually all cases far from deterrent and usually comparable to fines for minor administrative offenses such as parking fines, etc. Furthermore, the courts have the unfortunate tendency to return the infringing goods to the pirates. Furthermore, even after several legal reforms in Latvia's criminal legislation there are still no reports of any imprisonments imposed for the copyright crimes.

**Onerous burdens in evidence collection:** The copyright industries experienced substantial difficulties and delays in securing expert reports that courts systematically require in order to pursue criminal actions against piracy. Thus, cases have been chronically hampered because of the delays in securing this evidence. These delays have the effect of "pushing" criminal cases into the administrative areas, where they can be disposed of quickly, but at a much reduced penalty. This difficulty is not so much in the industries' ability to provide the evidence, but rather the problems in obtaining the expert reports without delay. Expert reports create a bottleneck in the Latvian criminal procedure.

## COPYRIGHT AND RELATED REFORM IN LATVIA

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### The Copyright Law of 2000

Latvia made significant progress in recent years with the adoption of new laws and its accessions in important copyright and neighboring rights treaties. The history of Latvian copyright reform began in 1993, when Latvia overhauled its old Soviet-style copyright law.

Latvia became a member of the Berne Convention (August 11, 1995) and the Geneva Phonograms Convention (August 23, 1997); it also became a member of the Rome Convention (August 20, 1999). On January 21, 1999, the Latvian Parliament adopted a package of minor amendments to the Copyright Act, the Code of Administrative Offenses, the Criminal Code, the Consumer Protection Act and the Customs Act, to pave the way for Latvia's 1999 accession to the WTO. After a series of revision efforts in 1998 and 1999, Latvia's new Copyright Law was enacted, effective April 27, 2000 (with some provisions in force on January 1, 2001 and others on January 1, 2003).

On April 27, 2000, the new Copyright Law was adopted by the Parliament. While many of its provisions went into force on April 27, 2000, some provisions entered into force on January 1, 2001, and others will go into force on January 1, 2003. The new law made significant improvements to the former law, including definitions of critical rights such as reproduction right (including temporary copies), and a right of making available. The new package of amendments also changed the penalties for software piracy offenses; for example, for end-user and reseller piracy offenses, the penalties were increased from 200 Lats (US\$350) to 7,500 Lats (US\$13,070), with possible imprisonment of five years.

Even with the adoption of the 2000 copyright amendments, several TRIPS issues remain outstanding, or require further clarification in Latvia's relevant laws. These more troubling deficiencies include:

- No civil *ex parte* search procedure, a TRIPS-required tool, which is especially critical enforcement in business software actions.
- No clear protection for pre-existing works and sound recordings. Such protection is not clearly spelled out in the copyright law for works or sound recordings, although many Latvian experts have offered their view that such protection does exist under current law and Latvian officials acknowledge that such protection is required under the TRIPS Agreement (Articles 9, 12 and 14.6).
- Low administrative penalties that do not deter piracy. The current is a maximum of 250 Lats (US\$435).
- No deterrent criminal penalties (with the exception of provisions added for certain types of software piracy; the maximum penalty is 5 years' prison, up to 150 minimum wages).
- A dangerous provision in the Copyright Law [Article 69(3)] regarding the destruction of equipment used to produce illegal copies indicates that the equipment (and perhaps the illegal copies produced) can be given to charity. There was considerable confusion about this provision in discussions with Latvian officials; at the very least, it should be clarified. The criminal provisions do properly provide for the seizure and destruction of equipment. However, the industries believe that this charitable element should be eliminated from the copyright law; while such charitable giving is sometimes applied in trademark situations (e.g., counterfeit goods given to charity after the offending logos are removed), copyright presents a different situation.
- Provides only a right of remuneration for the broadcasting, public performance, and other communication to the public for producers of sound recordings. Latvia should be encouraged to give performing artists and phonogram producers an exclusive right of public communication, instead of merely a claim for remuneration. Market developments indicate that the future "delivery" of recorded music will increasingly be accomplished through the licensing of music services rather than the sale of physical



products, and non-interactive transmissions will compete with on-demand communications for listener loyalty. Both interactive and non-interactive services must operate under market principles. To achieve this, it is essential that rights holders, like producers of sound recordings, enjoy exclusive rights, and not merely rights to claim remuneration.

- Currently, one of the main obstacles to effective enforcement is created by cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rights holders. The cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights enables defendants to delay judicial proceedings, and in some cases even escape justice, even when it is clear from the outset that the plaintiff owns the copyright or neighboring rights in question. This issue has become particularly problematic now that hundreds of thousands of different infringing optical discs (CDs, CD-ROMs, VCDs, DVDs) are regularly seized during raids. Latvia should introduce a presumption of ownership for phonogram producers. The principle of presumption of ownership is not, in fact, a new phenomenon in Latvia's legislation. Latvian Copyright Law includes the same principle for authors [Article 8(1) of the Copyright Law].

## **WIPO Treaties**

Latvia has deposited its instruments of access to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and was one of the original 30 countries putting them into force in 2002. Now, Latvia must fully implement the obligations into national law. Some implementation provisions were adopted in the Copyright Law of April 2000, but many others still need to be enacted.

For example, Latvian law must allow rights holders to enforce their rights against the circumvention of technological protection measures. Technological protection measures are the tools that rights 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 circumventing devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. In addition, rightsholders 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. Latvia is working toward implementing the EU Copyright Directive.

## **Criminal Code**

Latvia passed a new criminal law in June 1998, which entered into force on April 1, 1999. Of the three provisions in these amendments which relate to IPR protection (in particular, Articles 148-149), the criminal law now includes: fines for manufacturing, selling, storing or concealing unauthorized copies; confiscation of infringing copies and equipment; prison terms of one to two years for repeat offenders (including activities related to unauthorized decoders and smart cards); and up to five years imprisonment for organized crime activity. The fines range from between 50 and 200 times the minimum monthly salary (which as of January 1, 2003, is 70 Lats, or US\$120)—meaning the fines range between US\$7,200 to \$120,000. The Latvian government started to prepare the new draft of the Criminal Procedure Code in 2002. The draft is still at the government level and there is no further information as to when exactly it will go to the Parliament.

## **Administrative Offenses Act and the Civil Code**

Article 2046 of the Administrative Offences Act sanctions the use of copyrighted material without a license and imposes a fine of up to 250 Lats (U.S.\$435), hardly a deterrent to the lucrative nature of piracy. The amendments to the Administrative Offences Act are currently in the Parliament waiting for the second reading, which has not scheduled yet. Reportedly, the Ministry of Culture has proposed to include the Municipal Police to be authorized to take actions against IPR infringements and increase the fines for legal entities infringing copyrights. Unfortunately, the last proposal has already been rejected by the Parliament.

There are no known pending amendments regarding civil penalties. Articles 1770-1792 (Civil Code) and Article 69 (Law on Copyright and Neighboring Rights) include civil sanctions for copyright violations. Given the wide-scale sale of piratical materials in open markets, the industries circulated several proposals to address this problem several years ago. One proposal would have revised the Administrative Code to ban the sale of music, audiovisual or computer program material at such open markets, which, unfortunately, was rejected by the Latvian government.

## **Government Software Management**

The Business Software Alliance (BSA) reports that the level of unlicensed use of business software applications within the Latvian government remains at a very high level. No comprehensive review of software installations and licenses has taken place within the central or municipal government in Latvia, a situation that BSA recommends be addressed forthwith. Government use of software is seen as an essential behavior determinant by BSA for business users of software: it is essential that government take steps to regularize and legalize its use of business software applications in order to set an example to the software using community. BSA has had meetings with senior officials of the Latvian government in 2002 to discuss this problem, which have met with an encouraging and positive response from the Latvian government. However, expressions of willingness to address these problems have not been backed up by positive action. The situation concerning unlicensed use by the Latvian government is particularly acute as there is a widespread public perception in Latvia that the government is a user of unlicensed software. Accordingly, there is a general reluctance to legalize in the absence of a strong example being set by central government, and, in addition, police enforcement bodies feel they lack credibility in enforcing software piracy cases as the targets of such enforcement object to that enforcement on the basis that the police/government themselves are most likely illegal.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# MALAYSIA

### EXECUTIVE SUMMARY<sup>1</sup>

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Malaysia should be maintained on the Watch List, and an out-of-cycle review should be conducted toward the end of 2003. Improvement is noted in government will, evidenced by increasing numbers of inspections and raids. Bottlenecks remain at the prosecutorial stage, and lack of deterrent sentencing results in organized criminals remaining free to produce and export product with impunity around the globe. Malaysia was first placed on the Priority Watch List in 2000, remained there in 2001, and was lowered to the Watch List in 2002, to recognize some progress made against illegal optical disc plants.

Strong anti-piracy statements from high-level government officials, and increased inspections and raiding activity, including against licensed and unlicensed optical disc factories (chiefly under the Optical Disc Act), indicate strong recognition by the government of Malaysia of the seriousness of the piracy problem. Nonetheless, the Malaysian government is working hard, not smart, as optical disc piracy continues to be exported around the globe, the retail market remains decimated by piracy, and pirates fail to be punished because of prosecutorial and judicial bottlenecks, lack of IP expertise, and failure to impose deterrent penalties.

Required action for 2003:

#### Enforcement

- Run more surprise factory raids (licensed and unlicensed) under the Optical Disc Act, as well as more raids of photocopy shops, residential photocopy and other book/photocopy production centers, with seizures and closures where warranted.

#### Prosecutions

- Prosecute high-profile cases against non-compliant or unlicensed optical disc plants, charging factory owners as well as directors/other principal officers personally for offences, with full investigations of links to other crimes where applicable.
- Create a unit of legally qualified, adequately trained prosecutors within the Attorney-General's Chambers to prosecute high profile copyright cases involving production, distribution and export of copyrighted materials, particularly pirate optical discs, end-user piracy of business software, or offset piracy/illegal photocopying of books.
- Institute charges of copyright violations within 30 days after full documentation is received from copyright owners.
- Secure convictions against businesses that are replicating pirated optical discs.

#### Courts

- Assign piracy cases to judges trained and experienced in IP cases with a view towards establishing specialized IP courts.
- Issue directive on the need to impose deterrent sentencing on infringers.
- Issue and enforce sentencing guidelines, with systematic reviews of acquittals and inadequate sentences, and disclosure of reasons if any are not appealed (including appeals of corporate end-user piracy cases in which imprisonment is not imposed).

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<sup>1</sup> For more details on Malaysia's Special 301 history, see IIPA's "History" appendix to filing.

**MALAYSIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	42.0	75%	40.0	80%	41.0	80%	42.0	85%	40.0	80%
Records & Music <sup>3</sup>	110.2	70%	148.9	70%	15.6	65%	5.0	40%	13.0	70%
Business Software Applications <sup>4</sup>	82.7	70%	75.0	70%	75.4	66%	67.8	71%	63.8	73%
Entertainment Software	NA	NA	56.4	93%	NA	98%	164.0	99%	135.2	99%
Books	8.3	NA <sup>5</sup>	8.2	NA	8.0	NA	8.0	NA	8.0	NA
TOTALS <sup>6</sup>	243.2		328.5		140.0		286.8		260.0	

## PIRACY IN MALAYSIA

### Malaysia Remains One of the World's Leading Producers and Exporters of Pirate Optical Media (CD, Video CD, DVD, CD-ROM)

Beginning in the late 1990s, authorities in China, Macau, Hong Kong, and other jurisdictions started to crack down on the pirate production and export of optical media products—including music and video CDs, and CD-ROMs containing entertainment, educational and business software and literary material. As a result, Malaysia became an increasingly attractive destination for the organized criminal enterprises that are running optical media factories and distributing their output worldwide. There are currently at least 38 optical disc

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> 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.

<sup>4</sup> BSA's 2002 loss numbers are preliminary. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$63.0 million at 62% were identified as preliminary. BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above.

<sup>5</sup> While the Association of American Publishers does not have an overall piracy level for the Malaysian market, a local copyright organization estimated in 2001 that about 30% of revenues are lost each year from illegal campus copyshops in Malaysia. However, more recent raids and surveys of the situation near universities suggests the piracy take of copyshops in those neighborhoods runs at more like 50-60% of the total market. Recent successful raids undertaken in June 2001 at Tar College and Putra University unearthed the full extent of the problem. Copy-shops conspire with students and pre-print books they learn have been adopted on students' booklists, to have them ready for the start of the school term.

<sup>6</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Malaysia were \$316.5 million. Because BSA's were revised, estimated total losses to the U.S. copyright-based industries in Israel in 2000 increase to \$328.5 million.

plants in the country, including at least 86 production lines; but unlicensed underground facilities also continue in operation.<sup>7</sup> The total estimated capacity of the verifiable plants is at least 301 million discs per annum, which amounts to over-production for the domestic market. Today, Malaysia's enormous excess capacity for the production of optical discs results in massive pirate production for export. Recent seizures of Malaysian-produced pirate product were found on every continent in the world.<sup>8</sup> Investigations have revealed that ownership of many Malaysian OD production facilities for entertainment software is tied to Greater China syndicates run primarily from Taiwan, Hong Kong and China. Disturbingly, optical disc pirates in Malaysia have begun the practice of "disc gouging," namely, tampering with source identifiers used to identify the loci of production of a disc.

## Piracy Decimates the Domestic Market

The Malaysian market for copyrighted materials of all kinds remains dominated by piracy, hurting domestic Malaysian as well as foreign creators.<sup>9</sup> The problem is particularly acute for optical media products, including uncensored music and video CDs (VCDs), DVDs, and CD-ROMs containing entertainment, educational and business software and literary material. For example, pirate copies of *Star Wars: Attack of the Clones* were readily available on the street prior to theatrical release at RM5 (US\$1.32) in VCD format, or RM10 (US\$2.63) in DVD format. Retailers selling at RM5 (US\$1.30) per VCD now offer a free VCD for every four or five VCDs purchased. Retailers have also started selling three or four VCDs for RM10 (US\$2.63). Competition is intense between the pirate retailers. Pirate shops (with no names or signs) have also sprung up, located at the end of the entry point where the many pirate VCD, DVD and CD stalls are located. When raids are conducted, pirate shops have ample time to close since officers from the Ministry in charge of copyright enforcement in Malaysia, the Ministry of Domestic Trade and Consumer Affairs (MDTCA) sweep the stalls upfront. Pirate audio CDs also remain widely available throughout the country for about RM5 (US\$1.32).

Entertainment software companies continue to report devastation to their local market, as pirates continue to dump product—both PC games and those for play on consoles—on the local market at prices as much as 95% below legitimate retail. The number of retail outlets in open spaces, such as SS2, Bangsar, Taipan, Ampang and Jalan Alor, have been significantly reduced, in part due to increased raiding activity discussed below. However, pirate vendors have now moved to fixed shops in these areas (two to five per area) and continue to provide pirate product. Major problems also remain in shopping complexes such as Sg. Wang, Low Yat Plaza, and Imbi Plaza in Klang Valley; and in Holiday Plaza & City Square in Johor. Mini-

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<sup>7</sup> IIPA has heard that there may be as many as 43 plants and 109 lines, which would increase capacity to 381.5 million discs per year. These are conservative estimates of capacity, and compensate for down-times and movement and set-up of machinery.

<sup>8</sup> Pirate music CDs from Malaysia have been seized throughout Asia, Latin America, Australia, Europe, and Africa: many infringing music discs that flooded the Kenyan market in 2001 originated in Malaysia, as have pirate discs seized in Mauritius and Ghana. Malaysia remains a major supplier of pirate video CDs and DVDs to Asian destinations via Singapore, and these products have turned up in South Africa, the U.K., New Zealand, and the U.S. Malaysia is also a leading source of high quality counterfeit business software products, which are shipped via Singapore into the United States and other markets. With regard to entertainment software in CD-ROM format, Malaysia continues as the world's single leading source of pirate product.

<sup>9</sup> For example, in many of the raids carried out on behalf of the Association of American Publishers (AAP) in 2002, Malay authors' titles, like *Pengajian Malaysia* by Nazaruddin Haji Mohd Jali, *Pengaturcaraan* by Marini Abu Bakar, Norleyza Jailani and Sufian Idris, and *Statistik Untuk Teknologi Maklumat & Industri* by Mohammad Khatim Hasan, were found among the many books being pirated.

theaters (mostly in East Malaysia) frequently show and advertise movies that have not been approved for theatrical release by the Malaysian government.

Aside from the optical disc plants which alone could overwhelm the local market, recent news reports indicate that crime syndicates are even taking to the high seas, manufacturing pirated (burned) music, movie and game CDs, and VCDs for distribution in Malaysia and elsewhere, in order to avoid enforcement.<sup>10</sup> So-called “burn-to-order” piracy on CD-recordable discs (CD-R) has emerged in Malaysia in 2002. While some pirate entertainment software (all formats, including PC, PlayStation®, PlayStation2®, and Xbox) is being produced in smaller “burn-to-order” operations, factory production for export still dominates among pirate formats in Malaysia, showing up in such far away places as South Africa. Pirate CD-R discs of music recordings are turning up more frequently in Malaysian night markets (the estimated monthly production capacity of CD-R burning facilities in 2001 was 1.2 million CD-R discs). Malaysian pirates continued to use the Internet as a marketing medium, delivering pirate product to customers via mail or courier service. An even newer phenomenon involves consumers and pirate business owners auctioning off pirate copies of games and other products on Internet auction sites. Pirates of entertainment software have increasingly used deceptive means to fool authorities into believing they are “authorized” by right holders, adding an additional investigative challenge to Malay authorities investigating piracy.<sup>11</sup>

Book piracy (especially textbooks, scientific, technical, or medical books) grew slightly worse in 2002, with more photocopy piracy and more pirates moving underground and distributing out of their cars/vans, and with evidence of pirate books being exported to the Middle East and elsewhere. Houses used by pirates as photocopying centers have gone high-tech with video cameras installed to spot raiding MDTCA officers. Student leaders are recruited to take orders among fellow students and pass them to the pirates. The pirates package the pirate copies of books with new cover designs to confuse the authorities as to which is the legitimate copy.

Corporate/institutional (“end user”) piracy of business software (such as when a business buys one legal copy of a business software application and loads it on all the office’s computers) remains a serious problem (piracy rates increased from 66% in 2000 to 70% in 2001 and remained at 70% in 2002), especially since corporate directors and business managers are not held accountable by being prosecuted for piracy taking place on their premises. 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.

A disturbing concomitant to piracy in Malaysia, especially in recent years, has been increasing threats and violence to right holders and enforcement officials. While this phenomenon (including some instances in which notes containing death threats to government officials were wrapped around daggers) may, ironically, actually signal some success among Malaysia’s enforcement officials in getting at the heart of the piracy problem, it is an uncomfortable reminder that piracy has become a dangerous and organized criminal activity,

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<sup>10</sup> Disturbingly, there were some cases in which pornographic materials were even “disguised” as Motion Picture Association animated movie titles, by having the MPA title covers pasted onto the VCD covers.

<sup>11</sup> For example, one entertainment software company reports that exporters regularly falsify documents, and neither the Customs in Malaysia nor in the target country verified the legitimacy of documentation, or required/verified proof of identity. In another instance, companies in Malaysia have tried to establish and obtain licenses to run “Internet cafes” on an entertainment company’s behalf, without that company’s authorization!

perpetrated by dangerous criminals and a whole web of organized crime syndicates.<sup>12</sup> MDTCA officers were authorized in late 2002 to carry pistols when they take a VCD, DVD or CD piracy raid. However, a more recent directive prohibits them from firing their weapons unless they are in bodily danger (and then, they may only fire warning shots).

## **ENFORCEMENT IN MALAYSIA**

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### **Optical Disc Factory Inspections and Raids Evidence Growing Government Resolve to Fight OD Piracy**

Malaysian authorities clearly recognize the scope and seriousness of the optical media piracy problem. They appear committed to the fight against OD piracy, and in many cases, work ably and willingly with our affected industries. Since 2000, Malaysia has actively raided many pirate optical media production facilities, and 2002 was a seminal year in implementing the inspection and raid provisions of the Optical Disc Act. Working with the motion picture and music industries, MDTCA conducted 12 factory raids from January to December 2002. Twelve of the raids were conducted against licensed factories, while two were against unlicensed plants, and one was against a licensed plant found in a location other than that endorsed on the license. Generally, the machinery found at the unlicensed plants (including seven replication machines, one of which was a DVD line, several printing machines and some “metalisers”),<sup>13</sup> was dismantled and/or seized, while the machinery found in the licensed plants was generally only sealed (or not sealed at all), depending on the evidence found at the plant.<sup>14</sup>

The very fact of these raids and the findings of piracy indicate at once the resolve of the Malaysian government to take more concerted action against both licensed and unlicensed plants in 2002, but also the continuing seriousness of the optical disc piracy problem, and the as yet inadequate overall enforcement efforts in Malaysia. These raids will, if past experience holds true, never result in deterrent penalties. It must be noted that not a single optical disc license has been suspended as a result of these raids, and not a single factory owner has gone to jail or sustained deterrent fines. These facts demonstrate a flawed enforcement system where the guilty often go unpunished.

As discussed in detail below, if the Malaysian government is going to have a chance at defeating the optical disc piracy problem, owners of these plants engaging in piracy must be punished with deterrent sentences, including jail time actually served. Until that happens, plant managers and owners will continue to bear the relatively minimal risks of piracy—a highly

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<sup>12</sup> IIPA looks to the government to cease the practice of MDTCA officers taking down the names of lawyers and clients' representatives on their lists, since copies of the so-called “visit list” is then given to the pirate, which raises significant safety concerns for industry representatives. MDTCA has already issued a directive indicating that this practice is incorrect, but the practice continues, especially among different branches of the MDTCA.

<sup>13</sup> A “metaliser” is a machine that puts a coating of metal on an optical disc (usually aluminum) to reflect the laser in a CD player. The disc is then transferred to a spin coater, where a layer of UV lacquer is coated and cured over the aluminum.

<sup>14</sup> For example, in October 2002, a routine inspection of a licensed factory uncovered infringing optical discs containing MPAA member films from which the SID codes had been scoured concealed in a storage area within the plant. The discs, submitted for forensic analysis against exemplar discs obtained from this plant, revealed a positive match, and to our knowledge, the three replicating machines have now been sealed by the MDTCA.

profitable and relatively safe illegal activity to engage in. It is also worthy of note that in one of the plants inspected, in which highly suspicious discs were found (with SID codes scoured off), the authorities even refused to seal the machinery pending the outcome of the forensic investigation.<sup>15</sup> It is hoped that throughout 2003, even greater efforts will be made on the part of MDTCA to bring to justice plants that continue to pirate, seemingly with impunity, notwithstanding their status as licensed entities with the government. If the Optical Disc Act is to be effective, license revocations and prosecution of owners must become part of the enforcement equation following raids uncovering serious breaches of optical disc production licenses.

## **More Raids Against Piracy in 2002**

The Malaysian government added greater resources to the fight against piracy in 2002. In the second quarter of 2002, MDTCA recruited an additional 285 enforcement officers, with 160 of those officers reportedly dedicated to an “Anti-Piracy Task Force.” The 160 officers are divided into three teams (an “intelligence team” to learn source information at the manufacturing level, a “factory team” to conduct plant inspections/raids, and a “retail team” to run domestic raids), of which 100 are in the Klang Valley while 30 are based in Penang and Johore Baru. This placement of enforcement officers is a very positive step aimed at curtailing domestic piracy, and we commend the government for its devotion of manpower and resources.

The number of raids grew in 2002 as a result of this greater devotion of resources. For example, between January and November 2002, the motion picture industry, in conjunction with authorities, conducted 20 Internet or export related raids, 82 warehouse raids, and 511 retail raids, including sustained raids in the two most infamous pirate areas in Malaysia (Petaling Street in Kuala Lumpur and Holiday Plaza in Johor Bahru). Unfortunately, these actions have had very minimal impact due to post-raid enforcement problems.<sup>16</sup> As noted, there were 12 optical disc factory raids in 2002. Raiding activity against music piracy also picked up, with reports of hundreds of raids run against music pirates. Seizures during raids in 2002 have also increased due to two large-haul raids netting 500,000 pirated discs. In a series of recent raids (from August to November 2002), the motion picture industry was able to thwart thousands of pirated discs from leaving the country. With the increase in the export of illegal optical discs through the mails, industry has been working with the MDTCA in tackling the export problem by getting the cooperation of the courier companies and National Post, and seminars and meetings have been held to this effect. Two recent courier cases are worthy of mention, in which the Police at Kuala Lumpur Airport stopped pirated products being exported from Malaysia, arresting two Mauritians attempting to smuggle pirated music, film and software products out of the country. Both were detained by the Police for several days, and immediately went before the court on criminal charges.<sup>17</sup>

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<sup>15</sup> The entertainment software industry notes that “scoured” discs are being found all over the world, sourced to Malaysia. The phenomenon of “disc gouging” become far more prevalent in 2002.

<sup>16</sup> Less impressive has been the fight against hawker stalls, night markets and vendors in open areas selling movies that have not been approved by the authorities in Malaysia, and pornographic VCDs and DVDs that were to be the subject of a nationwide crackdown announced in August 2001. The deadline for compliance was said to be September 1, 2001 for some areas, and October 1, 2001 for others, but well over a year later, the problem remains, and it appears local police slowed down their enforcement efforts, leaving the MDTCA to carry most of the weight.

<sup>17</sup> IIPA understands that both the accused were convicted on documents produced by the local music industry group (RIM) and the Motion Picture Association.



Book publishers have had their share of raiding successes during 2002, with nearly a dozen large raids on both stores dealing in photocopies as well as counterfeit books, as well as residences stocked with books, many for university students (a recent piracy method of choice for book pirates).<sup>18</sup>

Also encouraging has been continued support by the Malaysian government against unauthorized use of business software in a business setting, so-called end-user piracy (such as where one copy of software is purchased but then that copy is loaded on many computers without authorization). The government brought five successful end-user raids in 2001 and another five in 2002. Over 900 reports of corporate end user piracy were directed to the BSA hotline in 2002, many of which were generated due to the assistance of the MDTCA. In August 2002, the MDTCA Minister held a press conference to announce a BSA-sponsored crackdown on corporate end-user piracy. The Minister noted that the full force of the law would be used and that directors and managers would be held criminally liable for software copyright infringements. MDTCA also placed newspaper advertisements warning companies of the consequences of using pirated software. The MDTCA also sent more than 300 personal delivery warning notices to companies that had been reported to BSA as having used pirate software. The MDTCA publicized that it would make random checks on offices and companies nationwide, targeting senior management and big corporations, and such visits began in November. IIPA commends the Minister's clear demonstration of government will to tackle this damaging form of piracy.<sup>19</sup>

One reason enforcement efforts at the front end have improved in 2002 is that government-industry cooperation has expanded. Such expansion is due in part to the establishment in 2001 of a special enforcement task-force, chaired by the MDTCA, including representatives from all ministries and agencies with any level of responsibility for enforcing intellectual property rights. We are hopeful that this effort will continue and increase in 2003.

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<sup>18</sup> Some of these raids netted an astounding number of titles, which should give pause to U.S. authors and publishers who in many instances have their life's academic work stolen from under them, and to the Malaysian government, which should be ashamed that pirates such as these flaunt the rule of law and all academic integrity by copying such materials without having created anything of value themselves. One of the largest raids, run in late November 2002, yielded pirate copies of dozens of titles, including: *Psychological Testing*; 5th Ed. (Wadsworth/ TL) 2001; Bill Sanders, *Flash 5 F/X And Design* (Coriolis/JW) 2001; Anthony Orton, *Learning Mathematics*, 2nd Ed. (Cassell) 1992; John R. Nesselroade, *Individual Development and Social Change* (Academic Press/E) 1985; John A. Axelson, *Counseling and Development in a Multimedia Society* (Brooks/Cole/TL) 1999; Richard I. Arends, *Exploring Teaching* (MGH) 1998; Donald R. Atkinson, *Counseling Diverse Populations*, 2nd. Ed. by (MGH) 1998; Sandra W. Russ, *Affect, Creative Experience and Psychological Adjustment* (Taylor & Francis) 1999; David W. Johnson, *Joining Together* (Allyn & Bacon/P) 2000; Hall, *Economics: Principles and Applications* (South-Western/TL) 2001; Brem & Christine, *Basic Skills in Psychotherapy and Counseling* (Brooks-Cole/TL); Robert William Buckingham, *A Primer on International Health* (Allyn & Bacon/P) 2001; Barbara Knoll, *Second-Language Writing* (CUP); Cherry Campbell, *Teaching Second Language Writing* (Heinle/TL) 1998; Richard E. Watts, *Interventions and Strategies in Counseling and Psychotherapy* (Accelerated Development) (Taylor & Francis) 1999; Jeffrey A. Kottler, *Introduction to Therapeutic Counseling* (Brooks-Cole/TL) 2000; Steven D. Brown, *Handbook of Counseling Psychology*, 3rd Ed. (JW) 2000; Theodore Milon, *Disorders of Personality* PSM III: Axis II (JW) 1981; Fay Fransella, *Personal Construct Counseling: In Action* (Sage) 2000; Kathryn C. Mac Christie, *Becoming a 21st Century Agency Counselor* (Brooks-Cole/TL) 2001; Robert C. Berg, *Group Counseling*, 3rd Ed. (Taylor & Francis) 1998; Bernard Kolman, *Discrete Mathematical Structures*, 4th Ed. (P) 2000; Paul R. Kinnear, *SPSS for Windows Made Simple*, 3rd Ed. (Psychology Press/Taylor & Francis) 1999; Edward J. Coburn, *Programming with Visual Basic 6* (Brooks-Cole/TL) 2000; Paul R. Burden, *Methods for Effective Teaching* (Allyn & Bacon/P); Gary D. Borich, *Effective Teaching Methods* (Merrill/P) 1998; Graham Brown et al., *Introduction to Food and Beverage Service*, 1st Ed. (P).

<sup>19</sup> Success of a huge raid for the Association of American Publishers was publicized in the form of a press conference by MDTCA officials in June 2002.

## **Less Progress Noted on Government Self-Initiation of Raids, Arrests, Deterrent Detentions, and Results in Civil Actions**

Somewhat less impressive has been the resolve of the government to initiate raids on its own or to take deterrent actions, including arrests of suspected pirates. The recording industry reports that sometimes the MDTCA has conducted raids on its own initiative, but the results of these have not always been transparent. MDTCA has done little on behalf of other industries, such as the book publishing industry, which faces more underground pirate distribution than in the past (which has traditionally been dominated by copy-shop photocopy piracy).<sup>20</sup>

Another abiding problem has been the lack of authority for MDTCA personnel to arrest suspected pirates. The Police have arrest powers, but MDTCA traditionally does not, although the industries support the government's apparent intent to enact legislation that would give MDTCA arrest powers, hopefully to be implemented sometime in 2003. In the meantime, the Attorney General has directed MDTCA to make citizen arrests, but MDTCA officers have found this difficult in practice, and as of January 2003, MDTCA had made no arrests under copyright.<sup>21</sup> Another area of concern is the fact that those arrested are let out on bail, the amounts of which never exceed RM 3,000 (US\$789) to RM 4,000 (\$984)—totally non-deterrent.

Problems have also been noted in civil actions against music, book, and end-user software piracy. In the music cases, pirate vendors often abscond, or their identity is unknown, leaving no defendant to sue. Even where there is a defendant, right holders have noted the high expense of obtaining a search and seizure order, which apparently does not guarantee that the owner of the premises will not refuse entry. In raids carried out on behalf of the Association of American Publishers, MDTCA officers sometimes refused to remove all the infringing goods, as they are: 1) afraid of retaliation against the complainant if the complainant stays too long in the premises; 2) convinced that the amount seized was enough to charge the pirates; and 3) the officers wanted to finish the raid as quickly as possible. It is inexcusable for the Malaysian authorities to leave behind any infringing goods so pirates can essentially continue their illegal activities. The dangers of a raid should be mitigated by calling in the Malaysian police for assistance.

In cases against end-user software piracy, in which civil cases are brought in parallel with criminal cases brought by the MDTCA, the civil cases invariably get bogged down in court, are expensive to bring, and have little deterrent effect in the long run. There are no statutorily imposed deadlines in civil cases, and, as a result, such cases can average between two and four years to resolution. Anton Pillar (AP) actions are risky and expensive to bring, and are ineffective, due to inordinate delay, since it is the practice in Malaysia that permission is needed before entry, and defendants are informed to obtain legal advice and given time to consult with

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<sup>20</sup> Piracy rates for publishers are now roughly 50%, with evidence of exports of published materials as far away as the Middle East and the U.S.

<sup>21</sup> Section 117 of the Criminal Procedure Code (CPC) gives police officers the power to remand an accused for up to 14 days to investigate the offense and others involved in it. At present, since the MDTCA officers don't have arrest powers, they lack the logistical support (e.g., a lock-up, handcuffs, etc.) and lack expertise to interrogate those arrested. One example of a raid leading to unsatisfactory results occurred in 2001 in the Batu Caves against a licensed optical disc plant by censorship authorities. The plant was caught in possession of pornographic VCDs and pirate music discs, but no arrests were made and the plant continued operations, as usual, post-raid. After operating for a while longer, the plant was subsequently raided again toward the end of 2002, found to be infringing copyright, and the machines were sealed.

a lawyer before entry (providing an opportunity to remove infringing software from computers). It also takes the courts two to three weeks from the date of filing of an application to approve such an action. Another concern is that proof of copyright subsistence by way of an affirmation of affidavit or statutory declaration pursuant to Section 42 of the Copyright Act may not be sufficient if a case proceeds to trial.

#### MALAYSIA CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	SOUND RECORDINGS <sup>22</sup>
Number of raids conducted	976	227
Number of VCDs seized	1,612,506	
Number of DVDs seized	246,773	
Number of CD-Rs seized	618,570	
Number of investigations	150	
Number of VCD lab/factory raids	11	
Number of cases commenced by MDTCA	962	487 <sup>23</sup>
Number of cases commenced by Police, Customs, censorship board	14	224 <sup>24</sup>
Number of Indictments	Unclear	27
Number of defendants convicted (including guilty pleas)	2	4 <sup>25</sup>
Acquittals and dismissals	2	2
Number of cases pending	800	21
Number of factory cases pending	24	12
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	28	
Up to \$1,000	19	
\$1,000 to \$5,000	8	2
Over \$5,000	1	1
Total amount of fines levied (in US\$)	48,538	

## Post-Raid Investigations and Prosecutions Fail to Deter Piracy in Malaysia

While appreciating the greater resources being devoted to enforcement on the ground in Malaysia, the enforcement system falters post-raid, due to lack of investigative or prosecutorial

<sup>22</sup> Because of prosecutorial bottlenecks and backlogs, the number of cases represented in the chart is the total number of cases brought between 1997 and November 2002.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.

expertise and an overburdened docket of cases to bring forward. The results are a Malaysian government in 2002 that clearly worked harder, but not smarter. The failure to effectively prosecute piracy cases 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 the problems. Meanwhile, pirates in Malaysia, who essentially have no fear of being prosecuted, have become more emboldened, and 2002 was fraught with instances of right holders or enforcement officials being threatened with violence.

After a raid is carried out, MDTCA or Malay Police investigators must prepare the case before charges can be filed. The processing path for these cases is bifurcated depending upon whether the Police or MDTCA conducted the raid giving rise to the charges. The MDTCA pathway remains hopelessly backlogged, since there are no strict deadlines for prosecutors to file cases after a raid.<sup>26</sup> While 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. Cases can also be held up at the MDTCA investigation stage (i.e., preparation of the documents for the prosecutor).<sup>27</sup> Even in cases in which this consent is obtained, the case has then traditionally been turned over to an MDTCA prosecuting officer. These officials are often not legally trained; in some cases they are simply investigating officers or office administrators who have been assigned to this duty. As a result, these officials generally lack the skills to handle complex legal questions, a fact well known to defendants and their counsel. Accordingly, MDTCA officers are under considerable pressure to resolve piracy cases under other statutes (e.g., the Price Control Act, or the Trade Descriptions Act), which avoids complex legal issues but which results in purely nominal penalties (these laws allow the offender to pay a compound fine, usually a very nominal, insignificant amount), in which event the case never goes to court.<sup>28</sup> By contrast, cases originated by the Police often fare better because they are handled by Public Prosecutors in the Attorney General's Chambers who have law degrees. Even in such cases, long delays are the norm, as normally copyright cases are given low priority and usually postponed, and only a tiny minority of cases result in formal charges, and even fewer, in convictions.<sup>29</sup>

A common problem with prosecutions in Malaysia involves cases in which the pirate successfully avoids a summons or has absconded before being charged in court.<sup>30</sup> In most such

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<sup>26</sup> In raids conducted by the MDTCA, the raiding officer orders the seizure of pirated goods and records the name of the business owner, takes statements from the owner, and then applies to the court to issue a summons against the owner. The MDTCA officer is then personally to serve the summons on the owner, but owners avoid being personally served in order to get a "discharge not amounting to an acquittal" (DNAA), whereupon the case usually goes dormant. Thus, MDTCA almost never gets a conviction.

<sup>27</sup> For example, in recording industry cases, there are huge backlogs of cases. For example, in 2000, documents were submitted in 94 cases, resulting in only 11 charges being brought and no convictions. In 2001, MDTCA accepted documents for 177 cases, resulting in 15 charges being brought and one conviction. In 2002, 51 cases were brought before the Ministry, resulting in only one case in which charges were filed. Notwithstanding inquiries to MDTCA regarding the status of these cases, there is no feedback.

<sup>28</sup> Most cases are resolved in this manner for the entertainment software industry.

<sup>29</sup> The conviction statistics include guilty pleas and don't generally include completed trials.

<sup>30</sup> For a case to proceed to court, magistrates require that a summons be personally served on a pirate. This is straightforward if the pirate has been arrested and remanded under Section 117 of the Criminal Procedure Code ("CPC"), but in a majority of cases, no arrest has been made and the defendant may have disappeared, since the magistrate grants consent to charge as much as three months after the raid (provided that documentation is

cases, a summons cannot be served on the pirate, resulting in a “discharge not amounting to an acquittal” (DNAA). Once a DNAA has been issued by the court, the case remains “dormant” unless, e.g., miraculously, the officer in charge of the summons happens to “run into” the pirate by accident.<sup>31</sup> In most cases, the raid goes for naught, as MDTCA does not devote resources to tracking down disappeared pirates. In a recent development that may bode well for future enforcement, the MDTCA legal office has apparently directed that pirates be charged in court three days after a raid, or otherwise, a warrant of arrest could be issued against the pirate.<sup>32</sup>

IIPA strongly believes the appropriate next step is for the Malaysian government to devote the resources to develop a cadre of highly qualified, specialized, well-trained unit of public prosecutors to handle all copyright piracy cases. Such a unit should be made up of those who already possess the legal skills and experience to handle such cases, but may need further training on the complexities arising in copyright cases. IIPA’s members stand ready to assist in the training of such a team once assembled.<sup>33</sup> In the interim, IIPA recommends that, at least in the case of large-scale infringement cases involving CD plants and warehouses, prosecutors from the Attorney General’s Chambers be made available, and notes that some copyright cases arising out of Police raids are already handled in the AG’s office, leading to better results in court than those arising out of MDTCA raids. In practice, MDTCA officials rather than the AG’s Chambers continue to handle some large factory-raid cases.<sup>34</sup>

## **The Court System Fails to Expedite Justice Against Copyright Piracy and Fails to Impose Deterrent Penalties on Pirates**

As noted, few cases ever proceed to trial in Malaysia, which is close to the heart of the enforcement problem. Due to failures at the prosecution and court stage, Malaysia’s huge investment in enforcement in the past couple of years has been, sadly, wasted.<sup>35</sup> Any case that does survive the gauntlet, and which can weather a succession of additional delays in the judicial process, is ultimately brought before a court whose judges are almost always unfamiliar with the copyright law. For example, the presumptions provisions (subsistence and ownership of

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complete, e.g., for the Association of American Publishers, after presumption of copyright ownership information and the “examination report” have been handed to the MDTCA).

<sup>31</sup> One industry reports that even if the infringer is found by the officer for a summons, the infringer can often avoid being called into court by paying the officer. By contrast, in Singapore, if industry is unable to personally serve a summons, it can apply for a “substitute service” to compel the owner to answer the summons in court. If the owner does not answer the summons, the court will issue a warrant of arrest against the owner.

<sup>32</sup> Apparently, pirates would be charged without any documentation as to copyright ownership in the seized materials, but the Magistrate would set a date by which all documentation had to be completed.

<sup>33</sup> In fact, the Business Software Alliance, recognizing that it may be a while before dedicated prosecutors from the AG’s Chambers or a newly formed group of prosecutors are available, has plans to provide training in February 2003 to a team of MDTCA officers who are most likely to present its cases in court. The Motion Picture Association has also participated in seminars for both prosecutors and judges.

<sup>34</sup> For example, Prosecuting Officers from the MDTCA, not from the AG’s chambers, handled two plant cases recently, a cassette manufacturing case in Penang (Summons No. 62-74-4-2001) and the Swetch case in Johore Baru. In only two known plant cases in Kuala Lumpur and P. Jaya (the “Ting Sony” and the ODVD case) did prosecutors appear from the AG’s Chambers.

<sup>35</sup> For example, as noted above, because a defendant must be personally served with a summons to answer charges of infringement, defendants actively avoid accepting service of summons.

copyright) remain, as interpreted in practice, tilted toward defendants.<sup>36</sup> In practice, many judges still have allowed defendants to insist on live testimony and cross-examination of the party submitting an affidavit with respect to presumptions. 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 expedite trials to bring them to quick closure,<sup>37</sup> nor of the need to impose deterrent sentences, even in the handful of cases which actually proceed to that stage. For example, there has never been a criminal conviction in a disputed case for corporate end-user piracy,<sup>38</sup> although there have been five convictions for book piracy, albeit with paltry, non-deterrent fines meted out.<sup>39</sup>

IIPA recommends several corrective steps or actions to begin the process down the road to meaningful judicial reform. First, the Malaysian government should follow the lead of several countries in the region by establishing and developing a cadre of highly qualified, specialized, well-trained judges and prosecutors in the area of copyright. Even better would be immediate consideration of the establishment of a specialized intellectual property court. Malaysia's ASEAN neighbor Thailand has had considerable success in using a specialized court to resolve seemingly intractable problems similar to those that 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. Such a court would hopefully understand, for example, the importance of swift evidence gathering, and the need for preventive measures (such as Anton Piller orders) that avoid the destruction of evidence. Such a group of trained judges would also recognize the commercial nature of the crime of piracy, and would therefore understand the important role deterrent sentencing plays in lowering piracy levels.

Second, measures should be taken to ensure that pirates do not get away. Measures mentioned above regarding the ability to dramatically speed up the time after a raid in which the pirate would be charged with the crime, and thus, decrease the possibility that the pirate will be able to abscond, will be an extremely helpful first step. Courts should also be empowered to try pirates and convict them *in absentia*. Thereafter, a warrant of arrest would be issued, and cooperation from the police would be made available to assist in the arrest of the convicted pirates. Further, pirates released on bail must be required to report to the nearest police station every day, pending the prosecution of the piracy case.

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<sup>36</sup> The 2000 amendment to Section 42 was actually intended to help copyright owners by allowing for a statutory declaration to be affirmed by an agent authorized in writing by the copyright owner. Courts have largely disregarded Section 42. In the meantime, they continue to employ an abundance of caution with respect to presumptions, and have required prosecutors to prove subsistence issues through other documents such as record company receipts of first publication, letters of authority, or sometimes even live testimony of right holder representatives. Failure to comply with these requirements has in some cases led to acquittals.

<sup>37</sup> For example, for the Business Software Alliance, seven of eight end-user piracy cases remain pending, some dating back as far back as 1997. Some of the delays are due to numerous requests for adjournments by defense counsel or even the prosecutors themselves which are readily granted by the courts.

<sup>38</sup> Consequently, there is little incentive for businesses to legalize, as they do not feel threatened by any consequences for using pirate software.

<sup>39</sup> The average fine in five convictions obtained in book piracy cases since 1996 involving U.S. publishers was about US\$800, hardly sufficient to deter a pirate photocopying operation.

Third, sentencing guidelines should be issued and strictly enforced for maximum deterrent effect.<sup>40</sup> For example, if Malaysian courts were to adopt the sentencing practices of the judiciary in Hong Kong and Singapore, where custodial sentences are handed down without exception and high fines are imposed, a level of deterrence would surely result. By contrast, in the first prosecution of a CD plant in Sungai Buloh in June 2001, the defendants had been charged with 1,000 copyright offenses involving music and films. The accused pleaded guilty to all charges, but was fined only RM100,000 (US\$26,316), or RM10 (US \$2.63) per charge, a mere 0.01% of the maximum possible fine under the Copyright Act. The defendant did not spend a day in jail, and his machinery was returned. Such a result was anything but a deterrent to further infringement, given the undoubtedly huge profits reaped by the pirate in this case.

Fourth, a systematic review should occur of any acquittals and inadequate sentences, including immediate disclosure of grounds for the judgment (necessary in order to appeal a case) as well as the prosecutors' reasons for not appealing a case (including appeals of corporate end-user piracy cases in which imprisonment is not imposed). For example, in the CD plant case discussed above, an appeal was filed, but the Attorney General has still not received grounds for the earlier decision from June 2001.<sup>41</sup>

## **A Proposed New Sticking Program Demonstrates Government Will, But Raises Some Concerns**

The Trade Description (Original Label) Order 2002 went into force on January 15, 2003,<sup>42</sup> introducing a program requiring all distributors to apply stickers available from the government inside the shrinkwrap of all copies of works distributed in Malaysia (whether manufactured locally or abroad) on optical discs (VCDs, DVDs, CD-ROMs, LDs, MDs), including imported discs. Recognizing the government's efforts to curb piracy through the use of stickers, but having experience dealing with such programs in other countries and around the world, the copyright industries express doubts about the overall effectiveness of such a sticking program for anti-piracy purposes. For one, such a program may be prohibitively costly for the

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<sup>40</sup> For an example of a case in which deterrence was not achieved, in one case in 2001 involving end-user piracy of software, the AG's office accepted a plea bargain reducing charges of an end-user pirate from 20 counts to two counts. Section 41(1)(i) of the Copyright Act currently imposes a fine of up to RM10,000 (US\$2,632) for each infringing copy, and/or imprisonment for a term of up to five years, and for any subsequent offense, a fine of up to RM20,000 (US\$5,263) for each infringing copy and/or to imprisonment for a term of up to ten years. In this instance, the not only was imprisonment not imposed, but the fine was reduced to less than a cost of doing business. In early 2002, the Business Software Alliance received assurances from the AG that this would not reoccur without BSA's approval.

<sup>41</sup> Another unfortunate case result was recently handed down in the KTA Sarawak case, involving corporate end-user piracy. KTA Sarawak was acquitted in November 2002 of charges of end-user piracy. The court reported that the acquittal was based on the following: 1) the prosecutors had not properly secured all the evidence; 2) possession of the infringing software required general knowledge on the part of KTA, not proved by the prosecution; 3) the affidavit was deemed inadmissible relating to copyright of the software; and 4) KTA had acted in good faith and had no reasonable grounds for knowing that copyright was infringed (since KTA had issued a Memo and Handbook Warning to employees not to use infringing software prior to the raid). After consultation with BSA, the MDTCA filed notification of its right to appeal the case, and it is expected that the focus of the appeal will center on the issues of "knowledge" and the "good faith/reasonable grounds" on the part of KTA. Many other appeals cannot proceed since the grounds of judgment were never provided in writing, even years after the verdicts were rendered.

<sup>42</sup> The regulation is found under Section 11 of the Trade Descriptions Act and requires the application of government-issued holograms.

government to run.<sup>43</sup> Secondly, such programs have been prone to abuse and fraud in other markets, making enforcement even more challenging.<sup>44</sup> Third, such a program will impose burdens on copyright owners, particularly on those right holders who do not manufacture in Malaysia, such as the business software and entertainment software industries. For this and other reasons, the business and entertainment software industries should be excluded from the program.<sup>45</sup> Finally, such a program must not be considered a substitute for sustained on-the-ground enforcement against piracy. IIPA will be monitoring the stickering program carefully to ensure that there is no possibility of fraud or abuse, and that the costs to right holders do not become prohibitive.

## **COPYRIGHT LAW REFORM**

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Copyright in Malaysia is governed under the Copyright Act, 1987, as amended through 2000. A major recent legislative development in Malaysia was the passage of the Optical Disc Act (2000), to address rampant optical disc piracy. Based on many of the issues raised in this report, the copyright industries collectively would like to see several changes—mostly minor—to the laws which, if implemented swiftly, would lead to positive gains in the fight against piracy in Malaysia.

### **Enact Technical Amendments to Optical Disc Act**

Several technical amendments to the Optical Disc Act (2000) would go far to improve enforcement against optical disc piracy. Such changes should include:

- making the sale of optical discs without SID code an offense under the Act;<sup>46</sup>
- requiring that samples (“exemplars”) be obtained from licensed plants, by making it a term of the license for the plant to provide sample discs at regular intervals;
- fully authorizing enforcement officers under the Act to seize sample discs when conducting inspections;
- authorizing associated representatives (such as RIM, MPA, etc.) to accompany officers as a matter of right when conducting an inspection on either a licensed or unlicensed plant, to confirm the source of the discs, and to maintain the chain of custody of the discs;
- providing right holders the opportunity to receive sample discs for forensic examination;

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<sup>43</sup> Security stickers will apparently be sold at RM 0.10 (US\$0.02) during the initial window period and thereafter be increased to RM 0.20 (US\$0.05).

<sup>44</sup> IIPA has heard reports that stickers may already be showing up on auction, which, if true, would indicate a terrible start to this program.

<sup>45</sup> For example, Business Software Alliance member company product is packaged in such a way that already makes legal product readily distinguishable from piracy product.

<sup>46</sup> While Article 19(1) provides, “[a] licensee shall cause each optical disc manufactured by him to be marked with the manufacturer’s code . . . ,” contravention of which is made a punishable offence, sale of such a disc without manufacturer’s code must also be prohibited under the Act to make it as strong as possible.



- authorizing in the Act that enforcement officers have the authority immediately to enter a plant, including, where necessary, by forcible entry (to avoid the phenomenon whereby plants often delay entry to officers in order to dispose of infringing copies);
- providing for automatic revocation of a license for any plant committing an offense under the Act;
- ensuring that the practice of “disc gouging” or “disc scouring” is an offense under the Act.

## **Enact Minor Amendments to the Copyright Act That Will Significantly Enhance Government Enforcement Capabilities**

Several minor amendments (or clarifications through internal documents or regulations) to the Copyright Act would address several significant shortcomings in the current ability to effectively enforce and provide deterrence against piracy. Such changes should include:

- making copyright infringement a public offense (or confirming the same) so that MDTCA officers can initiate investigations *ex officio* and call relevant industry representatives to identify their works once a seizure has occurred;<sup>47</sup>
- imposing mandatory minimum jail sentences under Section 41 of the Copyright Act;
- further amending Section 42 of the Copyright Act, so that affidavits of subsistence and ownership of copyright will be accepted by the courts (as sufficient to establish *prima facie* the subsistence and ownership of copyright), so that the burden of proof is shifted to the defendant regarding such presumptions,<sup>48</sup> and so that defendants shall bear all costs and expenses in any attempt to dispel the presumption. Section 42 should also be amended to permit agents (in addition to copyright owners) to file such affidavits. Affidavits made before any person having authority to administer oaths should not be subject to the further procedural requirement of having that statement “legalized,” as is presently the case.
- amending Section 52 to permit the disclosure by enforcement authorities to copyright owners and their counsel of documents and other evidence known to them, for the purposes of pursuing court proceedings such as a civil action or an offense under some other law;
- amending Section 36 to reflect a presumption that infringing copies found in the custody possession and control of any person are intended for distribution to the public by sale or other transfer of copyright, and an act of infringement shall be deemed to have been committed.

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<sup>47</sup> It should be noted that the intent of the Act appears clearly to provide for action to be taken by MDTCA and the Police without the need for a right holder complaint. For example, Section 44 of the Copyright Act authorizes MDTCA officers to enter premises without a warrant in certain circumstances. Section 50 of the Act gives officers general powers to investigate, including seizing infringing copies from open premises, which also do not require a warrant.

<sup>48</sup> One case in which Section 42 was properly applied by the trial court involving an Indian film is now before the High Court on appeal. The outcome of that appeal, expected in 2003, could indicate whether it is necessary to enact a further amendment to achieve the purpose of the 2000 legislation.

## **Enact Copyright Act Amendments Enabling Malaysia to Join the WIPO “Internet” Treaties**

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 “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Changes included recognizing that the copyright owner’s exclusive right of communication to the public embraces the right to make works available on demand (for instance, 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, and to position itself as a leader within the APEC and ASEAN communities in the adoption and implementation of modern intellectual property regimes, 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.<sup>49</sup> These goals are especially urgent now that the WCT and WPPT are in force and are now international minimum standards for the e-commerce environment.

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<sup>49</sup> Coming out of the October 2002 APEC Ministerial in Los Cabos, Mexico, was the “Statement to Implement APEC Policies on Trade and the Digital Economy” (Leaders’ Statement), including the following statement regarding WIPO treaties ratification/implementation:

[APEC Member Economies] will ratify and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty as soon as possible. If an Economy is a non-Member of WIPO, it will implement the provisions of these treaties as soon as possible. For any Economy in the process of reviewing accession or implementation, it will commit to completing that review as soon as possible.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# PERU

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Peru stay on the Special 301 Watch List in 2002 due to high piracy levels harming the legitimate copyright sectors. We request that the U.S. government continue high-level bilateral engagement contacts with Peru on copyright issues.

**Overview of key problems:** Effective enforcement—on both the administrative and the criminal levels—remains the copyright industries' primary concern in Peru. Estimated trade losses due to piracy of U.S. copyrighted materials in Peru were \$93 million in 2002. For the recording industry, piracy has devastated the market such that, in effect, no legitimate record businesses are operating in Peru. More police actions are needed, prosecutors must actively pursue piracy cases, and judges must impose deterrent sentences for Peru to meet its multilateral and bilateral copyright obligations. Administrative end-user actions should be INDECOPI's primary focus and such actions need to be improved so that deterrent fines are issued and collected. Peru also needs to improve its border controls. Progress is being made on the government's legalization of computer software; the Government Software Legalization Decree was published on February 13, 2003, and requires all public government entities to use legal software and establish effective controls to ensure such legal use between now and March 31, 2005.

**Actions which the Peruvian government should take in 2003:** To better enforce copyrights, the Peruvian government should:

- Make anti-piracy an issue of national priority;
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials used in making those products;
- Pursue prosecutions and issue expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- Dedicate significantly more resources to criminal IPR enforcement (e.g., budget reallocation, 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);
- Conduct regular and concerted anti-piracy actions on the streets of high-traffic areas for piracy in Lima, specifically Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados;
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including retailer actions;
- Have SUNAT work jointly with other government entities to fight piracy in corporate settings (e.g., SUNAT could request companies to provide information about licensing and software when it conducts its own inspections, and send such information to INDECOPI if it believes that a copyright violation has been committed);
- Improve the prosecution of software end-user actions by INDECOPI.

**PERU**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	70.2	98%	57.8	97%	55.0	96%	50.0	85%	50.0	85%
Business Software Applications <sup>2</sup>	10.3	58%	11.2	60%	12.6	61%	22.2	63%	30.5	64%
Motion Pictures	4.0	50%	4.0	50%	4.0	75%	4.0	65%	4.0	50%
Entertainment Software	NA	NA	NA	NA	3.8	70%	NA	NA	NA	NA
Books	8.5	NA	9.0	NA	9.5	NA	10.0	NA	10.0	NA
<b>TOTALS</b>	<b>93.0</b>		<b>82.0</b>		<b>84.9</b>		<b>86.2</b>		<b>94.5</b>	

Peru is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), and the recently adopted Andean Trade Promotion and Drug Eradication Act (ATPDEA).<sup>3</sup> These programs have standards of intellectual property rights which must be afforded to U.S. copyright owners. Responding to the U.S. government's request for comments regarding countries' eligibility for ATPDEA benefits, IIPA reported that Peru had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.<sup>4</sup> Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Peru. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Peru's actions to meet the IPR standards of the ATPDEA before designation was officially conferred. IIPA understands that Peru indeed made general commitments (a) to reduce piracy and (b) implement a software legalization decree by February 28, 2003.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$13.5 million at 59% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> For the first 11 months of 2002, \$157 million worth of Peruvian goods (or 9% of Peru's total imports) entered the U.S. under the duty-free GSP code, representing an increase of 154.3% over the same period in 2001. During this same 2002 time period, an additional \$309.1 million worth of Peruvian goods entered the U.S. under ATPA, representing a 54.4% decrease from the same time period in 2001. For more information on the history of Peru's status on Special 301, please see Appendices D and E of this submission.

<sup>4</sup> IIPA Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September 16, 2002; available on the IIPA website at [http://www.iipa.com/rbi/2002\\_Sep16\\_ATPDEA.pdf](http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf).

## COPYRIGHT PIRACY IN PERU

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The legitimate record industry in Peru has almost entirely vanished in the last two years. The estimated piracy level is now at 98%, one of the highest music piracy rates in the world. Pirate audio product in Peru appears in all formats—cassettes, CDs and now mostly CD-Rs (recordable CDs). Estimated trade losses due to record piracy in Peru rose to \$70.2 million in 2002. In recent years, many recording companies have closed because they could not compete with the overwhelming levels of piracy. Customs figures have indicate that there were more than 10 blank CD-Rs legally imported into the country for every single CD sold in the country. Record 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 produced locally. APDIF PERU also works with COPERF, the Peruvian Recording Industry Association, and continues to run an anti-piracy campaign which results in police raids and the seizures of pirate product.

For the business software industry, the major challenge remains illegal duplication of business software within larger Peruvian private sector companies. The Business Software Alliance (BSA) reports that this problem of corporate copying has declined over the past five years, but it continues to be a serious problem, particularly within small and medium-sized organizations. Unfortunately, during the last seven months, INDECOPi's priority has shifted towards channel actions. INDECOPi should refocus its administrative enforcement priorities on end user piracy. To be sure, reseller piracy remains a very significant problem as well. Despite an impressive number of raids by the criminal justice authorities, pirate business software and other copyrighted products are openly available in commercial centers such as Galerías Garcilazo and Wilson, in Lima. Pirates frequently move their production facilities around Galerías Garcilazo and Wilson to evade police raids. The level of illegal use of business software in Peru was 58% in 2002, with losses due to the piracy of U.S. business software estimated to be \$10.3 million. These stable levels are due to the industry's effective anti-piracy program, despite only modest growth in the market for legitimate software.

Video and optical disk piracy is the most significant audiovisual piracy problem in Peru and is rampant in both video stores and street vendors, according to the Motion Picture Association of America (MPAA). The piracy situation in street markets is so pervasive that thousands of pirate videos and optical disks are sold in the street market one block away from the police headquarters. In addition to street sales, 80% of all video stores, estimated at 800, rent pirate videos. The piracy level continues at a high 50% level. Pirate videos and optical disks sell for approximately US\$2.00. Small-scale pirate duplication laboratories supply both video stores and street markets, and there is also a high incidence of back-to-back copying in video stores. Sales of optical disc pirated materials over the Internet has significantly increased. It has become usual to receive e-mails offering home deliveries of pirated material with increasingly high quality. DVD parallel imports have been also detected. Cable operators in the provinces generally use satellite TV decoders to steal signals and distribute protected audiovisual copyrighted programming via cable. Finally, pirate exhibitors use videos and optical disks for unauthorized exhibitions, damaging the theatrical distribution. Cease and desist letters have been sent, even to the public universities, with limited success. Losses to the U.S. motion picture industry due to audiovisual piracy in Peru are estimated to be \$4 million in 2002.

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 \$8.5 million in 2002 due to the difficult economy, not because of a decline in book piracy.

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.

## **COPYRIGHT ENFORCEMENT IN PERU**

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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. Unfortunately, the criminal and administrative enforcement systems simply fail to deter piracy.

### **Criminal Enforcement**

Deterrent criminal penalties and effective enforcement action by the police, prosecutors, and the administrative and judicial system remain essential, and much improvement in these areas is needed.

**Police actions:** Unfortunately, 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 is full of all kinds of pirate product. The IPR industries agree that there is a strong need to allocate public resources to support the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations.

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).

**Prosecutions:** Prosecutors have been unable to move copyright cases along and judges have issued only few, non-deterrent sentences. In January 2003, a new special intellectual property rights prosecutor was appointed (Dr. Fredy Santiago Irigoyen) to replace the previous prosecutor. The new prosecutor's jurisdiction is still limited to metropolitan Lima and the northern suburbs, but it excludes the Province of Del Callao, which comprises the port and six other areas, and north Lima, which includes several of the most populated areas of Lima. The prosecutor handles matters of intellectual property rights exclusively; he seems willing to pursue copyright infringement cases, but is overwhelmed by a large caseload and budget cuts.

On November 28, 2001, the Public Ministry and INDECOPI created a Special IP Prosecutor's Office, and appointed two special prosecutors. Nevertheless, this office lacks effective

public budget support and will face severe problems in improving criminal enforcement.

**The courts:** Few criminal cases reach the Peruvian judiciary. When they 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 adequate penalties.<sup>5</sup> Under Article 57 of the Peruvian Criminal Procedures Code, sentences of four years or less are suspendable; the amendments made to the Criminal Code in 2002 did not change this. As a result, the courts usually 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 suspended if the defendant files an appeal).

During 2002, MPA conducted two raids in Peru. One of them was a criminal action filed in August 2002. The raid has been conducted by the special prosecutor's office in the street market of Las Malvinas, seizing over 7,000 illegal videos. MPA obtained 19 sentences of 1-2 years of imprisonment from older cases during this year. All of them were suspended. As such, the industry has no confidence in the judicial system.

In 2002, BSA commenced nine criminal actions through the public prosecutor against resellers suspected of software piracy. In addition, the police self-initiated more than 30 raids to reduce piracy in pirate bazaars such as Galerías Garcilazo and Wilson, Lima. Regarding the 2001 pending criminal cases, the court issued three decisions, two of which included prison sentences of two years and the third one included a prison term of one year. However, the prison terms were suspended because, under Peruvian law, only prison terms of four years or more are actually imposed.

## **SUNAT (National Tax Authority)**

For the first time ever, SUNAT participated in several criminal copyright infringement cases in 2002. On April 29, SUNAT and INDECOPI raided 178 stands at Galerías Wilson, a shopping center known for the sale of counterfeit products. 700 policemen and 12 prosecutors conducted the raid, seizing 25 tons of software and computer equipment. Since no invoices were produced to justify the software found at the various stands, SUNAT ruled that the crime of tax evasion had occurred. This was the largest series of computer software piracy raids in Peruvian history. Despite this breakthrough, SUNAT has since been reluctant to take further action.

## **INDECOPI**

Over the last three years (2000-2002), the BSA and INDECOPI have participated in successful, jointly branded software legalization campaigns in Peru, including joint publicity bearing the INDECOPI and BSA logos. The business software industry also continues to work with INDECOPI on many of its end-user actions. Despite being an effective entity, INDECOPI charges a discriminatory case fee to carry out inspections in software piracy cases, alleging that it needs to charge in order to pay the fees of the experts that accompany such case. The case fee is 60%

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<sup>5</sup> Article 217 of the 1996 copyright law provides for a penalty of not less than two years or more than six years in jail, and a fine of 30 to 90 times the average daily income for most infringements. Other articles provide even higher penalties. For acts involving commercial purposes, Article 218(d) specifies that the sanction is not fewer than two years or more than eight years in jail and fines of 60 to 100 average daily income wages. While these on-the-books provisions are strict, they are not actually imposed as a matter of practice by Peruvian judges.

higher than the one imposed on other copyright industries. Additionally, INDECOPi fails to compel collection of the fines it assesses.

A few years ago, the film industry began 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. In some cases, fines issued against pirates amounted to \$2 per infringing tape; the cost of a pirate tape is \$2, so this administrative fine can hardly be seen as a compelling deterrence to video piracy. In September 2002, MPA filed an administrative complaint with INDECOPi to support the new head of the Copyright Office (Dr. Martin Moscoso) in its efforts to conduct a joint industries raid in Arequipa, the second biggest city in Peru. The Copyright Office seized over 3,000 videos, among other illegal products.

The recording industry does not bring administrative enforcement cases in Peru.

The entertainment software industry had some success working with INDECOPi in 2001, with respect to the seizure of counterfeit goods being shipped into the country. In November 2001, INDECOPi along with customs officials, seized 12 containers full of counterfeit *Nintendo* and *Pokemon* products. Although INDECOPi conducted a hearing into the seized items in February 2002, none of the importers showed up. The seized products are being held for destruction pending INDECOPi's investigation.

**Overlapping jurisdiction with police in 2002:** During the last six months of 2002, the jurisdiction of INDECOPi's Copyright Office overlapped with the IP prosecutor (Fiscalía) in filing cases against resellers. This new issue has caused some delays in conducting software end-user cases. End-user piracy continues to be the greatest problem and BSA's main focus because entities frequently load copies of software onto more PCs than authorized by license. End-user piracy is present in both academic and commercial environments throughout the country.

**Case resolutions in software actions and fine collections:** The business software industry, unlike the audiovisual and the recording industries, has relied significantly on administrative actions by INDECOPi against end-users, and the level of success achieved over the years has been improving, although there are still some problems, mainly with the Copyright Office.

BSA prefers INDECOPi enforcement because its administrative proceedings continue to be faster than criminal proceedings, which seldom reach indictment and trial.<sup>6</sup> In 2002, INDECOPi's Tribunal finally decided all BSA cases still pending before the Tribunal, some of them pending since 1998. In 2002, BSA commenced 28 end-user administrative actions through INDECOPi. Presently, INDECOPi has six cases awaiting decision.

In 2002, INDECOPi started imposing deterrent fines against end-users that first reached a settlement with BSA but later chose not to comply with the settlement terms. The fine imposed is 50% of the amount due under the settlement, with the possibility of higher fines for non-compliance. Despite this improvement, the Copyright Office continues to fail to collect the fines once imposed, so the end-user has little incentive to comply with the decision. This is precisely what happened in the Municipalidad del Callao, Cepeban and Transamerica cases. The Copyright Office also fails to

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<sup>6</sup> 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.



assess and collect the fines when the end-user refuses the inspection, such as with Mensajería El Rayo and Redesin. A further example of INDECOPI's surprising lack of recent cooperation is the CESCO case, where the defendant, CESCO, entered into a settlement agreement with BSA, under the auspices of INDECOPI. When CESCO's check failed to clear, BSA asked that CESCO pay by wire transfer. CESCO refused to do so, and INDECOPI refused to require the company to meet the payment stipulated in the settlement agreement, or indeed even to hold another meeting, claiming the matter had been resolved. BSA will now have to seek payment through the slow and inefficient civil court system.

## **Customs**

Border measures in Peru are inadequate to stop the flow of pirated material into the country. Interventions by customs authorities SUNAT (formerly known as SUNAD) to seize suspect shipments are few. SUNAT has been working jointly with INDECOPI to take action on the ground to interdict 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.

On a slightly positive note, an IDSA member company, in cooperation with the Peruvian Customs Office, was able to seize a huge shipping container of counterfeit videogame products belonging to a Lima importer. The confiscated merchandise included a variety of products including educational computers, keyboards, joysticks and video games. A total of 5,500 video game systems with built-in Nintendo video games were seized. The products were all exported from China.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **1996 Copyright Law**

Peru's copyright law (Legislative Decree No. 822) 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.<sup>7</sup> 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

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<sup>7</sup> 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 civil and criminal enforcement standards found in NAFTA and TRIPS.

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.

## **WIPO Treaties**

Peru separately deposited its instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Both WIPO treaties provide the basic framework for the transmission of content in e-commerce. Peru needs to review its laws to ensure the effective implementation of the WIPO treaties' obligations. One of the copyright industries' challenges in substantive laws is to elevate the levels of protection to account for changes in the digital environment. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a global problem. 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. While the Peruvian law is quite good, several refinements would strengthen its protections, especially in the area of technological protection measures and rights management information, both key elements of the WIPO treaties.

## **Government Software Asset Management**

On February 13, 2003, the Peruvian government published the Government Software Legalization Decree, Decreto Supremo No. 013-2003-PCM. The Decree states that all public entities should use legal software and, to that end, these entities must establish effective controls to ensure legal use of software. The Decree specifies that government agencies must budget sufficient funds for the procurement of legal software. The Decree also sets a deadline of March 31, 2005, for government agencies to provide an inventory of their software and to erase all illegal software. The Decree also delineates clear lines of responsibility and mechanisms for ensuring compliance with its provisions: the chief technology officer or other designated official must certify compliance. The Decree also provides for education campaigns aimed at public employees to inform them about licensing provisions and the content of the Legalization Decree, and further requires INDECOPI to publish a guide to ensure efficient software administration in the public sector. This is a major step forward that demonstrates the government's increased awareness of the value of managing its software assets in a systematic and thorough manner.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be

forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# QATAR

### EXECUTIVE SUMMARY<sup>1</sup>

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Qatar should remain on the Watch List. Qatar should be commended for amending its copyright law to bring it closer to compliance with international standards. However, software piracy remains at serious levels due to Qatar's failure to enforce its copyright law.

Qatar was placed on the Watch List in 1998. In 2001, with the impending WTO Doha Ministerial and with good prospects for passage of a copyright law, Qatar was taken off all lists. In 2002, Qatar was once again returned to the Watch List, with USTR noting that "high levels of end-user piracy of unauthorized computer software continues."

IIPA is pleased about passage of the new copyright law. However, while right owners in Qatar had sufficient legal basis to take enforcement actions against copyright piracy even before passage of the copyright law amendments, not a single enforcement action was initiated by the Qatari government in 2002. It remains to be seen whether passage of the new law will lead to improvements in the enforcement situation. Given the persistently high piracy rate in Qatar and the absence of any serious government action to address it, Qatar has clearly failed to meet its international obligation under TRIPS to provide "effective" enforcement that constitutes "a deterrent to further infringement." In addition, Qatar should be encouraged to accede to and implement the WIPO "Internet" treaties.

#### Required Action for 2003:

- Develop and execute an Action Plan that includes specified numbers of raids and targeted actions against retailers and corporate end-users. Specifically, any action plan should include:
  - Systematic surprise inspections at least every six months of shops that sell copyright materials, including resellers and "hard-disk loaders" (those who load software onto a hard drive of a computer without a license to do so).
  - Sustained actions against corporate end-users using unlicensed software.
  - Imposition of deterrent fines and penalties.
  - Publication of actions taken in the Qatari-based and international media.
- Instruct enforcement and copyright officials to actively address piracy in order to lower piracy rates.
- Ensure that the new enforcement office and the Copyright Bureau have adequate resources and the authority to initiate enforcement actions, and that the judicial system reinforces raids by meting out deterrent sentencing.
- Legalize software usage within the Qatari government, including public issuance of an executive decree requiring all government agencies to review and legalize their software assets.

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<sup>1</sup> For more details on Qatar's Special 301 history, see IIPA's "History" Appendix to this filing.

## **COPYRIGHT PIRACY IN QATAR**

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Qatar had the second highest piracy rate of all Middle East and Africa countries surveyed for retail and corporate end-user piracy of software in 2002. Corporate end-user piracy (in which a company purchases or obtains one copy of business software and proceeds to use it on many computers or exceeds its license) remains widespread in Qatar. Further, the Qatari government has not taken adequate steps to legalize its usage of software. Simply put, Qatar remains a safe haven for those dealing in illegal copies of software.

## **COPYRIGHT ENFORCEMENT IN QATAR**

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The central challenges for Qatar in the area of software piracy lie in parlaying the improvements written into its new copyright law into effective action against its endemic piracy problem. This involves three key challenges: Qatari government leadership, effective action against end-user piracy, and effective action against retail piracy.<sup>2</sup>

### **The Qatari Government Should Lead on Software Legalization**

Some of the greatest software success stories worldwide involve governments leading public and corporate efforts to legitimize software usage. For example, when governments issue executive orders instructing government agencies to conduct audits, assess software needs, budget for those needs, and purchase properly licensed software and support services, industry tends to follow suit. This role of government as a leader in proper use of software is critical to demonstrate leadership in a host of other information technology areas. Appropriate use of software by governments demonstrates an overall commitment to growing a local information technology industry and an information technology literate population. Managed use of software requires new thinking and understanding of the value of digital technologies. Legitimate use of software by a government also indicates a sincere commitment to implement WTO obligations.

To date, the Qatari government has failed to demonstrate strong leadership in this area. For example, the government has not even issued a decree requiring all government agencies to use only legal software. IIPA strongly encourages the Qatari government to do so. The government indicated that several years ago agencies were advised to use licensed software, and subsequently, a committee was formed to evaluate all IT usage in the government. Unfortunately, that committee seems to have become a barrier to acquisition of licensed product. Discussions are progressing with some software companies and IIPA is hopeful that arrangements to ensure legal use of software in the Qatari government will be concluded speedily. However, there are no concrete results to report to date.

### **Corporate End-User Piracy of Business Software Must Be Curtailed in 2003**

Business software piracy is widespread in Qatar. Over the years, the Business Software Alliance and others have undertaken educational efforts to promote awareness among

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<sup>2</sup> The Business Software Alliance supplied the Copyright Bureau with a list of potential raid targets in 2001. This list demonstrates the widespread retail piracy problem in Qatar. Of the 45 stores listed for investigative purposes that year, every store offered to load pirate software onto a hard drive as an incentive for purchasing a computer. The products being offered for “free” included a wide range of BSA member company products.

corporate end-users to use legal software. Despite such efforts, end-users continue to use unlicensed software at alarming rates in Qatar. This is due in part to the government's refusal to endorse enforcement actions against end-user piracy.<sup>3</sup> By refusing to support right holder efforts to enforce their rights against piracy in the corporate context, Qatari copyright officials have effectively fostered the perception that corporations can use and copy pirate software with impunity. There is no risk to their business of using unlicensed software because the government will not enforce the law.

## **Retail Piracy Problem Went Unaddressed in Qatar in 2002**

Retail piracy of business software exists on a large scale in Qatar, and the government did nothing to address the problem in 2002. The last raid conducted by Qatari government agencies was well over two years ago, in May 2000. No action has been taken since that date. In fact, over the last five years combined, only two raids have been conducted against business software piracy,<sup>4</sup> one by the Copyright Bureau against a computer store that was illegally pre-loading software on the hard disks of computers sold by the store ("hard-disk loading" piracy), and one by the police against a computer reseller shop in Doha. In both cases, no penalty was imposed on the infringer. Addressing the lack of interest and unwillingness of enforcement officials to conduct enforcement actions is critical to lowering the rate of retail software piracy.

## **COPYRIGHT LAW AND RELATED ISSUES**

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Qatar passed a new copyright law in 2002, which went into effect on October 3, 2002. This long-awaited law provides a series of important changes to Qatar's legal framework, addressing many of the deficiencies raised in previous years' filings and moving the country towards TRIPS compliance (although some concerns remain, some of which are addressed below). The law also requires that an "Office for the Protection of Copyright and Neighboring Rights" be established under the Ministry of Economy and Trade, and IIPA hopes that this office is established swiftly, with the necessary will and resources to effectively enforce copyright.<sup>5</sup>

We herein make several non-exhaustive remarks, mainly with respect to some remaining concerns regarding the protection of computer programs. First and foremost, the law fails to explicitly criminalize end-user piracy, as required by Article 61 of TRIPS (requires countries to criminalize "piracy on a commercial scale"). The law provides for criminal penalties, but fails to criminalize the unlicensed use of software in a business setting (so-called "end-user" piracy of business software).<sup>6</sup> The government must clarify that unlicensed use of software in a

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<sup>3</sup> One Qatari government official has in the past made statements opposing enforcement against corporate end-user piracy of business software. The same official is ultimately responsible for the dearth of enforcement against retail piracy and has discouraged industry from taking actions on its own against retail piracy. However, it should also be noted that correspondence in 2001 from another government official has recognized the unethical nature of piracy and has vowed to fight it. Still, little or no progress has taken place to address piracy.

<sup>4</sup> In 2001, the Copyright Bureau indicated that it was prepared to take action against software piracy. To support this effort, the business software industry provided the Copyright Bureau with a list of known end-user and retail pirates in Qatar. Not a single action was taken by the Qatari government against any business or person on the list. This result is unfortunately part of a longstanding pattern. In 1999, the Copyright Bureau announced a similar effort, BSA provided the Bureau with a similar list, and not a single enforcement action resulted.

<sup>5</sup> The Business Software Alliance (BSA) has offered on many occasions to assist the Qatari government in implementing an enforcement program; BSA maintains this offer of assistance.

<sup>6</sup> Two competing translations IIPA has seen of the text of Article 48 conflict with respect to what acts are criminalized,

business setting (corporate end-user piracy) is a criminal offence in order to comply with TRIPS. Second, Qatar must ensure that exceptions provided in the law meet the Berne “tripartite” test as incorporated into TRIPS Article 13. That test requires exceptions to be available only in “special cases,” that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. At least with respect to computer programs, the exception provided in Article 20 appears to be appropriately narrow (i.e., it appears to provide an exception to back up a computer program, but not to allow any other unauthorized activity with respect to that program).<sup>7</sup> The exception in Article 18(1) of the new law may be overly broad, since it appears to make no distinction between digital and non-digital reproductions.<sup>8</sup> The exception is specifically narrowed by the Berne “tripartite test” verbiage, but should be limited to a single analog copy for private, personal use. To the extent that any of the enumerated exceptions contemplate allowing digital uses, those must be carefully examined so that they do not run afoul of the well-established tripartite test. Third, particular to the software industry, the law contains no definition of computer program. In order to confirm compliance with TRIPS Article 10,<sup>9</sup> the category of protected works provided in Article 2(10) should be revised to provide more specificity, for example, as follows:

Computer programs, which shall be protected as literary works. Such protection shall apply to any mode or form of expression of a computer program.

Fourth, the law does not contain a presumption of copyright ownership. Such a presumption makes the prosecution of copyright pirates more efficient by reducing evidentiary burden on prosecutors and copyright owners. Without proper presumptions, defendants can abuse the court system by raising unnecessary objections with respect to basic questions of fact in the case, potentially causing lengthy delays and increasing the costs to right holders to uphold their rights. Qatar’s law should be amended to provide a presumption of ownership of copyright to the person whose name appears on the work, that shall be rebuttable only by proof to the contrary. Finally, it is unclear whether the law provides TRIPS-compatible protection for “unpublished” works.<sup>10</sup>

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one version indicating that “publication” without authorization is criminalized, which would appear to exclude exercise of many exclusive rights, and the other version indicating that to “publish or exploit” without authorization is criminalized, which appears to provide much broader coverage. Either way, unlicensed use of software in a business setting must be explicitly criminalized in order for Qatar’s law to comply with TRIPS.

<sup>7</sup> The word “adaptation” appears in one translation IIPA has seen, which would raise serious concerns if it is interpreted to allow the adaptation of a computer program without authorization of the right holder. Such an interpretation would be totally incompatible with TRIPS and the Berne Convention. IIPA seeks clarification as to the meaning of that term “adaptation” (which appears in another translation as “quotation,” which does not appear to make sense).

<sup>8</sup> One translation IIPA has reviewed uses the term “photocopying” instead of “reproduction” which would seem to exclude digital. It also appears that the exception in Article 18(1) tracks, if imperfectly, some of the language in Berne Convention Article 10*bis*.

<sup>9</sup> Although protection for computer software is specifically provided for under Article 2 (10) of the new Qatar Copyright Law, that provision does not clearly establish that software is protected “as a literary work,” nor does it clarify that the protection applies whether the program is “in source code or object code” as required by Article 10(1) of TRIPS. This is a basic and important point that ought to be spelled out in the law. “Source code” is the human-readable code used to write software. “Object code” is the set of machine readable binary instructions that a computer uses to run the program. All software is written in source code, and most business software is distributed in object code. To be meaningful, copyright protection must apply equally to source and object code.

<sup>10</sup> Article 3 of the Berne Convention, incorporated by reference into TRIPS, requires protection of both published and unpublished works.

## **Qatar Should Implement and Join the WIPO “Internet” Treaties**

IIPA recognizes the Qatari government for its efforts to bring its law into line with international treaty obligations, and recognizes steps taken to address rights in the digital age. Specifically, we note inclusion in the 2002 law certain provisions which attempt to respond to requirements in the two WIPO “Internet” treaties, the WCT and WPPT. The WCT went into force on March 6, 2002, and the WPPT went into effect on May 20, 2002.

The law addresses rights needed by right holders in the digital environment. For example, the law confirms that certain temporary reproductions are protected as such under the exclusive right of reproduction.<sup>11</sup> The law also provides a treaties-compatible “communication to the public” right for works, but, disappointingly, not for neighboring rights, including sound recording producers.<sup>12</sup> The law even attempts, but with some deficiencies, to implement a key requirement of the WIPO treaties, namely, that countries prohibit the circumvention of technological protection measures used by right holders to protect their works.<sup>13</sup>

Implementation of the WIPO treaty provisions is necessary to ensure that Qatari officials have the tools to address the important and growing problem of copyright piracy on the Internet, but are also vital to open up the vast opportunities made possible by a growing universe of electronic commerce. While the provisions in the new law do not address adequately all aspects of the treaties, IIPA encourages Qatar to begin consideration of accession legislation so that it can lead the Gulf in joining the treaties, and so that it can join the growing list of countries that now adhere to these treaties (as of February 2003, there were 39 members of both the WCT and WPPT).

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<sup>11</sup> The Article 1 definition of reproduction includes “permanent or temporary electronic storage.” The agreed-upon statement to Article 1(4) of the WCT, and corresponding provisions in the WPPT, confirm that the concept of reproduction, under Article 9(1) of the Berne Convention, extends to reproduction “in any manner or form;” therefore, a reproduction may not be excluded from the concept of reproduction just because it is in digital form, through storage in electronic memory, nor may it be excluded from the concept of reproduction just because it is of a temporary nature. While the definition in the Qatari law may in fact be too narrow (since it is not technology-neutral), it is nonetheless helpful to the extent that it illustrates the notion that in Qatar, reproductions shall be protected regardless of their duration.

<sup>12</sup> The law (in Article 41(3)) also provides a WIPO treaties-compatible distribution right for producers of sound recordings.

<sup>13</sup> The provisions contained in Article 51 make a valiant attempt to protect technological protection measures (TPMs) as well as rights management information (RMI), as provided in the WIPO Copyright Treaty, Articles 11 and 12, and corresponding articles in the WIPO Performances and Phonograms Treaty (WPPT). Unfortunately, the attempt fails with respect to TPMs in several respects. First, the act of circumvention does not appear to be covered. Second, while the provision appears to cover a fairly broad range of access controls, so-called “copy” controls appear unduly limited to TPMs that “would forbid or put a limit for reproducing a work [or other subject matter] or reduce the quality of the work.” In order for the provision to be effective as required by the treaties, it should be made applicable to all TPMs that protect against the unauthorized exercise of all exclusive rights under copyright, not limited, as in this case, to the reproduction right. Third, it is unclear that devices are covered down to the component level. Fourth, it is unclear whether indirect proof (such as how a device is marketed) or other objective tests (such as whether a device has significant financial uses other than to circumvent) can be employed to prove an illegal purpose. Under the current provision, a circumvention device seems to be prohibited if it “was designed or made especially” for circumventing a TPM. This may not be enough to provide effective relief against circumvention.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# ROMANIA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Romania remain on the Watch List in 2003 because of its ongoing enforcement and legal deficiencies that result in high piracy levels in this country.

**Overview of key problems:** The copyright industries continued to confront very high piracy rates and significant losses in Romania during 2002 because of long-standing systemic inaction by government authorities. Romanian anti-piracy efforts are uncoordinated and a low priority for prosecutors and courts reluctant to impose deterrent penalties, and these efforts are woefully under-funded. For many years the Romanian government has pledged to raise the level of commitment by police, prosecutors, border officials and the courts so that criminal cases would target large-scale operations and impose deterrent penalties. Also, the government agreed to commit the anti-piracy resources necessary for effective enforcement. But most of these promises have gone unfulfilled. Border enforcement must also be a priority as pirate products easily enter the country for sale in the local market, and also is shipped to other countries. The police have been conducting raids but Romanian prosecutors refuse to follow through and have not pushed for deterrent sentences for those cases they do prosecute. This is the major stumbling block to successful and effective enforcement. Also, Romania does not afford viable civil *ex parte* search remedies in its copyright law or in practice—a blatant violation of its TRIPS obligations. ORDA, a government agency, needs to improve its interagency coordination skills, its willingness to work with all rightsholders' groups, its verification and enforcement of the hologram system, and its monitoring of illegal products in the marketplace. Estimated trade losses due to copyright piracy in Romania were \$74.5 million in 2002.

**Actions which the Romanian government should take in 2003:** Long overdue actions which the Romanian government should take to improve the copyright situation include—

- High-level government officials instructing the enforcement agencies to make piracy a priority and to set goals for tough anti-piracy sanctions. The enforcement agencies must then commit to undertake these goals with clear lines of authority for copyright enforcement among the competing agencies. Plus, the government of Romania must provide the needed resources. Thus, the Prime Minister, along with the ministers of Interior, Finance, Culture and Justice must tackle piracy in a cohesive manner to get on-the-ground enforcement results.
- Encouraging the economic police to substantially increase the number of anti-piracy raids and to bring more cases to the prosecutors.
- Providing training to police officers in order to improve the quality of the files presented to the prosecutors and instruct police to impose administrative fines in small-scale piracy cases, as opposed to opening criminal files, in order to avoid bottlenecks at prosecutorial level.

- The Prosecutor General should appoint at least one IPR specialized prosecutor in each district and direct prosecutors to move criminal cases to their completion and push for deterrent penalties, especially directed at large-scale operations and repeat offenders. Prosecutors should also be instructed to, as a rule, keep the rightsholders concerned informed of the outcome of their criminal investigations and their decisions.
- Amending the copyright law to provide clear legal basis for civil *ex parte* search authority, a TRIPS requirement especially critical to the business software community.
- Improving border enforcement by providing customs officials with *ex officio* authority to make inspections and seizures and encouraging continued consultations and coordination with rightsholders' organizations.
- Ensuring that ORDA increases its inspections and verification of the use of holograms in the marketplace and improving ORDA communications with all rightsholders' groups, without exception.
- Revising the hologram decree to be consistent with the concerns of the motion picture, business software, and entertainment software industries (to move from a mandatory ORDA-regulated one, to a voluntary system for these industries).
- Imposing deterrent sentences (in criminal courts) and fines (in both criminal and administrative courts).
- Amending the 1996 Romanian copyright law to meet Romania's bilateral, TRIPS and WIPO treaties' obligations.
- Refraining from introducing changes in the criminal code that would lower the level of penalties, including imprisonment, provided for copyright crimes.

**ROMANIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	6.0	55%	6.0	65%	6.0	60%	6.0	60%	6.0	50%
Records & Music	15.0	75%	14.0	70%	11.0	55%	25.0	85%	20.0	90%
Business Software Applications <sup>2</sup>	16.4	72%	15.7	75%	17.1	77%	9.8	81%	17.6	86%
Entertainment Software	35.2	97%	NA	95%	6.9	91%	NA	NA	NA	NA
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
<b>TOTALS</b>	<b>74.6</b>		<b>37.7</b>		<b>43.0</b>		<b>42.8</b>		<b>45.6</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. BSA finalized its 2001 numbers in mid-2002, and those figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

Romania has bilateral and multilateral trade obligations related to copyright and enforcement. In 1992, Romania entered into a Trade Relations Agreement with the U.S., which included a Side Letter on Intellectual Property Rights; this agreement entered into force in November 1993. Romania participates in the U.S. Generalized System of Preferences (GSP) program, which requires that it provides U.S. copyright owners with “adequate and effective” protection of intellectual property rights.<sup>3</sup> In 1996, Romania became a member of the World Trade Organization, and its WTO TRIPS Agreement obligations are in force.

## **COPYRIGHT PIRACY IN ROMANIA**

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### **Optical Media Piracy: Importation and Local Production**

**Importation across the porous border:** The copyright industries in Romania are faced with the importation of large quantities of pirate audiocassettes and CDs, videos, DVDs and CD-ROMs containing entertainment and business software, as well as videogame cartridges. The recording industry reports that most of this material is produced in and imported from Russia and other neighboring countries. An estimated 60% of the pirate CD material is coming from Russia, Moldova, Ukraine (as inventory from past years’ piratical production there) and Serbia & Montenegro. Perhaps 15-20% of the pirate market is held by small CD-R operators. The main entry points for pirate material are Siret and Dornesti (by truck and train) on the Ukrainian border, Nadlac and Bors on the Hungarian border, Portile de Fier and Moravita on the Yugoslav border, Calmabat and Giurgiu on the Bulgarian border and Albita, Giurgiulesti and Iasi on the border with Moldova. It is estimated that 10% 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 rightsholders regarding searches and seizures. IDSA continues to report that pre-recorded CD-ROMs of entertainment software (particularly PlayStation® games) continue to be produced in or shipped from mostly from Russia and Ukraine, while pirated Game Boy® products mostly come from Asia.

**Local production:** Back in 2000, 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. Given the low levels of local production of optical media, it is premature at this time for the industries to suggest that the Romanian government adopt an optical disc regulatory regime. For the entertainment software industry, there has also been a significant increase in the level of CD-R burning in Romania.

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<sup>3</sup> For the first 11 months of 2002, \$995.5 million worth of Romanian goods (or 14.9% 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 2.3% increase over the same period in 2001. For more details on Romania’s Special 301 history, see Appendices D and E to this filing.

MPAA reports that optical disc piracy continue to thrive in Romania. In 2002, ROACT, the local audiovisual anti-piracy organization, seized over 18,500 pirate discs, the majority of which were pirate DVDs imported from the Ukraine. However, pirate VCDs, both locally pressed and imported, remain popular, with quantities seized at the same level as in 2001.

## **High piracy levels continue in all industry sectors.**

The Business Software Alliance (BSA) continues to report high levels of piracy in Romania, as in year's past. Hard-disk loading piracy especially is becoming an increasingly serious problem as police still refuse to take any action against this form of piracy. Police are willingly raiding a number of small end-user targets, while hard disk loaders and larger end-user targets remain safe from enforcement. As a result, widespread use of unlicensed software in both private and public sector remains a concern. The Romanian government should continue down the path towards implementation of effective software asset managements practices, and to work closely with the private sector in doing so. Internet-based piracy has become more sophisticated, with online advertisements asking potential end-users to request software by sending an e-mail message to an address given in the advertisements. Estimates for 2002 business software piracy losses and piracy levels in Romanian are \$16.4 million at 72%.

The Interactive Digital Software Association (IDSA) reports that the pirate PC game market is 80% gold disc (burned discs) and 20% silver (pre-recorded discs pressed at an industrial CD plant). Pirated software for videogame console platforms are all silver CDs. The silver CDs are all coming from Russia and Ukraine; pirated videogame product (in cartridge format) is coming from Asia. Reports indicate that Russian organized crime groups ship much of this material. Pirated videogames sell for about 3 Euros (US\$3.25). Significant quantities of pirated CDs being imported into the country are severely damaging the ability of entertainment software companies to develop the console market in the country. Improving the country's border enforcement measures is crucial to stemming the unhindered flow of pirated product into the country.

Pirate videogames are sold in specialized shops, kiosks, Internet sellers and outdoor markets. To show the extent of the problem, there are approximately 100,000 people playing the popular FIFA 2002 (soccer) videogame, but only 1,000 legitimate copies of the game have been sold in the entire country. There was a big shopping mall but the industry, with much diligence, was able to convert the sellers into vendors of legitimate products. Companies have conducted public education efforts aimed at consumers and have issued product incentives, but it remains difficult to expand the market given the widespread piracy. In addition, there are now several thousand Internet cafes in Romania. Only about 5% have licenses from videogame publishers; the rest are using either illegal product or non-licensed product. Some companies have been taking enforcement actions against smaller establishments, some of which have resulted in settlements. Online anti-piracy efforts have also been undertaken, with some sending takedown notices to Romanian Internet service providers, but there are no estimates as to compliance rate at this time. IDSA estimates that the overall value of pirated entertainment software products present in Romania was \$35.2 million in 2002, with an estimated piracy level of 97%.

The primary problem confronting the recording industry continues to be the vast amounts of illegal material (CDs and cassettes), mostly from Russia and previously produced inventory from Ukraine, which enter Romania due to weak border controls. The serious problem with music CD-R piracy continued in 2002. The piracy level for international repertoire

alone is higher at approximately 75%, representing trade losses for the U.S. industry of around \$15 million. The estimated overall piracy level for sound recordings is 60%, with estimated trade losses for both U.S. and international repertoire at \$25 million for last year. Piracy of international repertoire consists mainly of best hits compilations, which contain the best tracks of a great variety of albums, with one pirate copy frustrating the sale of several legitimate albums. As a result, the damage to the industry is much higher than the number of pirate copies would suggest. Investigations show well-organized networks of "mules" transporting pirated products using well-established routes; these mules now transport only small quantities (fewer than 1,000 pieces) through different border stations, thus reducing the risk of losing large quantities of goods and money. The recording industry reports successes at the seizure level, but few prosecutions. The quantities seized are often small but the number of repeat offenders is high. 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 mean that the music pirates in Romania have little fear of being punished for their illegal activities.

The overall audiovisual piracy rate in Romania, including both videocassette and optical disc piracy, is estimated to be approximately 55%. This improvement over previous year's rates is the result of the blatant and overt piracy found in almost every retail video store having been much reduced. The Motion Picture Association of America (MPAA) reports that annual losses due to audiovisual piracy in Romania are estimated to be \$6 million in 2002. Optical disc piracy is a flourishing business in Romania. VCDs remain a popular format, with the number of discs seized by ROACT remaining at its 2001 level. DVD seizures soared, however: twice as many pirate DVDs were seized than VCDs. Unfortunately, retail stores are still involved in pirate activities, however these are now limited to back-to-back copying, selling after rental rights have expired, and under the counter deals for well known customers. The most popular method of distribution of pirate materials is at street markets; there are over 400 regular markets in Romania and 250 other markets open at various times. The Internet is also being used to distribute movies, both through the sale of hard goods and downloads. Internet cafes are opening up all over Romania and they allow customers to download and burn movies onto CD-ROMs.

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.

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 in 2002.

## **COPYRIGHT ENFORCEMENT**

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Inaction by Romanian enforcement officials has been very frustrating for the copyright industries. The Romanian government showed it could engage in effective enforcement, at least with regard to raids and seizures. 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. And, even with successful raids, effective enforcement is hampered due to prosecutorial indifference and the lack of police resources to pursue large-scale pirate operations or repeat offenders.

The Romanian government and WIPO signed a bilateral “Program of Cooperation” in June 2001 whereby WIPO would assist the Romanian government in modernizing its IP system. Among the various actions agreed to be WIPO reported activities were “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.” While such training and assistance, in all forms, is welcome, the true test should be whether the Romanian government actually takes concrete action to improve the enforcement situation. To date, it has not.

## **Criminal enforcement in Romania is ineffective.**

**No clear lines of authority plus poor interagency cooperation and communication by ORDA lead to disappointing results.**

The state body responsible for copyright enforcement, ORDA, has direct reporting lines to the Council of Ministers and the Ministry of Culture. The National Police, the other body that should play an active role in IPR enforcement, never created a specialized unit for IPR protection, and there are only a handful of police officers assigned to IPR protection. Staff changes within government agencies with IPR responsibilities have contributed toward an overall lack of efficiency. ORDA continues to face severe internal and budgetary problems, which is hurting 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.

The only way enforcement will be effective is if the Romanian government clearly indicates that copyright enforcement is a priority and commits the needed resources to the police, including its the Anti-Organized Crime Directorate, 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” (administrative decrees) passed in 2000.

ORDA’s working relationship with the police is frustrated by poor communication and a lack of clear authority and 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 rightsholders’ representatives in the area of enforcement. By excluding the rightsholders’ organizations, ORDA is gravely undermining an enforcement system that is already weak and often ineffective.

**Working with rightsholders:** Throughout 2002, ORDA continued to instruct local police units in writing not to allow UPFR representatives to participate in anti-piracy raids as observers. Such unjustified intervention has on several occasions prevented the local recording industry group and the police from carrying out effective enforcement actions. ORDA's active policy aimed at excluding UPFR is contrary to internationally accepted enforcement practice, not warranted by any part of the Romanian legislation, counterproductive and reprehensible. ORDA should immediately be instructed by the Prime Ministers' office and the Ministry of Culture to cease this campaign of exclusion. In 2002, the recording industry carried out 42 joint actions with ORDA and 353 joint actions with the police. A total of 29,108 CDs and 4,449 audiotapes were seized during these joint actions

### **The police take raids but are reluctant to act in some cases.**

The copyright industries continue to report that the Romanian police generally exhibit a positive attitude in cooperating with industry representatives on investigations and raids.

The business software industry reports that, despite generally good cooperation from Romanian police especially in actions against small end users, piracy continues to flourish. This is so despite a large increase in the number of criminal raids conducted in 2002. BSA reports that the authorities still are unwilling to undertake raids on large end-users, and concentrate their efforts instead on smaller infringing companies. Although the police, in general, are very cooperative and frequently conduct raids, only a few raids have taken place against companies with more than 10 computers and the police absolutely refuse to raid any resellers selling computers to end users with unlicensed software (HDL). In 2002, Romanian police raided 452 end-users and 38 resellers, which is about 200 more than the number of raids carried out in 2001. Raids on smaller end users were 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. Practically all the software resellers targeted by the police in 2002 were street resellers of CDs containing illegal software or small computer cafes. Romanian authorities, for instance, raided a network of five resellers and confiscated 2,780 CDs in April, and raided another reseller in June and confiscated USD 32,130 worth of illegal products. These types of raids are common. BSA also reports that ORDA was responsive to complaints regarding piracy during 2002; however, ORDA does not have a sufficient number of inspectors to deal with the volume of business software piracy cases. ORDA cooperated with Romanian police to conduct raids in Craiova and Bucharest, in particular.

In 2002, the recording industry reports 353 joint actions with the Romanian police. Partly as a result of training organized by UPFR, the police increased the number and efficiency of its joint and individual anti-piracy actions: In the first half year of 2002, the police seized 49,951 illegal sound carriers (compared to 34,206 seized by the police during the all 2001). In July 2002, the recording industry, working with the police, engaged in an operation at three different locations simultaneously, with the resulting seizure of pirated materials being the largest ever to take place in Romania. The operation netted 11,617 CDs, 11,617 inlay cards, plus 3,650 jewel boxes; the forensic examination revealed that half of these CDs were industrial pressed and the other half were burned CD-Rs containing both international and local repertoire. Ongoing investigations continue to reveal connections to Moldova and Ukraine as well as Romanian ones. UPFR has signed several Memoranda of Understanding with police departments and other agencies (including customs) to assist in anti-piracy cooperation.

MPAA reports that its local colleague, ROACT, in December 2001 signed a Memorandum of Understanding with the police responsible for street markets, and this has had a positive impact on the amount of pirate material found at the markets. This result shows that once law enforcement authorities make intellectual property crimes a priority, they can have a substantial impact. In 2002, the motion picture industry assisted on 449 raids.

### **Few prosecutions, more dismissals, and no deterrent sentences**

**Little progress:** The recording industry filed 209 criminal cases involving recording piracy in 2002. Romanian prosecutors dropped at least 50 of these cases. At the end of 2002, five record piracy cases were pending trial and eight court decisions were issued in 2002; all in all, 24 cases are pending trial.

In 2002, despite constant efforts, ROACT secured a judicial decision in only one case. MPA confirms that prosecutors remained far too ready to drop cases, through a lack of understanding of the damage caused by copyright offenses.

BSA reports some progress in enforcement by the Romanian courts during 2002. There were nine judgments during 2002 involving illegal use of business software, two more than in the previous year; however, most of these judgments were appealed. In September, the BSA obtained two convictions of end-users for infringement before the courts in Cluj Napoca, and were awarded US\$ 4,000 and US\$2,500. Significantly, the company representatives were convicted of criminal copyright infringement and fined nominal amounts. Later, in October and November, the BSA secured two further judgments against internet cafes, and were awarded over US\$4,500 in total damages. These damages represented full retail value of the infringed products, and two senior members of management were criminally fined. 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.

**Non-uniformity in prosecutorial action.** All industries report that prosecutors often refuse to pursue criminal cases because they find that there has been "a lack of social harm" in piracy cases. That is, once this invisible threshold has not been met in the view of the prosecutors, the cases are dismissed—this thereby acts as a prosecutorial excuse to dispose of cases. In addition, BSA reports that the attitude of prosecutors towards cases involving illegal copies varies in different regions. Prosecutors in Bucharest frequently hand out only administrative fines in software cases instead of filing charges and prosecuting in court. The recording industry reports that, up till now, the prosecution in Bucharest Sector 4 has rejected all criminal copyright infringement files. The Public Ministry in this sector does not include a prosecutor specialized in IPR, has never sent any of its prosecutors to the various trainings organized by the copyright sector and is known to have dismissed cases of multiple repeat offenders. Other examples where cases involving multiple repeat offenders are consistently dismissed are the prosecutors' office in Suceava County, Sibiu and Arges County.

**Concerns over corruption:** Corruption among enforcement officials remains a severe problem in Romania. Moreover, there is minimal prosecution of corrupt acts. Part of the reluctance of police in raiding large companies suspected of infringement may arise from the political influence wielded by such large companies. Factors suggesting that corruption is at least partly responsible for piracy problems in Romania include the lack of any cases forwarded by public prosecutors to Bucharest courts; the fact that few cases arise from the customs police; and there is disinterest on the part of the Anti-Organized Crime Directorate in copyright piracy



cases. In fact, an order from the Supreme Council for National Defense in 2001, which instructed the Anti-Organized Crime Directorate to take action against large-scale copyright crime, failed to have any effect, as the Deputy Head of the Police subsequently instructed the anti-organized crime units throughout the country to disregard the order. This blatant act of insubordination was left without any further consequences.

**Lengthy court proceedings:** Criminal judgments of even minor fines against copyright infringers require a considerable exertion of effort and time. The average amount of time needed to obtain a criminal court decision is between one and two years, whereas a ruling on appeal requires another 18 to 36 months.

**No deterrent penalties issued:** There have still been no reports of any effective (i.e., non-suspended or time-already-served) jail terms imposed to date in Romania for copyright piracy—four years after the “new” laws were enacted. This unacceptable result occurred despite the fact that the copyright industries in the last two years have begun to receive some cooperation from the police to conduct raids and seizures of infringing product. All industries continued to report they had virtually no prosecutorial support in 2002, even for the few raids and seizures that were conducted.

### **Civil *ex parte* search authority is still missing.**

A glaring TRIPS deficiency in the Romanian copyright law is the lack of an effective civil *ex parte* remedy. There are no provisions in the copyright act actually to 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.” The current practice is for Romanian judges to deny a request for an *ex parte* search on the basis of that provision. Moreover, the provisions of the Civil Code and Criminal Code are similarly ineffective in providing such a remedy. Romania’s Civil Procedure Code (Article 239) permit rightsholders 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, too, are not used effectively and are not available to rightsholders. 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. BSA confirms that no civil *ex parte* searches were granted in Romania in 2002.

### **Border measures must improve.**

Some industries confirm some minor improvement in the actions taken by customs officials to stem the flood of pirated products entering Romania. However, the flood remains. Any improvement is a far cry from a fully effective border control regime. 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.

Customs and border police must step up *ex officio* action and contact the rightsholders every single time they catch illegal copyright material, be it smuggled by private persons or officially imported by companies. The Romanian government had stepped up its customs training programs partly due to pressures resulting from its prospective European Union

accession. More resources must be 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 five people in the central customs office with responsibility for fighting IPR smuggling and piracy.

Romanian Law No. 202 of 2000 allows customs officials to detain *ex officio* shipments suspected of infringing IP rights, whereupon the IP owner is to be immediately contacted by the authorities. However, customs clearance will be granted unless the IP owner registers a formal application with the General Customs Office, and provides a related tax, within three days of being informed. This deadline has proved unworkable in practice, and as a consequence infringing product routinely crosses the Romanian border.

## **Inconsistent enforcement by ORDA of the Hologram Decrees**

### **Passage of the Two Hologram Decrees**

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, in August 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.

The motion picture industry was and remains opposed to this decree (which was actually initiated by its local representatives in an entirely different form) because it imposed a state-mandated (ORDA-approved) hologram sticker system on audiovisual works. It requires the application of “distinctive marks” on each copy of an audiovisual work and obliges all distributors (who must be registered at the National Film Office and receive certificates for every title) to purchase stickers. Each sticker cost 500 lei or approximately two cents. This type of a state-mandated sticker system, attempted in other countries (Moscow, Russia) is counterproductive to anti-piracy efforts because it results in “legalizing” pirate material once the stickers are themselves forged. In addition, there is the problem of corrupt government officials giving the pirates the legitimate stickers to place on their product. Alternatively, it prevents the legal distributor from getting product into the marketplace, because ORDA’s bureaucracy works very slowly and inefficiently. Pirate material is thus more readily available than legal material.

The provisions pertaining to audiovisual works and software went into force on February 1, 2001. The local motion picture industry group, ROACT (then known as ARA), fought to prevent the introduction of any sticker system by ORDA and the Ministry of Culture. Rather than accept a state-organized system, ROACT is working to amend the Ordinance so that it or another non-governmental organization can manage it. Until the upper and lower houses of parliament (Senate and Chamber of Deputies) both agree to reject the Ordinance, it will remain applicable under the Law of Ordinances. The Ordinance should be revised to be consistent with the concerns of the motion picture and software (both business and entertainment) industries.

The ordinance (as amended) also introduced new penalties for IPR infringements and permits rightsholders to have control over certain criminal proceedings. Under the provisions, rightsholders 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 2002. The BSA remains opposed to extending the stickering regime to business software.

### **Inconsistent enforcement of the Decrees**

Despite ORDA's inconsistent to poor enforcement of the hologram decree, the recording industry nevertheless continues to support the use of holograms for its products. Record producers purchased 16,925,552 holograms in 2002, compared to 16,400,000 in 2001. 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. Large numbers of holograms were delivered to small companies with only a small catalog that could not possibly sell the quantities they pretended to sell.

ORDA needs to be much more thorough when it checks the background of companies for which it issues holograms. In addition, it should be more cognizant of companies ordering excessive numbers of holograms. Finally, ORDA needs to invest more manpower in inspecting and monitoring the actual use of the holograms in the market. ORDA should also use its position and competence to annul or suspend the certificates under the National Phonogram Register of those companies that have infringed the hologram decree or that are involved in copyright piracy.

It remains essential that the UPFR, the local recording industry group, 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.

## **COPYRIGHT LEGAL REFORM AND RELATED ISSUES**

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In 1996, Romania became a member of the World Trade Organization. In 1998, Romania joined the Paris Act of the Berne Convention (it was a member of the Rome Act of Berne from 1927) and the Geneva Phonograms Convention, thereby fulfilling obligations it made in the U.S.-Romania Trade Relations Agreement of 1992. 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).

### **Copyright Act of 1996**

**Enforcement aspects:** 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 (US\$6 to \$315) and imprisonment of one month to five years (Articles 140-142). 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.

Unfortunately, Romanian judges have interpreted these sanctions as requiring fines for first offenses, and imprisonment only for subsequent offenses. The fine levels in the criminal provisions have also been ravaged by inflation and are now too low to effectively deter piracy, particularly by criminal organizations in Romania. The criminal code provides police with the proper (*ex parte*) search authority, but these searches have not been undertaken as needed.

Three actions could improve the current dearth of prosecutions and absence of 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—three inspectors in the National Registries and Collecting Society Directorate and seven inspectors in the Law Enforcement and Control—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).

**Criminal code:** The criminal code also needs to be amended. It should make clear that possession of infringing materials, including the possession of the equipment used to make infringing material, could result in criminal sanctions. Much to the concern of the copyright industries, the Ministry of Justice has started drafting amendments to Criminal Code (44/53) that would change the current penalties to a substantially lower level. Prison sentences would be reduced to a maximum of only two years (compared to the current five years foreseen in the Copyright Act). Prison sentences foreseen for "normal" property theft in the Romanian Criminal Code are up to ten years. Lowering the penalties for intellectual property theft to a mere and obviously non-deterrent two years is against the principles set out by the TRIPS Agreement and would indicate that the Romanian legislature does not even remotely consider intellectual property theft a serious crime.

**Substantive copyright protection:** The 1996 law continues to contain several deficiencies. New international norms in the digital age have been scripted since the law's passage, and further amendments are needed.

- There are no express provisions in the copyright act to actually provide for civil *ex parte* search orders, as discussed above and as required by TRIPS. The government of Romania refers to Civil Code provisions (Article 239) as providing equivalent protections but these are neither *ex parte* provisions *per se*, nor could they work effectively in any case at securing evidence. No civil searches were executed in 2002, so there is no effective protection.
- With respect to 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.

- As a WTO member, Romania must make it clear in its legal system that it is providing full protection for pre-existing sound recordings, as required by Article 14.6 of the TRIPS Agreement.<sup>4</sup>
- Amendments are needed to effectively implement Romania's obligation under the WIPO treaties (see discussion, below).

## 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. For example:

- Adopting a more complete right of communication to the public, including a right of making available; and provisions to allow rightsholders to enforce their rights against the circumvention of technological protection measures.
- Providing appropriate technological protection measures (including remedies and sanctions). These are tools that rightsholders 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.
- Protecting "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.

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<sup>4</sup> 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# SAUDI ARABIA

### EXECUTIVE SUMMARY<sup>1</sup>

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Saudi Arabia should remain on the Watch List. The piracy situation in Saudi Arabia continued to improve for most sectors in 2002, with cooperation from the Ministry of Information,<sup>2</sup> and sustained raiding that has eaten into piracy rates for the motion picture and business software industries (although the piracy level for books remained level). With greater transparency in raids and follow-up enforcement, and a continuing resolve to rid the Saudi market of pirated goods, Saudi Arabia might be on the verge in 2003 of turning the corner on piracy for good.

Saudi Arabia was on the Priority Watch List from 1993 to 1995 for a weak law and non-deterrent enforcement. In 1996, Saudi Arabia was lowered to the Watch List in recognition of strong enforcement actions taken in 1995, and the Kingdom has remained on the Watch List ever since.

At least in part because Saudi Arabia remains the largest market in the Gulf, it was an obvious attraction point in the 1990s for pirate merchants, importers, distributors, broadcasters, and even producers. Saudi Arabia has been slower than others in the Gulf region to begin cleaning up the pirate market through sustained raiding and deterrent enforcement. Especially in the past two years, with the enormous cooperation of the Ministry of Information, sustained raiding has made a dramatic difference in the marketplace, evidenced by lowering piracy levels for some industry sectors. Yet, more needs to be done. Saudi Arabia's enforcement system is one of the least transparent in the world (although there were some improvements in terms of publicizing raids through the newspapers in 2002). Raids must continue to focus on larger targets, and the judicial process can still be made easier for right holders to use. Long-awaited copyright legislation was approved by the *Majliss Alchoura* (Shoura Council), but apparently this is just one step of several, and there are opportunities for further changes before the bill becomes law.

Required actions for 2003:

- Continue sustained inspections and raids (by and/or including the Ministries of Information and Interior officials) on retail establishments, storage areas, distribution hubs, and duplication sites.
- Improve transparency in the enforcement, prosecutorial, and judicial processes, including newspaper announcements regarding copyright infringements.
- Intercept pirate imports at the borders through a more robust customs enforcement program.
- Amend the copyright bill so that it complies with TRIPS, including deterrent penalties, and implement the requirements of the WIPO "Internet" treaties.
- Continue to follow up on enforcement of the software usage directive.

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<sup>1</sup> For more details on Saudi Arabia's Special 301 history, see IIPA's "History" Appendix to this filing.

<sup>2</sup> MOI's Director General of Author Rights Department, Abdullah Al-Obeid Al-Abdullah, has said that while the piracy rate in Saudi Arabia dropped from 95 percent in 2001 to 52 percent, the local Saudi economy continues to suffer from this phenomenon. *Intellectual Piracy Causes \$20 Million Losses*, IPR Strategic Information Database, January 26, 2003.

**SAUDI ARABIA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>3</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	20.0	35%	30.0	45%	40.0	65%	40.0	65%	32.0	50%
Records & Music <sup>4</sup>	16.0	42%	12.0	42%	8.0	40%	12.0	45%*	12.0	45%*
Business Software Applications <sup>5</sup>	NA	47%	16.4	52%	17.7	52%	31.8	64%	30.9	73%
Entertainment Software	NA	NA	115.7	83%	28.0	NA	20.2	59%	21.4	68%
Books	14.0	NA	14.0	NA	14.0	NA	14.0	NA	9.0	NA
TOTALS	50.0		188.1		107.7		118.0		105.3	

## COPYRIGHT PIRACY IN SAUDI ARABIA

Saudi Arabia remains the largest potential market for most of the copyright industry sectors in the Middle East.<sup>6</sup> That market can be opened by dealing with the following piracy phenomena:

- **Optical Disc Piracy.** Optical discs (CDs, VCDs, DVDs, CD-ROMs) of a cornucopia of copyrighted content (music, movies, business software, entertainment software, reference materials) have emerged as the carrier of choice for pirates in Saudi Arabia. Copies of pirate (retail) optical discs are available in Saudi markets, mainly imported from other parts of the Middle East (e.g., transshipped through the UAE), Pakistan, as well as Taiwan, Indonesia, and Malaysia. Pirated interactive games are still openly sold in the public markets in mass quantities, as Saudi Arabia remains the worst pirate country for console-based videogames in the Gulf region. The situation worsened in 2002 – for example, such pirate products are now

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>4</sup> The 2002 losses due to piracy of sound recordings and piracy levels are for U.S. repertoire only. The local music piracy level in 2002 was a whopping 62%. The 2000 and 2001 piracy levels are for international repertoire (and for overall level of piracy for 1996-1999, as indicated by \*).

<sup>5</sup> BSA's estimated piracy losses 2002 are not available, and estimated piracy levels are preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 submission, BSA's 2001 loss and level figures were unavailable. These numbers were made available in mid-2002, and are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>6</sup> Mohammed Alkhereiji, *Music Hits A Low Pitch With Pirates Calling the Tune*, Arab News, Dec. 11, 2002 (explaining that music sales in the Middle East fell in 2001 by 23 percent in terms of units and 15 percent in value, according to the latest figures released by the International Federation of the Phonographic Industry (IFPI), and ascribing the chief cause of the decline to the thriving piracy market, which makes up a staggering 50 percent of the total music market in Saudi Arabia).

being sold with the game publisher's "trademark" falsely affixed to the product.<sup>7</sup> A consumer can readily purchase an illegal CD-ROM in most retail interactive game stores, and such pirate wares are openly displayed on the shelves. Any games not openly sold over the counter can quickly be retrieved by the sales staff upon request. Illegal CDs are often stored in nearby locations (in private residences or warehouses). In many instances, street vendors will offer to produce pirate videogames on demand, accosting pedestrians in their zeal to sell their pirate products. In major cities, street vendors offer the latest business 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. It is commonplace for PC assemblers and resellers to load all types of software on PCs sold both to consumers and to small- and medium-sized businesses. Relatively small quantities of pirate music CDs are available for sale in the Kingdom.

- **Illegal Distribution of Pay TV Signals.** The illegal distribution of "Pay TV" (i.e., cable television) signals on compounds was the main piracy concern in Saudi Arabia for the audiovisual sector in 2002. The Kingdom's prohibition against cinemas makes the Pay TV market particularly lucrative. Almost all of the compounds in Saudi Arabia illegally distributed Pay TV signals in 2002 without the authorization of right holders. However, the Ministry of Information (MOI) appeared ready to tackle this issue in 2002, routinely raiding the compounds. The Pay TV industry was also encouraged by a recent meeting with the Undersecretary of MOI, in which His Excellency pledged to announce a stern warning against continued illegal redistribution of Pay TV signals. This announcement is expected to be publicized in the press by March 2003. Although most compounds are still illegally redistributing Pay TV services without authority from the rights holder, the industry is hopeful and confident that the MOI will address this issue in 2003.
- **Book Piracy.** Industry representatives note that Saudi Arabia remains one of the worst pirate markets in the region, with a steady amount of book piracy over the past three 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 continue to be imported from Lebanon, as well as from India (of reprints intended solely for the India market, so-called "India only" reprints), and there is increasing evidence that pirate editions are being produced locally in Saudi Arabia. Some commercial and (mainly) photocopy piracy of English language and teaching (ELT) materials continued in 2002 in universities, especially in the Western Province. Some of the new higher education institutions (like the College of Petroleum and Minerals in Dahrhan) reportedly are encouraging the use of legitimate books, which is a positive sign that times are changing in Saudi Arabia. Journals are bought directly from the publishers, primarily on CD. Most of the universities in the Central Province and the Eastern Province bought centrally as of 2002, a positive development, in that it enables publishers to keep track of their supply lines and ensure licensed usage. However, this process has not yet been adopted by the King Abdulaziz University of Jeddah and other universities in the Western Province, resulting in increased levels of piracy in that region (as the books are being used by the universities but comparable sales do not match the usage). The government of Saudi Arabia should encourage universities in the Western Province to 'buy centrally' and monitor copyright violations closely, so that enforcement may become more uniform throughout the country in 2003.

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<sup>7</sup> 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.



- **Business End-User Piracy.** The unlicensed use of software in a business setting (so-called “end-user” piracy) continued in large, medium and small enterprises in 2002.
- **Internet Piracy.** An emerging phenomenon in Saudi Arabia is download and peer-to-peer sharing of copyrighted materials over the Internet.<sup>8</sup> With the announcement recently of an initiative to make Internet access free for all Saudi citizens, such piracy may only grow worse.<sup>9</sup>

## **COPYRIGHT ENFORCEMENT IN SAUDI ARABIA**

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In 2002, the government of the Kingdom of Saudi Arabia demonstrated its continuing commitment to fight piracy. The Ministry of Information (MOI) was particularly cooperative and interested in building partnerships with copyright industry representatives throughout 2002. Despite the progress against piracy in 2002, several structural hurdles remain to effective enforcement in Saudi Arabia. First is the lack of transparency in enforcement actions carried out by the government (although the MOI has done a better job in 2002 publicizing the outcomes of some raids in the newspapers). Second, the MOI remains understaffed. Third, deterrent penalties are largely not forthcoming from the administrative court (and court ineffectiveness is exacerbated by the lack of transparency in the enforcement system in Saudi Arabia).

### **Continued Cooperation of the Ministry of Information (MOI) and Renewed Efforts of the Ministry of Interior Result in Sustained Raiding**

Overall, raids in 2002 were conducted against pirate retailers and distributors, with a focus also on warehouses and producers of pirated product, namely, the sources of piracy. Such efforts have made inroads against day-to-day piratical operations, moving many pirate operations underground. Raids are typically run by the Ministry of Information (MOI), which has control over commercial property issues. The year 2002 also marked the first time in many years that the Ministry of Interior conducted some raiding actions against copyright pirates.

Each industry has a slightly different tale to tell about enforcement in 2002, although all the industries were pleased with the commitment of Saudi authorities, evidenced by the sheer number of raids and the seizures netted. The business software industry was extremely pleased with efforts taken by the Ministry of Information in 2002. In 2002, the MOI, following on requests from industry, engaged in raiding retail establishments, storage areas and duplication sites replete with piracy. Per industry requests, authorities focused on the Eastern and Western Provinces (designated by industry as the most important points of pirate production), while continuing to monitor the Central Province. Also, it was the commendable efforts of the MOI in its extensive planning and running of a retail anti-piracy campaign that led to the arrest of 70 street pirates, disruption of six sources of supply for pirated goods, and seizure of 172,000 gold pirate CDs.<sup>10</sup> Yet, to the Business Software

<sup>8</sup> See Mohammed Alkhereiji, *Music Hits a Low Pitch with Pirates Calling the Tune*, Arab News, Dec. 11, 2002.

<sup>9</sup> *Internet Service To Become Free In Kingdom Soon*, Jan. 12, 2003 (describing an impending agreement with the Kingdom's 27 Internet service providers (ISPs) to provide Internet service for no charge in the Kingdom, and noting that Saudi Arabia now boasts more than one million Internet users).

<sup>10</sup> See Mohammed Alkhereiji, *supra* note 8 (describing a raid in August 2002 of six centers for pirated computer programs run mainly by Asians, and in which 1.2 million CDs worth about SR70 million (US\$18.7 million) were seized; special teams comprising members of the Ministry of Information and the Passports Department, along with police officials from Riyadh

Alliance's knowledge, no fines have been imposed against any of the raided targets in 2000, 2001, or 2002, resulting in lack of deterrence in the market. The Ministry of Interior, for the first time in several years, also got involved in enforcement, raiding channel targets and pirate end-users, resulting in more than 155 shops that custom-build computers for their customers being raided, of which 92 were incriminated for illegally loading pirate software onto the hard drives of computers prior to their sale (so-called "hard-disk loading" piracy).

For the motion picture industry, the Saudi government continued to clean up the video piracy market in cities in Saudi Arabia. Importantly, the MOI as well as the Ministry of Interior made commendable progress in combating the *sources* of video piracy, i.e., private residences and warehouses used as pirate duplication and storage areas. Numerous raids in 2002 resulted in the seizure of millions of pirate VCDs and DVDs, and of illegal recording equipment.<sup>11</sup> Over a million optical discs were seized in just two raids by the MOI in Riyadh alone, and recently another 1.2 million were seized in raids in Jeddah during a single night. These measures orchestrated by the MOI sent a strong message to the market about the resolve of the Saudi government to enforce legitimate business rights. The actions by the MOI and the Ministry of Interior in combating piracy at source resulted in a major reduction of audiovisual piracy rates to less than 20% in the markets where such measures have been taken.

The music industry similarly reports significant raiding, yielding major seizures of pirate music as well as other industry sector's product.<sup>12</sup> Saudi Ministry of Interior raids have also yielded significant numbers of pirated entertainment software titles on CD-ROMs.<sup>13</sup> One raid in September 2002 yielded US\$13.9 million worth of pirated sound recordings, entertainment software, and movies, picking up enormous press coverage. The raid was so large that it was accompanied later in the day by a Ministry of Information press conference (in which impending passage of a new copyright law by the Shoura Council was also announced).<sup>14</sup>

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province, conducted the raids and arrested 50 Asian workers.

<sup>11</sup> The Motion Picture Association reports many raids throughout the year, including: a raid on a videocassette duplication lab (and store) in June 2002, yielding 1,816 videocassettes and 7 VCRs, and resulting in three arrests; and a raid in April 2002, yielding seizures of 23,000 pirate videocassettes.

<sup>12</sup> Aggregate reports from the Ministry of Information indicated that more than 600,000 discs were seized between January and March 2002 (all of which were destroyed). In addition, the recording industry reported that Customs officers at King Khaled International Airport in Riyadh, in close cooperation with inspectors from MOI, seized more than 200,000 pirated optical discs – a vast majority from Indonesia – through April 2002; apparently, more than 75% of the pirated discs had been hand-couriered, 25% were pirate audio CDs, and 25% were pirate VCDs. Those discs were also destroyed in April 2002, a scene witnessed on Saudi TV and by the Saudi News Agency. On May 14, 2002, another event took place in which 400,000 pirated optical discs (40% pirate music CDs of mixed repertoire) were destroyed.

<sup>13</sup> On January 6, 2003, Saudi police (Ministry of Interior) raided three warehouses and seized over one million pirated entertainment software discs, containing PlayStation games. This massive raid followed a raid in February of 2002, of a major importer of pirate interactive games, in which seven shipping containers containing over 625,000 discs, 5 million sleeves, and 1 million jewel cases were seized. That raid was a cooperative effort among private industry, the local police, and the Ministry of Information. The raid resulted in two arrests. Other raids have indicated the source of pirated discs as Pakistan, being transshipped through the United Arab Emirates (UAE) (the market value of one raid was US\$2 million).

<sup>14</sup> In a raid in September 2002, eight truckloads containing 172,000 pirated audio CDs, console-based videogames (mainly PlayStation®), videocassettes, VCDs of movies, posters and fake paintings were confiscated in a series of raids conducted in Batha, Shumaisy and Oleya Districts of Riyadh. The seizure had a value of SR51 million (US\$13.6 million). See Javid Hassan, *8 Truckloads of Pirated Goods Confiscated in Riyadh Raids*, Arab News, Sept. 2, 2002, at <http://www.arabnews.com/SArticle.asp?ID=18276&sct=Pirated>. In a highly unusual move, Assistant Deputy Minister of

## **“License Certification Program” and Enforcement Against Corporate End-User Piracy of Business Software**

The software industry has seen a great deal of assistance from the Saudi government over the last few years in combating corporate end-user piracy of business software (the unlicensed use of software in a business setting), implementing a number of unique and effective anti-piracy programs. For example, beginning in 2001 and continuing in 2002, the Ministry of Information implemented a decree issued in 2000 establishing a “License Certification Program” for companies licensed by the MOI. Under the program, businesses were required to demonstrate that they used only legal software as a requirement to obtain or keep their business licenses. 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. IIPA encourages the MOI to more widely implement the program to all businesses.

The MOI has followed up consistently over the last two years, visiting 2,500 companies in 2002, and continuing its practice of sending warning letters. Once warning letters were sent, the MOI sent government employees to audit end-users throughout Saudi Arabia. The next phase of the project in 2003 will involve repeat visits to see if the 2,500 companies have actually followed through and legalized their software usage. IIPA knows little about any remedies as a result of these visits (in part due to lack of transparency), except that in September 2002, Obaidullah M. Al-Obaidullah, Director of the Copyright Department at the Ministry of Information, indicated that in 2001, twelve business licenses were revoked by the MOI as a result of the program.

In addition to the implementation of the License Certificate Program, the MOI also conducted several major actions and raids on small- and medium-sized organizations in an effort to specifically tackle corporate end-user piracy of business software. Unfortunately, IIPA is unaware of results arising from those actions. IIPA hopes that the Ministry of Information will continue linking business license renewal to legal software usage. Also, in a major announcement in September 2002, the MOI announced that inspectors would soon be visiting 6,000 local and international companies operating in the Kingdom to create awareness of the need to abide by the copyright law and to use legal software, and that use of pirated software could lead the Saudi government to take punitive measures against companies in non-compliance.<sup>15</sup> IIPA looks forward to learning the results of these visits.

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Information for Internal Affairs Misfer Sa’ad Al-Misfer held a press conference announcing the raids, including the fact that as a result of one night of raids, 75 arrests were made. Those arrested are mainly immigrant workers, and the article indicates that those responsible would be jailed and deported. The Assistant Deputy Minister also indicated inspections were being conducted at gas stations and warehouses located on Riyadh-Makkah, Riyadh-Qassim and Riyadh-Madinah highways as part of a full-scale campaign to nab dealers in counterfeit and pirated products. See *also* [http://www.menafn.com/qn\\_news\\_story\\_s.asp?StoryId=2656#top](http://www.menafn.com/qn_news_story_s.asp?StoryId=2656#top) (explaining that the seized items would be destroyed, along with around five million other items seized from April to July 2002, including CDs, videocassettes, and CD-ROMs containing entertainment software).

<sup>15</sup> *Id.*

## **Lack of Transparency, Adequate Staffing, and Deterrence in Enforcement and ‘Court’ Proceedings Are Among Remaining Hurdles**

Notwithstanding existing enforcement improvements in Saudi Arabia in 2002, there are several abiding problems in enforcement that the government should address in order to make serious inroads into piracy in the Kingdom. First, 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. After providing “intelligence” on raid targets, right holders 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 were taken, the industries had not generally learned about results in individual raids, although in 2002, the MOI did a much better job of publicizing major raid results through major media outlets, and the MOI even held a press conference announcing the results of one particularly large set of raids in September 2002. 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, and we understand that some industries worked with the government in 2002 to assist in building such a system and have even engaged outside resources specifically for this task.<sup>16</sup> IIPA members are eager to have such a system up and running to create more transparency in the enforcement system in Saudi Arabia.

Second, while the Saudi government began devoting more resources to the fight against piracy, by creating 70 new jobs in the Ministry of Information copyright protection department in 2001, IIPA understands that these new staff are not well coordinated, being dispersed across the Kingdom, and that overall, the copyright enforcement group within the Ministry of Information remains largely understaffed. We understand that the MOI intends to increase yet again the number of staff, and IIPA members look forward to being able to employ these greater resources to bear in the fight against piracy in Saudi Arabia.

Third, without transparency regarding results of cases, little in the way of deterrence against further infringements can result. The MOI closely guards information on the penalties it issues in cases and rarely announces the amounts of fines and penalties applied for copyright law violations in specific cases (even though the MOI has improved in terms of publicizing raid results including seizures in 2002, but without any mention of specific information concerning the pirates). The MOI Decisions Committee acts as a quasi first-instance (administrative) court (since copyright cases do not usually proceed to the courts in Saudi Arabia), and its processes are non-transparent and inaccessible. 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 the court system. 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. Because there is no

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<sup>16</sup> Until 2002, the reporting system in Saudi Arabia used to provide right holders with only aggregate data on fines, but regular publicizing of sentences and fines did not occur. As a consequence, raids/fines lost their value as a public deterrent, as other pirate retailers had no fear that they would be singled out if caught. As noted, the Ministry of Information did a better job generally of publicizing some of the many raids it conducted in 2002.

representation of the right holder in the MOI administrative proceeding, 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 written decision from the MOI Committee. However, the MOI Committee has not, to IIPA's knowledge, published any judgments in the past three years (or at least has not alerted the right holders of such), so right holders have been unable to use this judicial procedure. IIPA hopes that the data tracking system mentioned above can help address these issues.

## **Government Legalization of Software Usage**

In addition to steps taken by the government of the Kingdom of Saudi Arabia to inform and legalize usage of software by businesses, the government took steps in 2002 to legalize use of software by Saudi government bodies. Governments are important role models for the private sector in legitimate usage of software. If a government does not use and manage digital technologies properly, nor will the business community. As of December 2001, it was estimated that the Saudi government had approximately 80,000 personal computers set up, many of which ran on pirated software. Despite the fact that the country's leadership repeatedly instructed all government departments and agencies to legalize their use of software, government entities continued to use illegal copies of software with impunity. Part of the reason for this is the complexity of still-existing procurement procedures that limit the ability of IT divisions of government entities to buy software as needed. Inadequate allocation of resources for software acquisition and low prioritization for software purchases also make legalization difficult. Despite all the challenges, public tenders seem to indicate a movement in the right direction. IIPA will continue to look for improvement in 2003.

## **COPYRIGHT LAW AND RELATED ISSUES IN SAUDI ARABIA**

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### **New Copyright Law Approved by Shoura Council in November 2002**

Several reliable reports indicate that Saudi Arabia's Shoura Council approved new copyright legislation on November 3, 2002, and it has now been sent to the Custodian of the Two Holy Mosques King Fahd for endorsement, whereupon it will enter into force.<sup>17</sup> IIPA was never given an opportunity to review the legislation, but understands that there may still be opportunity for further changes prior to the law coming into force. Passage of a TRIPS-compatible law is a prerequisite for Saudi Arabia to be admitted to the World Trade Organization (WTO), but may also be the best opportunity for a long time for Saudi Arabia to modernize its law. Certainly those governments with whom Saudi Arabia is negotiating WTO entry should be given every opportunity to weigh in on the bill before it is finalized, lest it be passed with avoidable TRIPS deficiencies. IIPA would hope also to be given an opportunity to review the draft for TRIPS issues, but in addition, to suggest ways to modernize the bill so that it meets the standards of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which went into force in 2002. Especially with Internet-related developments in Saudi Arabia, both good (that the Internet apparently will be available for no cost to users in the Kingdom soon), and bad (that Internet piracy including downloads and peer-to-peer piracy have increased dramatically in 2002), it is imperative that Saudi Arabia not waste this legislative opportunity to take the necessary steps to implement and then accede to the WIPO treaties.

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<sup>17</sup> See *Copyright Bill Cleared*, Arab News, Nov. 3, 2002, at <http://www.arabnews.com/print.asp?id=20104&ArY=2002&ArM=11&ArD=6>.

Regarding the legislation, the press reports Assistant Deputy Minister of Information for Internal Affairs, Misfer Saad Al-Misfer, as saying it includes increased penalties from the current law (which provides for fines of SR10,000 (US\$2,666) for a first offense, SR20,000 (US\$5,334) for subsequent offenses, business license cancellations, and permanent closures of the pirate retail establishment for repeated violations). IIPA has learned from industry sources that the proposed legislation includes imprisonment of up to six months, and penalties that are increased to up to SR250,000 (US\$66,670), in addition to cancellation and shop closure. Such strengthening measures would be welcomed.

## **Saudi Arabia's Current Law Does Not Meet TRIPS Standards**

Saudi Arabia's current copyright law (effective January 12, 1990) provides some basic protections for U.S. right holders. 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. The law, however, remains TRIPS-deficient in many ways.<sup>18</sup>

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<sup>18</sup> The following is a non-exhaustive list of problems in the 1990 law:

- Protection for foreign works is unclear; the Saudi government has long claimed that the UCC is "self-executing" in the Kingdom.
- The duration provisions for protection of "sound . . . works" and "audiovisual . . . works" are below TRIPS-level standards; the current law states that the author's rights in the case of "sound . . . works" are protected for 25 years.
- 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 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 so as to provide, in effect, a full 50 years of protection for pre-existing works and sound recordings.
- The copyright law should be amended expressly to include all the Berne Article 11*bis* 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) is Berne- and TRIPS-incompatible. 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 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 a violation of Berne/TRIPS.
- 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 would constitute a TRIPS violation.
- Original compilations of unprotected facts and data are not protected, which would be a violation of 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 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# SERBIA & MONTENEGRO

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Serbia & Montenegro be added to the Special 301 Watch List in 2003. Most copyright sectors report serious problems with the production, distribution, sale and export of illegal optical discs, VHS piracy as well as widespread piracy of business and entertainment software, which require urgent bilateral attention.

**Overview of key problems:** The former Yugoslav government, led by Slobodan Milosevic, openly encouraged piracy of Western copyright products as an act of patriotism. As a result, until recently, piracy levels of foreign products in former Yugoslavia were close to 100%. After the 1999 war in Kosovo, the new federal government broke with old traditions of government-encouraged piracy. Nevertheless, infringing copyright materials are still widely available throughout the country in kiosks, retail stores, and open markets. Internet piracy is also a significant problem, with numerous warez cites offering pirate games for download, as well as a source of videogame software for burn-to-order operations. Pirate optical disc manufacturing plants are operating both in Serbia and in Montenegro, enforcement is highly ineffective and prosecution and sentencing of copyright crime are virtually non-existent. In addition to massive local sales of illegal materials, pirate CDs from Serbia & Montenegro are also exported to neighboring countries, such as Bosnia, Bulgaria, Croatia, Greece, Romania, Slovenia and Turkey.

One of the reasons for these high levels of piracy is the inadequacy of the Yugoslav Copyright Act, which is not in line with international standards and requires substantial amendments. Its enforcement legislation should also be seriously improved. The presence of at least four known optical disc plants calls for the early introduction of a federal optical media regulation. Moreover, in advance of its accession to the WTO, Serbia & Montenegro should bring its entire legal system in line with the standards set by the TRIPS Agreement.

Foreign investment in Serbia & Montenegro in the copyright sector is seriously hampered by the present state of affairs and U.S., as well as other foreign and local rightsholders, are suffering millions of dollars in damages due to rampant piracy. Apart from certain rare but noteworthy exceptions, the federal government, most elements of law enforcement and the judiciary are not inclined to treat intellectual property protection as a priority. International pressure and close attention by the U.S. government will be necessary to avoid Serbia & Montenegro's becoming the next Bulgaria or Ukraine in the Balkan region.

**Actions which the government of Serbia & Montenegro should take in 2003:** In order to improve its copyright regime, the government should take the following actions—

- Deposit the instruments of ratification to the two WIPO treaties (both of which already have been approved by the parliament);
- Amend the 1998 copyright law to include high-level substantive protections and effective enforcement mechanisms, including effectively implementing the WIPO treaties by strengthening its provisions on technological protection measures and amending other deficiencies which cause the law to be inadequate to combat copyright piracy and protect copyright holders' rights, especially in the online environment;
- Adopt optical media regulations to combat and control the optical media production and distribution;
- Instruct the enforcement agencies to make combating piracy a priority and set goals to ensure active criminal investigations, raids and prosecutions;
- Improve administrative anti-piracy efforts to close down and fine kiosks and other retail operations which engage in the selling and distribution of pirated materials;
- Strengthen border enforcement to stop the importation and exportation of pirated goods, including optical media product;
- Improve judicial training on copyright matters so that the courts expeditiously and effectively enforce all aspects of the copyright law.

## **COPYRIGHT PIRACY IN SERBIA & MONTENEGRO**

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### **Piracy and Its Impact on the Market in Serbia & Montenegro**

The markets in Serbia & Montenegro are swamped with pirate products of all sorts. Illegal copies of music, films, business and entertainment software on optical discs and cassettes are openly offered for sale in hundreds of kiosks, retail shops and open markets throughout the country. In fact, for consumers it is very difficult to find any retail outlets that exclusively sell legitimate product. International repertoire is massively pirated and the same goes for local copyright products. Several years ago, during the Milosevic era, the government openly encouraged infringing foreign copyrights as an act of anti-Western patriotism. The current government, especially in Serbia, increasingly speaks out against piracy, but the heritage of the recent past is still strongly felt.

Piracy clearly has a devastating effect on foreign investment and development of local enterprises in the area of copyright. For example, as opposed to Slovenia and Croatia (both smaller markets than Serbia & Montenegro), where virtually all major international record companies ("majors") are represented, today only two out of five majors are indirectly present in Serbia & Montenegro and one of the majors recently even withdrew from the market altogether. The widespread availability of illegal copyrighted materials, the shortcomings of the copyright legislation and the lack of meaningful enforcement make it commercially impossible to survive in what could be a promising market in a country with more than 10 million inhabitants. For example, the recording industry reports a piracy level of 95% with losses to the U.S. music industry amounting to \$14 million in 2002.



Copyright piracy in Serbia & Montenegro is not limited to distribution and retail sales. Serbia and Montenegro host at least two known optical disc plants involved in large-scale pirate production (see below), not only for the local market, but also for export to other countries in the region. The bulk of illegal material in this market is available on cassettes (MC and VHS) and industrially produced optical discs. This includes pirate VCDs and DVDs imported from the Far East. However, CD-R (CD-Recordable) piracy is clearly increasing. Pirate cassettes and CD-Rs are mainly locally produced in underground replication facilities. The same goes, to a large extent, for the industrially manufactured illegal CDs. In addition, a certain number of illegal CDs are imported, mainly from Bosnia, Bulgaria, Ukraine and Russia. Rightsholders' investigations revealed in 2001 and 2002 that there is also an increase in Internet piracy by illegal sites hosted in Serbia & Montenegro. For the entertainment software industry, these illegal warez cites provide not only video game software to download for free but also serve as a source of video games for burn-to-order operations.

Retail shops and kiosks selling illegal copyright materials can be found in large numbers in every town in Serbia & Montenegro. For example, near the Serbian Ministry of Trade, Tourism and Services in front of the SKC (Student Cultural Center) on the Generala Zdanova in Belgrade there are around 50 kiosks, virtually all openly selling thousands of illegal cassettes and optical discs containing music, movies and software. Pirate CD-Rs are massively sold in the IPS Music Stores in Belgrade, Novi Sad, Nis and Podgorica. Another chain of music stores selling pirate CD-Rs is Hi-Fi Centar, with around 15 shops and kiosks around the country. The retail points are well known by the authorities. However, no action whatsoever has been taken to force these illegal enterprises to stop their infringing business.

## **Optical Media Manufacturing Piracy in Serbia & Montenegro**

In the last four years, since Bulgaria ceased being the region's largest pirate CD manufacturer, Serbia & Montenegro has developed into a major producer of pirate CDs. These illegal CDs, mainly containing international repertoire, are sold on the local market, where they frustrate any attempt to create demand for legitimate product and seriously undermine the local economy. They are also exported to surrounding countries (e.g., Bosnia, Bulgaria, Croatia, Romania, Greece, Slovenia and Turkey) with the same damaging effect on the legitimate music industry.

There are at least four known CD plants in Serbia & Montenegro, three in Serbia (Grand Production, RTS Records and General Disc Technology, all in Belgrade) and one in Montenegro (Podgorica). The two main pirate CD plants in Serbia & Montenegro are General Disc Technology in Belgrade and the plant in Podgorica. General Disc Technology was established in 2001 (see further below).

The plant in Podgorica was established in 1998 by the infamous Bulgarian illegal CD manufacturer Emil Dimitrov ("Makarona"), who used to own the Unison manufacturing facilities in Botevgrad (Bulgaria). When it became clear that Unison would not receive a license under the Bulgarian optical disc law, Dimitrov moved one of his CD lines to Montenegro and, with the help of local organized crime groups, set up a production facility in Podgorica, where he continued to produce hundreds of thousands of illegal CDs. The bulk of this production has been exported to countries in the region, including Bulgaria.

## The General Disc Technology Case

On July 6, 2002, the Serbian Economic Police (under the Ministry of the Interior), along with the Belgrade City Police and Serbian Financial Police (Ministry of Finance / Internal Revenue) carried out a raid on one of the three Belgrade-based CD plants, General Disk Technology (GDT), and related sites. The raid netted some 700,000 – 750,000 pirate CDs, more than 70 stampers, as well as large numbers of inlays, label films and other elements, all from pirate production. This was one of the biggest seizures ever in Europe. Most CDs contained recent international repertoire. As a safeguarding measure, the equipment and the pirate material were sealed on location in the warehouses of the CD plant.

Unfortunately, despite this laudable initiative by certain law enforcement bodies, the GDT case degenerated in October 2002 when the plant owner broke the seals on his premises and released the 750,000 pirate CDs into the market. Around that time, the competent court had revoked the safeguarding order and the law enforcement officials from the Ministry of Trade, who were supposed to supervise the pirated goods, arrived too late to stop the release of the illegal sound carriers. In the meantime, certain charges for commercial offenses had been filed, but were not considered sufficient to justify further retention of the discs. If the infringement of copyright of foreign phonogram producers, including the possession of infringing goods for commercial purposes, had been a criminal offense under the Yugoslav Copyright Act (see below) and if prosecutors had had the obligation to act *ex officio*, the outcome of this case would have been different.

Cooperation with the Ministry of the Interior in the GDT case has been exemplary. However, the judiciary and the competent courts have been uncooperative at key moments of the procedure. As a result, an injunction order, which was issued with defective wording, could not be perfected and executed. Also, legal counsel for the rightsholders has not been informed of essential developments in the case that would have allowed taking more effective civil safeguarding measures. In addition, rightsholders' representatives were refused access to the seized goods and were thus prevented from determining the exact titles of the infringing materials. As a result, three-quarters of a million illegal CDs ended up back in the Yugoslav market and were partly exported to neighboring countries, including Bulgaria.

The General Disc Technology plant is once again fully operational, churning out hundreds of thousands of optical discs. The Serbian government has not put any meaningful controls in place to ensure copyrights will, from now on, be respected. The criminal penalty foreseen in the law for breaking a seal is not deterrent. Consequently, the owner of GDT gained easy access to the pirated goods under seizure and extremely valuable evidence of massive copyright and, possibly, trademark infringement was allowed to disappear. The damage suffered by the various rightsholders (songwriters, performers and phonogram producers) in this particular case runs in the millions of dollars. In addition, the Yugoslav State is estimated to have lost the equivalent of US\$1.5 million in tax revenue on the sale of the 750,000 illegal optical discs alone.

# **COPYRIGHT ENFORCEMENT IN SERBIA & MONTENEGRO**

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## **Criminal / Administrative Enforcement**

A distinction has to be made between enforcement in Serbia on one hand and in Montenegro on the other. While extremely ineffective in Serbia, copyright enforcement in Montenegro is virtually non-existent. Piracy levels in Montenegro are even higher than in Serbia. The worrying state of affairs in Montenegro is illustrated by the fact that the optical disc plant in Podgorica has been able to churn out and export millions of illegal CDs in the last four years without in any way being disturbed by the authorities. In Serbia, a certain level of awareness of the piracy problem and its negative impact has occurred within specific government departments, notably the Serbian Ministries of Interior (the Economic Crime department), Finance and Culture. However, a lot remains to be done before an effective enforcement system will be in place.

Under the present federal copyright act, criminal prosecution for infringement of authors' rights is possible (provided a complaint is filed—see below) and criminal penalties, albeit too low, are foreseen in the law. However, in recent years, not one single criminal prosecution for copyright piracy has been initiated. There is no information available that would suggest that any pirate in Serbia & Montenegro has ever been sentenced for copyright theft.

Besides the illegal optical disc manufacturing (the two CD plants referred to above and the undoubted presence of a large number of underground illegal CD-R replication facilities), distribution and retail of pirated goods are rampant in Serbia & Montenegro. Retail of pirate materials in shops and kiosks is very visible and could easily be the target of sustained enforcement by police and trade inspectors. However, despite the fact that local and foreign rightsholders have regularly and increasingly urged the relevant enforcement bodies to take action, nothing has happened.

For example, the Serbian Ministry of Trade, Tourism and Services has the competence to inspect and control kiosks and retail shops. It also has the power to impose administrative penalties or close down outlets that are found to have broken the rules and regulations and/or exceeded the limits set by their operating licenses. Under the current legal framework, the Ministry's trade inspectors could have effectively clamped down on massive and blatant sale of pirated materials at the kiosks and shops in Belgrade and in other towns in Serbia, such as the huge market at the Generala Zdanova in Belgrade (around the corner from the Ministry of Trade), referred to above. However, despite repeated promises, nothing has been done.

## **LEGAL REFORM AND RELATED ISSUES**

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### **Copyright Law**

IIPA is informed that the very recent constitutional change of the name of the country did not have any legal impact on the validity of the Copyright Act of the Federal Republic of Yugoslavia and the country's recent decisions to adhere to various international treaties.

The 1998 Copyright Act for the Federal Republic of Yugoslavia (YCA) fails to provide rightsholders with the necessary legal framework to enjoy copyright protection in line with international standards and to effectively enforce their rights (as illustrated by the General Disc Technology case described above).

**Recent adherences to international treaties:** Despite deficiencies in the YCA, in a positive recent development, the following legislation has been passed at the federal level and was adopted by the Federal Assembly on December 16, 2002—

- The Law on Confirmation of the WIPO Copyright Treaty (WCT);
- The Law on Confirmation of the WIPO Performances and Phonograms Treaty (WPPT).
- The Law on Confirmation of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention 1971);
- The Law on Confirmation of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention 1961);

The government of Serbia & Montenegro should be encouraged to deposit its official instruments with WIPO as soon as possible.

**Improvements needed to the current copyright law:** At the same time, Serbia & Montenegro should also bring its law in line with the standards achieved under TRIPS in preparation of accession to the WTO. The Government of Serbia & Montenegro, through the Federal Intellectual Property Office, recently started working on the introduction of amendments to the YCA. A first set of draft amendments is available, but is not yet in a definitive form. Therefore, the comments below refer to the YCA as it is currently in force. The comments are non-exhaustive, as they focus to a large extent on the copyright law provisions that are relevant in the fight against piracy.

**Protection of foreign rightsholders (YCA, Article 139):** The points of attachment for protection of phonogram producers and performers under the YCA do not provide a basis for effective enforcement as regards foreign repertoire. For phonograms, protection is limited primarily to releases first produced in Serbia & Montenegro. Otherwise, protection is given as far as required under the international agreements Serbia & Montenegro has acceded to. The YCA should fill this gap as soon as possible and unconditionally provide full protection to foreign rightsholders. In order to achieve this, Serbia & Montenegro should, within the framework of its accession to the treaties and conventions referred to above refrain from taking any reservations.

**The right of reproduction (YCA, Article 20):** The reproduction right for authors in Article 20 is unnecessarily complicated and gives rise to a number of arguments that distract from the legal certainty required on the market place and in particular in view of digital ways of use. The provision should be redrafted by taking over the formula developed as an international standard: *“Authors shall enjoy the exclusive right of authorizing the direct or indirect, temporary or permanent reproduction of their works, in any manner or form.”* The same formulation should be introduced for producers of sound recordings and performers.

**Protection of software (YCA Article 1):** To provide adequate protection for software and to bring the YCA into compliance with TRIPS and the WIPO treaties, the YCA should be

amended to explicitly enumerate computer programs as a sub-item of literary works. Furthermore, the inclusion of preparatory design material in the definition of a computer program is necessary to clearly delineate the scope of protection in accordance with international treaties.

Lending right: The YCA lacks an exclusive lending right for copyright holders. The lack of this provision facilitates illegal copying and the YCA needs to be amended to provide for an exclusive public lending right.

Possession of infringing copies: In order to effectively deter infringement of copyright, the YCA must be amended to criminalize possession of infringing goods for commercial purposes. The GDT case described above shows the necessity to add the possession of infringing goods for commercial purposes to the list of criminal acts of copyright infringement. For reasons of consistency and as a technical change in the course of providing protection for technological measures and rights management information, the corresponding violation of the new provisions protecting technological measures and rights management information should also be made a criminal offense.

Making available right (YCA, Article 27(6)): The two 1996 WIPO treaties require that authors, performers, and phonogram producers shall be granted an exclusive right designed to cover the emerging services in particular on the Internet. This is to be a separate right clearly to be distinguished from broadcasting. This new right should be drafted as a separate exclusive right under the Yugoslavian Copyright Act: *“Authors shall enjoy the exclusive right of transmitting works by wire or wireless means to members of the public including ways in which members of the public can access the works at a time and place individually chosen.”* The same solution should be introduced for phonogram producers and performers.

Catalogue of economic rights for performers and phonogram producers: Currently, the YCA does not provide the full catalogue of economic rights required for performers and phonogram producers. As a minimum standard, performers and producers have to enjoy a reproduction right, the distribution right, the rental right, a separate and fully exclusive making available right, and rights covering communication to the public and broadcasting. For phonogram producers, as a bare minimum the right of making available has to be added to the list in Article 119. The making available right should not be subject to any existing or new exemptions and statutory licenses and should have the exclusive character prescribed by the 1996 WIPO treaties.

Protection of rights management information and technological protection measures: The protection of rights management information and technological measures is a requirement introduced by the 1996 WIPO treaties and is essential for the protection of creative content in the digital environment. The YCA already provides for meaningful protection of rights management information in Article 174(2). The protection afforded in the same article to technological measures is, however, deficient and needs to be redrafted in line with the requirements of the 1996 WIPO treaties. In particular, protection needs to be extended to cover the circumvention of technological measures and has to cover all activities relating to circumventing devices. Effective remedies have to include criminal sanctions for the violation of the provisions protecting technological protection measures and rights management information.

Ex officio action in criminal proceedings (YCA, Article 186): Article 186 currently makes the criminal offenses provided in the YCA subject to a private action. This fundamentally undermines the efficiency of the criminal procedures provided in the law. For criminal procedures to be efficient it is essential that the enforcement authorities and public prosecution services are under a legal obligation to investigate and prosecute criminal copyright infringements *ex officio*. Rightsholders in the private sector have neither the appropriate investigatory powers, nor are they given the same standing in court. The networks and information resources of public authorities and in particular those used by the public prosecution services are a necessary basis for effective enforcement.

Copyright infringement is a serious crime often conducted in an organized manner and as a means to fund other criminal activities. To create the basis for pirates to face conviction for copyright crimes, and to harmonize prosecution of copyright infringement with prosecution for other intellectual property crimes in Serbia & Montenegro (trademark, patent and industrial design) criminal actions for copyright under Articles 182 through 185 must be subject to *ex officio* action. Article 186 should be deleted.

Damages (YCA, Article 172): Under Article 172(1) Nr 5 copyright holders and related rightsholders can claim indemnity for material damage and under Article 172(1) Nr 6, the publication of the judgment at the defendant's expenses. These provisions, however, do not meet the requirements under Article 41 and Article 45(1) and (2) of the TRIPS Agreement for several reasons—

- No pre-established damages: The YCA does not provide rightsholders with pre-established damages as an alternative to actual damages. Pre-established damages are essential for effective enforcement and important to ensure that rightsholders have recourse to a sufficient remedy and a suitable and economical way to recover the damage suffered through piracy and counterfeiting.
- No aggravated damages: The YCA does not provide specific damages where pirates are found to have been engaged in particularly egregious infringing activity, over long periods of time, or when the violation has been particularly blatant. In such cases, mere compensation for the rightsholders for the direct economic injury or financial loss is not only insufficient to remedy the total harm caused but also does not satisfy the requirements under the TRIPS agreement and the 1996 WIPO treaties calling for deterrent remedies. A provision on aggravated damages should be added to the YCA in order to fulfill the requirement of deterrence.
- No provision on the burden of costs: The YCA does not include the obligation imposed on the infringer to pay the rightsholder's expenses, which may include the attorney's fees as provided under Article 45(2) of the TRIPS Agreement. Article 172(1) Nr 6 therefore needs to be amended. Covering the expenses and the attorney's fees is essential for effective enforcement of rights. Infringement proceedings are highly expensive and often exceed the amount of damages awarded by the courts. Rightsholders should be able to rely on a provision in the Copyright Act providing the means (directly or by reference) to recover their actual costs for infringement proceedings from the infringer and not being inhibited to take a case before a court by the risk of outstandingly high costs. It is therefore suggested that the YCA extend the provisions to the covering of expenses and the attorney's fees.

Presumption of ownership: An additional section on the presumption of ownership should be included in the YCA to address widespread piracy in Serbia & Montenegro effectively. Provisions of that kind become general standard in more and more jurisdictions as it is recognized that in a complex and internationally diverse licensing environment proving the chain of ownership can be extremely difficult and will prevent efficient enforcement of rights. The presumption as to existence and ownership of copyright and related rights is an obligation under the TRIPS Agreement through the application to comply with Article 15 of the Berne Convention. As there is no justification to distinguish between author's rights and related rights, the provision should apply to both rights alike.

Provisional measures: Provisional measures are an essential tool in the effective enforcement of copyright. The provisions in this regard in Article 173, 175-178, are not clear enough and there remains concern that they do not provide sufficient basis for immediately available, meaningful, indiscriminate measures including such measures issued in the course of *ex parte* proceedings. This concern is based on reports that provisional measures are not widely used in Serbia & Montenegro as yet. Also, to enable rightsholders to effectively use provisional measures, the deadline for filing a lawsuit after an official request for provisional measures has been filed must be extended. The current time period (15 days from the *time of filing for provisional measures, not execution thereof*) is much too short both to enable proper evaluation of the results of the provisional measures and sufficient preparation for effective enforcement. The time period should be extended from 15 days to at least 30 days *from the date the provisional measures have been executed*.

Offenses and penalties: The infringement of copyright and related rights amounts to a criminal offence under the YCA. Under Article 183 (1) the unauthorized exploitation of a copyrighted work or a work subject of related rights constitutes a criminal offense and can be punished with up to one year in prison. Under Article 183 (2) copyright infringement for financial gain can be punished with up to three years in prison. Both penalties are below the average compared to other countries and cannot be considered as deterrent within the meaning of Article 61 and should be increased at least to five years in order to meet the requirements of Article 61 of the TRIPS Agreement.

The YCA also provides for financial penalties. Under Article 187(1) any enterprise or other legal entity may be fined up to 45,000 to 450,000 new Dinars if it exploits a copyrighted work or a work subject to related rights or in the case of copyright infringement for financial gain by the entity. According to Article 187(3) the responsible person in the enterprise or entity shall also be fined between 3,000 and 30,000 new Dinars for any of those acts. The fines are roughly equal to US\$665 to US\$6,650 for the enterprise and US\$45 to US\$450 for the responsible person. The fines inflicted on the infringer are, however, not deterrent because they are unacceptably low compared to the profit that can be gained by dealing with pirated goods. To ensure that copyright piracy does not remain a lucrative "business" in Serbia & Montenegro and to provide the deterrent remedies required under TRIPS and the 1996 WIPO treaties the fines need to be substantially increased.

## **Inconsistencies between Federal and Republic Laws**

The legislature in Serbia & Montenegro should ensure that the specific laws at republic level (Serbia and Montenegro, respectively) are entirely in line with the federal laws, such as the

Copyright Act. The judiciary and courts often use existing conflicts and inconsistencies between federal and republic laws as an excuse not to act or dismiss clear-cut cases of piracy.

## OPTICAL MEDIA REGULATION

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The strategic location of Serbia & Montenegro in a region where copyright enforcement and border enforcement is not strong makes Serbia & Montenegro an appealing site for pirate optical media production. The relatively high number of CD manufacturing facilities (four) and the fact that two out of four CD plants have been caught producing hundreds of thousands of pirate optical discs call for the immediate introduction of an effective optical disc plant law in Serbia & Montenegro. The joint capacity of the four CD plants in Serbia & Montenegro is conservatively estimated at over 25 million CDs per annum, which is substantially more than the local legitimate demand for optical discs.

The government of Serbia & Montenegro should craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following 11 points:

- 1) Licensing of facilities: Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and “production parts” (including “stampers” and “masters”), including requirements like production must take place only at the licensed premises, a license only be granted to one who has obtained “manufacturer’s code” (e.g., SID code) for optical discs and production parts, the licensee must take measures to verify that customers have copyright/trademark authorization of the relevant rightsholders, etc.
- 2) Licensing of export/import of materials: Centralized licensing of export of optical discs, and import/export of production parts (including “stampers” and “masters”), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- 3) Requirement to apply manufacturer’s code: Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer’s code, and to cause each optical disc and production part to be marked with manufacturer’s code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer’s codes (including making, possessing or adapting an optical disc mould for forging manufacturer’s code; altering, gouging or scouring a manufacturer’s code on or from a mould or any disc; selling a production part not marked with manufacturer’s code, etc.).
- 4) License record keeping requirements: Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) Registration requirement for commercial optical disc duplication: Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such “commercial optical disc duplication,” giving the names and



addresses of the responsible persons and the address of the premises at which the duplication takes place.

- 6) Plenary inspection authority: Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for rightsholder organization to assist; etc.
- 7) Search and seizure authority: Plenary authority: to enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.
- 8) Government record-keeping requirements: Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- 9) Criminal penalties for violations: Violation of any significant aspect of the regime is subject to criminal sanctions, including individual liability (fines and/or imprisonment).
- 10) Possibility of withholding, suspending, or revoking a license for prior copyright infringement, fraud in the application process, or violation of the Optical Disc Law.
- 11) Possibility of closure of a plant.

The copyright industries look forward to working with the authorities of Serbia & Montenegro to draft, implement and enforce comprehensive optical disc regulations.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# SRI LANKA

### EXECUTIVE SUMMARY

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Sri Lanka should be placed on the Watch List. The piracy rate in Sri Lanka for sound recordings is very high, making it difficult for the legitimate music industry to establish and develop itself in the Sri Lankan market. A small percentage of CDs are legally imported into Sri Lanka, while most are “smuggled” into the country as hand luggage or air freight. Probably all pirated CDs are imported from Pakistan or Malaysia. In addition, approximately two million blank CD-Rs are imported into Sri Lanka annually (many of which are used to “burn” pirate music).

The cassette is the dominant music carrier in Sri Lanka, although CD penetration is likely to expand significantly. The estimated total annual market for cassettes is 8.5 million units, including both blank and pre-recorded, while the market for CDs, including both legally imported and smuggled units, is approximately one million units. Sri Lanka has three large music cassette duplication sites, all of which are involved in the production of both legitimate product for the domestic market and pirate cassettes.

In 2003, the government of Sri Lanka should take the following steps to combat piracy:

- Promptly ratify and implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and update its copyright law.
- Boost border enforcement and increase seizures of imports of pirate cassettes, CDs and other optical media.
- Crack down on pirate production facilities and pirate retail outlets through sustained raids by enforcement authorities (including surprise inspections), followed up by swift police investigations, efficient handling by prosecutors, imposition of deterrent penalties and destruction of all infringing articles as well as materials and implements used in the pirate activities.

### COPYRIGHT PIRACY IN SRI LANKA

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Piracy levels are very high in Sri Lanka. The recording industry reported that the piracy rate for optical discs totalled 35% for Sinhalese repertoire, but was a startlingly high 99% for international repertoire and 100% for Tamil and Hindi repertoire. Virtually the entire market for music cassettes of Tamil and Hindi repertoire is pirate, and the piracy rate for international repertoire on cassette is 97%, compared with 20% for Sinhalese repertoire. Legitimate cassette albums cost from SLR125 to 300 (Sri Lankan Rupees) (US\$1.29 to 3.10), compared with SLR125 to 150 (US\$1.29 to 1.55) for pirate cassette albums. Legitimate CD prices range from SLR400 to 1,100 (US\$4.13 to 11.36), while pirate CDs and CD-Rs cost between SLR100 and 350 (US\$1.03 to 3.61).

In Sri Lanka there are three large duplication sites for music cassettes, all of which produce both legitimate and pirate product. Probably all pirate CDs are smuggled in from Pakistan or Malaysia, and two million blank CD-Rs are imported into Sri Lanka annually (many of which are used for pirate CD-R “burning”).

## **COPYRIGHT ENFORCEMENT IN SRI LANKA**

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Sri Lanka should step up its efforts to crack down on pirate production facilities and pirate retail outlets. It should organize sustained raids by enforcement authorities (including surprise inspections), followed up by swift police investigations, efficient handling by prosecutors, imposition of deterrent penalties, and destruction of all infringing articles as well as materials and implements used in the pirate activities.

Another important initiative should be the enhancement of border enforcement, including seizures of imports of pirate cassettes, CDs, and other pirate optical discs.

## **COPYRIGHT LAW AND RELATED ISSUES**

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Sri Lanka's Code of Intellectual Property came into effect in 1979 and was last amended in 1990. The Sri Lankan government has also recently produced some drafts to update the Code. Sri Lanka should take the opportunity to accede to and implement the WIPO Performances and Phonograms Treaty (WPPT) as well as to the WIPO Copyright Treaty (WCT) and update the Code to comply with TRIPS. Accession and implementation of the two WIPO treaties will ensure that Sri Lanka's legal framework can offer an adequate basis to fight international piracy, ensure the protection of Sri Lankan right holders in foreign territories, and support the development of electronic commerce.

In addition to acceding to and implementing the WCT and the WPPT, Sri Lanka should update the Code to do the following:

- Grant clear and immediate protection for producers of sound recordings on the basis of national treatment of all WTO members, as required in TRIPS;
- Amend the exclusive reproduction right for works, including for producers of sound recordings, to include reproductions, whether temporary or permanent, whole or in part, direct or indirect;
- Grant producers of sound recordings TRIPS and WIPO treaties-compatible rights, including: an exclusive rental right, as required by TRIPS; an exclusive communication to the public right, covering all transmissions by wire and wireless as well as digital transmissions, including the making available of sound recordings so that individual members of the public are able to access them from a place and at a time they choose, consistent with the WIPO treaties; an exclusive distribution right, as required by the WIPO treaties; and an exclusive public performance right;
- Provide adequate protection against the circumvention of technological protection measures (TPMs), including access and copy controls, used by right holders to protect their works against unauthorised uses, as well as adequate protection against the manufacture and trafficking of devices and offering of services/information that enable the circumvention of such technological measures;
- Prohibit the illegal removal and altering of rights management information and the trafficking of copies that contain tampered information;

- Narrow exceptions and limitations, including the provisions on fair use and private copying, to avoid prejudice to right holders' legitimate interests and to ensure no unauthorized use is unintentionally permitted, as is required to comply with the "three-step test" set forth in Article 13 of TRIPS;
- Provide for civil remedies and criminal sanctions that constitute a deterrent to further infringement as well as compensate right holders for injuries suffered due to piracy, for all right holders, including producers of sound recordings, as required in TRIPS;
- Provide for all right holders, including producers of sound recordings, to be able to request *ex parte* provisional measures, including injunctions and searches and seizures of infringing copies, equipment and materials used in the manufacture and trafficking of pirated goods;
- Grant enforcement authorities, including customs officials, *ex officio* authority to search and seize infringing goods, as well as tools and implements used in infringement, and to conduct surprise inspections where violations and infringements may be taking place.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# TURKEY

### EXECUTIVE SUMMARY<sup>1</sup>

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Turkey should remain on the Watch List. Two positive developments occurred early in 2002: the de-registration of licenses granted to a company importing DVDs without authorization; and suspending the application of a broadcast compulsory license that was in conflict with the amended copyright law and was extremely detrimental to right holders. At the same time, Turkey remains a book piracy haven, optical disc piracy has increased, and Turkish courts fail to mete out deterrent sentences and are marred by delays and procedural hurdles.

Turkey was on the Priority Watch List from 1997 until mid-2001 for failure to meet certain benchmarks mutually agreed-upon by Turkey and the U.S. In 2001, Turkey was lowered to the Watch List in recognition of passage of its copyright amendments and was kept there in 2002. The U.S. government continues to investigate Turkey's enforcement practices under the Generalized System of Preferences (GSP) trade benefits program, based on a 1993 review.

Some positive developments in Turkey in 2002 improved the landscape for copyright owners. In March 2002, the Ministry of Culture decided not to appeal the Planet case (meaning Planet, which had obtained "false registrations" to import DVDs from the MOC, would have its registrations revoked). IIPA also learned that the Council of State had issued an intermediate decision suspending the application of a problematic compulsory license with respect to broadcasts. Problems remain in the country, as: U.S. book publishers suffer terribly from piracy of their works; optical disc piracy increased with little reaction by enforcement authorities; and right holders continue to face delays and some procedural hurdles in the courts.

Required actions for 2003:

- Implement activity among the Enforcement Committees under the Ministry of Culture to take swift and deterrent actions against piracy, including a campaign against pirate photocopying of and offsetting (counterfeiting) of published materials, and enforcement against sources and distribution channels of pirate optical discs (eventually under the auspices of a new optical disc law which should be drafted and considered in 2003).
- Enforce the copyright law through the courts by: imposing deterrent sentences on pirates, including jail time (actually served) and significant fines; decreasing delays, burdens, and costs placed on right holders, and awarding increased civil damages, including costs.
- Improve the banderole system so that it decreases fraud and ensures that right holders are not increasingly burdened by such a system.
- Enforce copyright at the borders through customs' efforts to stop pirate imports and exports at the borders.
- Implement provisions allowing for civil *ex parte* orders.

### TURKEY

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<sup>1</sup> For further details on Turkey's history under Special 301 and GSP, see the "History" Appendix of IIPA's 2002 Special 301 submission.

**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	50.0	45%	50.0	40%	50.0	50%	50.0	85%	59.0	95%
Records & Music <sup>3</sup>	18.0	75%	3.5	35%	4.0	40%	4.0	30%	4.0	30%
Business Software Applications <sup>4</sup>	NA	50%	22.4	58%	78.6	63%	78.2	74%	44.5	87%
Entertainment Software	NA	NA	23.7	90%	116.2	96%	95.1	82%	92.3	80%
Books <sup>5</sup>	25.0	NA	27.0	NA	28.0	NA	32.0	NA	28.0	NA
TOTALS <sup>6</sup>	93.0		126.6		276.8		259.3		227.8	

## COPYRIGHT PIRACY IN TURKEY

### Turkey Remains the Region's Worst Book Pirate

The book piracy situation in Turkey is the worst in the region, and indeed has deteriorated further during the past year. 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. Industry estimates that up to 90% of the English-language textbook market is decimated by high quality, four-color pirate editions. Copy shops near the universities (and bookstores) thrive in the pirate trade.<sup>7</sup> There has been a noticeable increase of reprints in

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> Loss figures for the record industry in 2002 in Turkey reflect an in-depth examination of the market, rather than a rapid surge in piracy compared with previous years.

<sup>4</sup> BSA's estimated piracy loss for 2002 is not available, and the estimated levels for 2002 are preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$58.9 million at 64% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> The publishing industry reports that over 50% of all published materials purchased in Turkey are pirated. This figure is considered conservative. Also, the value of the Turkish lira declined at least 35% from spring 2002 to January 2003. Thus, loss numbers have diminished slightly due to the shrinking overall market in Turkey, but the number of pirated copies has increased.

<sup>6</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses in 2001 to the U.S. copyright-based industries in Turkey were \$163.1 million. Because of the adjustment to reflect BSA's final 2001 statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Turkey in 2000 are adjusted to \$126.6 million.

<sup>7</sup> 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.

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. Certain local distributors have also been caught attempting the unauthorized sale of "India-only" reprints, much to the dismay of their foreign publisher suppliers. Some booksellers are fighting piracy by denouncing pirates and taking them to court,<sup>8</sup> but fines are ridiculously low – the new, higher fines in the copyright law have not been implemented. Furthermore, procedural hurdles continue to plague publishers who wish to enforce their rights. For example, many judges are now demanding notarized translations of original contracts between author and publisher in order to prove copyright ownership for each title. Hurdles such as these have prevented the successful prosecution of a single case since the new intellectual property law came into effect.

In addition to working to curtail blatant photocopy and reprint piracy, Turkey's government must be more aggressive in stopping public universities from encouraging their students to buy illegal photocopies at shops (some of which have ties to the public institution). Increasingly, professors at public universities endorse the practice of having students purchase "bound notes" for their classes. These "bound notes" contain 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). Illegal photocopying and piracy in the higher education sector are evidenced by increased requests by teachers for access to free supplementary materials through electronic databases in areas where sales have plummeted. This problem is like to worsen as digital copying and print-on-demand technology become more common. 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 fix this problem immediately.

## **Pirate Optical Discs Decimate Retail Markets in Turkey**

Digitized forms of piracy of copyrighted works now dominate the scene in Turkey. Pirate optical discs (media read by a laser, such as CDs, VCDs, DVDs, CD-ROMs) with all kinds of copyright content (movies, music, business software, entertainment software, reference materials), many of which are imported into Turkey from Asia (primarily from Malaysia, Hong Kong, Thailand, Taiwan), Ukraine and Bulgaria, as well as some from Russia and Eastern Europe, are abundant. In 2002, sources indicate that Turkey now has eight optical disc plants in operation, with at least 18 production lines, for a total optical disc production capacity of at least 63 million discs. Of increasing significance in the market is the illegal "burning" of copyrighted content onto blank CD-Rs.<sup>9</sup> This phenomenon can take place in a full-blown optical disc plant, or in as inconspicuous a locale as a residence. In addition, some optical disc piracy in Turkey has been smuggled in, as pirates often carry pirated materials in personal luggage on airplanes.

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<sup>8</sup> 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.

<sup>9</sup> The videogame industry reports increasing numbers of "burned" CD-Rs in 2002 with the latest games.

Some industry estimates indicate that as much as 70% of pirate product found in the retail markets is produced inside Turkey.<sup>10</sup> Given such apparent massive increases in local production, Turkey needs to pass and implement an effective optical disc law to weed out optical disc pirates, through robust licensing and controls over optical disc production, controls on imports of production equipment (including stampers and masters) and raw materials, as well as requirements to use unique source identifiers to track the loci of production. The retail markets have been devastated by pirate optical discs. Pirate product is sold through highly organized and effective distribution networks. Obviously, all industry sectors are affected.<sup>11</sup>

For the motion picture industry, the growing concern is DVD piracy, which appeared in the Turkish market at the beginning of 2002 and is on the increase. DVD copies of newly released titles can be found in retail stores with Turkish subtitles for about US\$8-10. These copies are mainly imported from Ukraine and Russia. Additionally, VCD piracy remains a significant form of piracy in Turkey.<sup>12</sup> Pirates duplicate VCD copies of movies not yet released in Turkey in theaters or on video (so-called “pre-release” titles) with Turkish subtitles, and also make back-to-back copies of legitimate VCD titles with Turkish dubbing. There is, however, no information or evidence regarding the existence of large-scale factories engaged in mass replication of Motion Picture Association member company titles. Instead, it appears that street vendors are directly supplied by local networks of varying sizes operating in complete secrecy. While the open sale of pirate VCDs in retail stores decreased following passage of the copyright law in March 2001, street trading in pirate VCDs, especially active in major cities and certain tourist locations, increased in 2002 due to the recent financial crisis, increasing unemployment and ongoing enforcement problems.

## Other Piracy Phenomena in Turkey

- **Internet Piracy:** The Internet is becoming an important distribution means for pirate VCDs in Turkey (through online ordering of pirate copies). In 2002, a new form of Internet piracy, namely, the downloading of movies in “DivX” format (an increasingly popular decompression technology that facilitates the downloading of a movie from the Internet), is causing damage to the legitimate retail market in Turkey.
- **Unauthorized Public Performances of Audiovisual Works:** Unauthorized public performances of new and popular films using DVDs and VCDs on wide-screen systems at schools, cafes and bars, cultural centers and unlicensed video theaters have grown in Turkey, such that the piracy level was roughly 25% in 2002. Certain inter-city coach services

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<sup>10</sup> A large entertainment software company indicates that 70% of its pirate console games are locally produced, while 30% are smuggled into the country. The motion picture industry reports that pirate VCDs are now mostly produced locally in small-to-medium size facilities and in private residences. Imported pirate CDs from Eastern Europe (mainly Ukraine) still pose problems, and sell on the streets in Turkey for about US\$1, while the cost for a pirated CD-ROM containing a videogame is less than \$1. According to the recording industry, most pirate audio CDs are locally produced illegal CD-R compilations.

<sup>11</sup> For example, numerous pirate videogame titles in all formats, including PC (personal computer) and console-based games, are available in Turkey at retail stores, through street vendors and by ordering them over the Internet. Pirate cartridge-based videogames manufactured in Asia and shipped through Hong Kong also flood the Turkish market.

<sup>12</sup> Turkish viewers generally prefer to play VCDs on personal computers as well as on VCD players. Sales of VCD players are on the rise, selling for as little as US\$50-75, and are also advertised to the public via newspaper publicity campaigns. The number of VCD players is now estimated at 1.2 to 1.5 million players, with an additional 600,000 to 900,000 CD-ROM drives on personal computers. Audio CD players and PlayStation consoles are also modified for multi-purpose use to include VCD playback.



also show films during journeys without authorization. The local enforcement organization working on behalf of the motion picture industry (AMPEC) identified and investigated 9 public performance cases in 1999, 25 cases in 2000, 22 cases in 2001, and 21 cases in 2002. Pirate VCDs and DVDs are used as masters for unauthorized public performances.

- **Corporate End-User Piracy of Business Software and Hard-Disk Loading Piracy:** Business software piracy continues to be a significant problem in Turkey. Both the unlicensed use of software in a business setting (corporate “end-user” piracy of business software),<sup>13</sup> and the loading of many programs onto the hard drive of a computer prior to its sale (so-called “hard-disk loading”) are found in Turkey.
- **Videocassette Piracy:** With the introduction of pirated audiovisual works in digital formats (mainly VCDs and less DVDs) to the Turkish market, the traditional videocassette has lost much of its popularity, and VHS video piracy has become of marginal significance since 2001. There remain approximately 100 video rental outlets in Turkey, with an average pirate copy stock of between 20 and 50. Pirate copies are generally produced by the shops themselves. Copies are generally poor quality, with typewritten or handwritten labels. Pirates use legitimate videocassettes, imported cassettes, imported DVDs, and pirate VCDs as masters. Occasionally, pay-TV broadcasts are also used to produce pirate copies.
- **Unauthorized Parallel Imports:** Unauthorized parallel imports of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) continue to present a problem for legitimate DVD distributors. However, the contentious issue regarding the systematic registration of Zone 1 DVDs by the Ministry of Culture has finally been resolved.<sup>14</sup>
- **Broadcast Piracy:** Broadcast television piracy has been a serious but declining problem in Turkey. It is now estimated that approximately 10-15% of the 230 local broadcast stations continue to engage in broadcast piracy, transmitting domestic and foreign films, including MPA members’ titles, using videocassettes and pirate VCDs as masters. Broadcasting music without a license from the relevant right holders is a criminal act under the Turkish Copyright Act. Nevertheless, despite frequent warnings, hundreds of radio broadcasters around the country play music round-the-clock without any permission from the copyright owners.

## 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

<sup>13</sup> In 2002, the Turkish government reportedly embarked on a program with the local Business Software Alliance and other private sector organizations on a campaign (commercials on television/radio as well as posters in metro stations) encouraging use of authorized business software. The government was also reportedly preparing to issue a circular in mid-2002 on the importance of the use of licensed software in government agencies, but did not do so following national elections.

<sup>14</sup> An action was filed in June 2000 against Planet, an illegal importer, and against the Ministry of Culture for allowing Zone 1 DVDs to be registered. After losing this case, the Ministry of Culture appealed the decision. Subsequent cases were then filed by other Turkish distributors. The Ministry finally decided to withdraw its appeal against the first case and not to appeal against the others, and to finally discontinue its practice of registering Zone 1 DVDs.

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 <sup>15</sup>	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 <sup>16</sup>	4	\$600	3

#### 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 <sup>17</sup>	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 <sup>18</sup>	5	\$1000	2

<sup>15</sup> For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2000.

<sup>16</sup> For motion pictures and entertainment software, this number denotes number of cases in which a fine was levied; in other cases, fines were suspended. The amount shown was current as of February 2001.

<sup>17</sup> For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2001.

## TURKEY CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	ENTERTAINMENT SOFTWARE (PLAYSTATION)
Number of raids conducted	216	106
Number of cases commenced	199	105
Number of defendants convicted (including guilty pleas)	199	105
Acquittals and dismissals	7	
Number of cases pending <sup>19</sup>	407	223
Total number of cases resulting in jail time	8	22
Suspended prison terms		
Maximum 6 months	4	3
Over 6 months		
Over 1 year	3	19
Total suspended prison terms	7	22
Prison terms served (not suspended) (appealed)	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	12	10
Up to \$1,000	7	6
\$1,000 to \$5,000	5	4
Over \$5,000		
Total amount of fines levied (in US\$)	15,000	10,600

### Some Enforcement Results in 2002

The copyright industries were generally pleased to see continued raiding in Turkey of various targets of piracy. The Turkish Ministry of Culture confirmed that 81 Enforcement Committees, once for each province in Turkey, were established in 2002, although only one (in Istanbul) is known to have started to take some concrete actions.<sup>20</sup> In Istanbul, for example, an investigator of AMPEC (the private anti-piracy organization that acts on behalf of the motion picture industry) was appointed to represent the film industry on this "Inspection Committee." The Inspection Committee ran its first raids in August 2002.<sup>21</sup> The strength in theory of these committees is that they can act *ex officio*.<sup>22</sup> This means groups like AMPEC can file their

<sup>18</sup> For motion pictures and entertainment software, this number denotes number of cases in which a fine was levied; in other cases, fines were suspended. The amount shown was accurate as of currency exchange rates in February 2002.

<sup>19</sup> For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2002.

<sup>20</sup> Each Committee is to be made up of Ministry representatives (from the Ministries of Culture, Finance, and Interior), representatives of local law enforcement (Police and Municipality), and representatives of right holder associations.

<sup>21</sup> On August 15, 2002, the Inspection Committee ran its first raid against nine street vendors in the Sirinevler district of Istanbul, resulting in the seizure of 2,243 pirate VCDs, 2,131 pirate music CDs and 640 pirate Sony PlayStation videogames. A few days later, a second raid was run against a pirate shop and small duplication facility located in the Sinanpasa Business Centre, resulting in the seizure of 23 CD-R burners and 120 pirate VCDs.

<sup>22</sup> Before the revision of the Copyright Law, the initiation of criminal actions could often be cumbersome as *ex-officio* actions were not normally possible for copyright offenses.

complaints directly with the Inspection Committees instead of having to obtain a search warrant from the Public Prosecutor. IIPA hopes this will enable law enforcement authorities to substantially increase the number of raids against street vendors, pirate producers, and distributors/warehouses in 2003. With a view to developing public/private cooperation in anti-piracy actions, education, and training, there should be an executive contact point/lead in each Committee, with an accepted/appointed lead body at the central government level.

Even prior to the formation of the Enforcement Committees, AMPEC was able to carry out raids with local law enforcement, although, unfortunately, in one instance, an AMPEC lawyer was physically attacked.<sup>23</sup> In one raid in June 2002, AMPEC and members of law enforcement took a raid on a known Internet pirate who was selling CD-ROMs with movies in DivX format via two websites (a decompression technology that facilitates the downloading of a movie from the Internet), seizing 1,192 pirate discs, and causing a minor uproar in the Internet pirate community.<sup>24</sup> As of the end of 2002, AMPEC cooperated with the police to seize a total of 642,000 pirate VCDs in numerous raids against retail stores, street vendors and wholesale distributors. The Financial Police are also estimated to have seized an additional 500,000 VCDs through *ex-officio* actions under the smuggling law. The growing appearance of pirate DVDs in the market has also been recently noted by AMPEC. AMPEC seized a total of 8,301 pirate and parallel imported DVDs in 2002. AMPEC also worked largely on its own to weed out 26 broadcasters during 2002 that were engaged in the illegal broadcast of Motion Picture Association content, and the stations concerned ceased their pirate broadcasts following written warnings.

The business software industry experienced some support from the government in 2002. Five criminal “end-user” raids were conducted upon complaints made by members of the Business Software Alliance: two in Istanbul, two in Izmir, one in Bursa, and one in Ankara.<sup>25</sup> In three of the raids, evidence was properly seized, including all the computers and hard drives used by the companies were seized. In the Ankara raid, unfortunately, those raiding the premise seized only one sample hard drive from the target company raided, which may have allowed the offending company to continue to pirate software.<sup>26</sup> Prosecutors in Ankara also delayed conducting the search until receiving an order from the court. The Business Software Alliance has also found that police have not wanted to intervene to stop retail sales of pirated materials unless the relevant right holder files a complaint. IIPA hopes that the establishment of

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<sup>23</sup> In May 2002, a motion picture industry representative (from AMPEC) and Turkish police officers raided a warehouse suspecting that the owner was using the facility as a VCD manufacturing plant. The owner barricaded the door and attempted to destroy the pirate material. After the police gained entrance, the man attacked AMPEC's attorney and had to be physically restrained. The raid netted over 1,400 pirate VCDs, and the man was arrested and charged for violating the copyright law and for assault. After the attack, AMPEC's attorney received threats from the defendant's family in an attempt to dissuade AMPEC from pressing charges. AMPEC has noticed a general increase in the amount of violence during raids following the enactment of tougher penalties in the 2001 copyright law.

<sup>24</sup> Apparently, after the raid, the perpetrator took down the website on his own, and sent out communications to many other websites engaging in similar activities to warn them about impending raids.

<sup>25</sup> One company which had branches in both Bursa and Izmir was raided in both locations.

<sup>26</sup> The BSA reports that prosecutors in Ankara usually order the seizure of only one personal computer during a raid and leave the rest with the raided company. Prosecutors in other areas of the country usually order the seizure of all PCs of a raided company that are found to have unlicensed software. The differing practice in Ankara often prevents the quick settlement of legal disputes between the raided company and the right holder and leads to protracted and expensive legal proceedings.

Enforcement Committees will allow for more *ex officio* raiding on behalf of all affected industries in the copyright community.

## Establishment of Specialized IPR Courts

The establishment of Specialized Intellectual Property Courts, as required by the amended Copyright Law, is a positive sign, although their effectiveness still must be demonstrated.<sup>27</sup> The establishment of one Specialized IP Court per province is a requirement imposed by amended Article 76 of the Law, but to date, only one court was established in Istanbul. In the meantime, existing criminal courts of first instance have been assigned by the Ministry of Justice to function as the Specialized IP Courts for all other provinces in Turkey. All intellectual property cases were filed before these courts in 2002; however, only two first-instance court decisions were issued under the 2001 copyright law. The first was issued on October 3, 2001 against a video retail outlet located in the Sinanpasa Business Center, Besiktas/Istanbul, in which the defendant was sentenced to four years in prison and to a fine of US\$30,000;<sup>28</sup> and the second was issued on July 17, 2002 against five video shop owners in Antakya, in which Hatay Province's Criminal Court of First Instance sentenced each defendant to the minimum penalty under the amended law, a two-year prison term, and a US\$6,000 fine. In both cases, the defendants have appealed the cases to the Supreme Court, which is expected to issue final decisions for each case sometime in 2003.

The Business Software Alliance achieved successes in some of the cases brought in 2001 (under the old law). Of 50 pirate resellers and end-users raided in 2001, six people were convicted in the criminal courts in 2002. Defendants were sentenced to jail terms of nine months each in three cases; however, all were suspended sentences. The sum of criminal fines meted out by the courts in the cases brought in 2001 totaled US\$1,000, far below the deterrent levels which TRIPS requires. These figures were affected to some extent by the general amnesty proclaimed in Turkey in 2001,<sup>29</sup> which decreased the total amount of criminal punishment ordered by Turkish courts in cases involving piracy of business software. On the civil side, the business software industry indicates that decisions reflected more familiarity with the concepts and need for adequate compensatory damages, awarding three times the retail market value, indicative of progress toward deterrence (note that these cases too were decided under the old law). There was no improvement in 2002, however, in moving courts to award costs and reasonable attorney's fees.

Viewing these results, it is clear that the situation has evolved somewhat from 2001, when most raids that led to criminal actions resulted in non-deterrent penalties, or, in cases where sentences were meted out, in suspended sentences.<sup>30</sup> IIPA hopes to see the evolution of

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<sup>27</sup> 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.

<sup>28</sup> Due to mitigating circumstances (the pirate's respectful attitude toward the court), the Court later reduced his sentence to a 3 year and 4 month prison term and to a US\$28,000 fine.

<sup>29</sup> The Amnesty of 2001 was a general amnesty program covering a broad range of crimes.

<sup>30</sup> Indeed, under the old law, non-deterrence was codified, since according to Law No. 647 for the implementation of criminal sentences, judges are required to commute automatically sentences of one year (or less) into a fine. Fines

the IP courts around the country into well-functioning bodies regularly meting out deterrence where commercial piracy is found. However, copyright infringement is still not viewed as a serious crime by some judges and prosecutors, and traders, especially street vendors, are seen as poor people who are victims of the economic and political situation.<sup>31</sup> Such attitudes have lead some prosecutors to refuse to take criminal actions following raids and to reject applications for criminal raids, referring complainants to the Enforcement Committees.

## Procedural Hurdles Still Hinder Judicial Enforcement

Notwithstanding the promising outcomes of several cases in 2002, the establishment of the Specialized IP Courts does not, unfortunately, seem to have shortened the prosecution timeline. Many cases brought under the amended law in 2001 and 2002 cannot expect to reach verdicts until late 2003. Because copyright infringement cases have traditionally been given extremely low priority by the prosecutors and courts, the copyright industries remain skeptical that the courts will begin to mete out justice more expeditiously.<sup>32</sup> Most cases in the courts for all the industries remain in court to this day.<sup>33</sup>

Another abiding problem involves the Attorneyship Law's prohibition on private entities such as AMPEC from protecting third parties without having a local lawyer acting on behalf of the right holder as an intermediary for every case.<sup>34</sup> This Law unduly adds an additional burden and substantial costs to the bringing of cases in Turkey.

Another procedural problem has involved the use of experts by courts to address specific issues in copyright cases, and defendants' use of objections to force other experts to opine on the same issues, leading to excessive delays, and even wrongful acquittals. IIPA is very hopeful that the newly established Specialized IP Courts will not rely on outside experts in cases involving copyright so readily, especially on basic questions of law.<sup>35</sup> A further concern

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can even be paid in installments. Since the two convictions under the amended law brought minimum jail sentences of two years, those sentences, unless overturned on appeal, cannot be commuted.

<sup>31</sup> In some adverse decisions obtained from the Istanbul and Ankara Courts, judges have dismissed cases, giving dubious reasons, like: the case should have been heard under the Cinema Law (Law no: 3257) because there is no evidence that the CDs were copied by the pirate himself; or, the case should be heard under the Cinema Law (Law no: 3257) as per Turkish Criminal Code, Article 2 "the law which is in the defendant's favor is/should be applied"; or other technical reasons.

<sup>32</sup> Courts have generally taken one to two years to decide such cases, and an additional eight months to a year to decide appeals.

<sup>33</sup> For example, there are at least 500 music piracy cases still languishing in the courts.

<sup>34</sup> As a result of the Attorneyship Law, organizations like AMPEC must hire regional attorneys to seek raid approval from Public Prosecutors. Following a raid where suspect material is seized, the Public Prosecutor then presses criminal charges, and the organization's lawyer immediately submits a petition of intervention to become a party to the case. Without such intervention, cases that lose in court cannot be appealed, and are unlikely to lead to successful results. For example, without the presence of an organization attorney, the accused can challenge the right holder's rights, and Prosecutors are likely to find it difficult to prove their cases because of a lack of access to right holder documentation. As a result, lawyers must be hired for three key phases of any case: (1) filing the initial complaint with the public prosecutor and obtaining a search warrant; (2) conducting the raid with the police; and (3) having the Public Prosecutor press charges and providing assistance in the courtroom to obtain convictions.

<sup>35</sup> For example, in the past, courts were known to have called upon experts to answer questions on basic issues of law, such as whether unauthorized loading of software on the hard disk of a computer is a copyright infringement. In a past case, a court-appointed expert opined that such act was not an infringement, and the business software industry notes several cases over the past few years in which a defendant was acquitted on the basis of such an "expert's"

with outside experts is the lack of adequate technical expertise. There have been cases where court-appointed experts in intellectual property cases have been issuing reports that are not factually accurate and appear biased against right holders. For instance, the expert's reports in two of the cases were far from being objective, sound or technically acceptable, and led to unfavorable judgments, despite the defendants' clear unauthorized use of software. The issue appears to be particularly acute for non-Turkish right holders. The apparent selective enforcement of intellectual property rights depending on the nationality of the right holder is not conducive to an economic environment in Turkey that is open to foreign investment. Moreover, such actions could discourage non-Turkish right holders from introducing products based on intellectual property rights in Turkey.

IIPA understands that the new specialized IP courts have already begun taking steps to obtain evidence and appoint experts with more urgency and care 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.<sup>36</sup>

## **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 unlicensed uses of software in a business setting (so-called “end-user” piracy of business software), and providing such searches is a TRIPS obligation. Local counsel has advised that the 2001 amendments to the Copyright Law would allow for *ex parte* civil searches, in addition to searches pursuant to the court's authority, for obtaining evidence of copyright infringements, and the Ministry of Justice has even stated that civil *ex parte* searches are available under Turkish law, but without citing any specific provisions.<sup>37</sup> 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.<sup>38</sup>

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report. 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).

<sup>36</sup> The private sector was active in training in 2002. For example, the Business Software Alliance supported a day-long judicial training seminar, under the auspices of the Ministry of Culture, to address software copyright in July 2002 in Ankara. In addition to Ministry officials, a number of judges also attended. Civil *ex parte* searches were one of the items discussed. Ministry officials have expressed an interest in similar training the future and IIPA members stand ready to assist.

<sup>37</sup> One possible interpretation is 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.

<sup>38</sup> 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

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 copyright law fixed this problem as it appeared on the books, for example, specifying imprisonment for up to three months for a 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. IIPA is unaware of a single instance in which the search and seizure provisions have been successfully used in Turkey. 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.

## **Banderole System Not Working to Curtail Piracy**

The banderole (sticker) system has not worked as an anti-piracy tool in Turkey, and even though strengthened provisions were introduced in the 2001 copyright law (including the possibility of criminal penalties for unauthorized uses of banderoles or dealing in works without banderoles), those provisions remained untested in 2001 and 2002.<sup>39</sup> IFPI (the International Federation of Phonographic Industries) reports that some plants hold unnecessarily large quantities of unused banderoles, which are not secured adequately. Additionally, where banderoles are applied to a jewel case (the case of an optical disc), this situation can easily be exploited for fraudulent purposes, as pirates will insert a pirate disc into the case of an original (making it look "legitimate"). Fraud and abuse marred the system in 2001, as over five million stickers were unaccounted for and probably made their way into unauthorized users' hands and onto unauthorized product, making them look "legal."<sup>40</sup> In addition, in 2001, proceeds from the banderole allocation were being collected but were not being used for anti-piracy purposes.<sup>41</sup>

IIPA has heard that the Ministry of Culture may be in the process of developing a computerized database to improve control over banderoles for all copyrighted products, starting in Ankara, with plans to extend it to Istanbul and around the country. Such a system could be a positive development, if the use of the banderoles is verifiable through audit procedures, including through contacting right holders or receiving right holders' correspondence to verify or deny that any particular applicant for the banderoles is authorized to distribute in Turkey (such denial might include a letter to the Minister indicating who the exclusive distributor is, thereby acting as a bar to anyone else receiving banderoles for that right holder's product in Turkey).

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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.

<sup>39</sup> Currently, Article 81 provides generally that infringement of banderole-regime products shall result in a prison sentence from (4) years to (6) years and a heavy fine from 50 to 150 billion Turkish Liras, and does not distinguish among street sellers, distributors and manufacturers of illegal products.

<sup>40</sup> IIPA understands that one civil servant of the Istanbul Copyright Office was tried in 2001, found guilty, and imprisoned for large-scale misappropriation of banderoles.

<sup>41</sup> For example, the entertainment software industry reported in 2001 that banderoles for game software were being obtained falsely by pirates supplying false documentation to the Ministry of Culture, which did not take steps to ascertain whether documentation presented was legitimate, somewhat analogous to the false registration problem with respect to importation of DVDs of movies that was solved in 2002.



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).<sup>42</sup> Unfortunately, in 2002, IIPA understands there were cases in which prosecutions were not brought against those fraudulently using banderoles, and that there was even a directive in November 2002 to prosecute not under Article 81, but under the Cinema Law, which would bring with it much less deterrent penalties.<sup>43</sup> This would be a step in exactly the wrong direction, and IIPA seeks clarification from the government of Turkey that it will prosecute to the maximum extent of the law anyone who fraudulently uses banderoles. 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.” The Ministry of Culture should, in a transparent and verifiable manner, use a substantial part of the banderole income to finance the further establishment and operations of the regional enforcement committees.

## **COPYRIGHT LAW AND RELATED ISSUES IN TURKEY**

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Amendments to the 1951 copyright law in Turkey (Law No. 5846) passed in March 2001 brought Turkey’s copyright regime considerably closer to international treaties standards and have led to some temporary gains in the fight against piracy.<sup>44</sup> Passage of the amended 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. There are a few remaining ambiguities about which IIPA seeks clarification.

- **Availability of *Ex Parte* Civil Search Orders:** As discussed above, the amended copyright law does not include express provisions regarding civil *ex parte* search measures. *Ex parte* civil search orders are required by TRIPS Article 50. We are pleased to learn that an official from the Ministry of Justice has stated that civil *ex parte* searches are available under Turkish law, but the official failed to cite specific provisions; IIPA seeks clarification from the Ministry as to the basis for stating such searches are available.
- **Importation Right for Producers of Sound Recordings:** Unlike works, there is no express exclusive importation right (including parallel import protection) for producers of sound recordings. This right should be provided.

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<sup>42</sup> 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.

<sup>43</sup> IIPA understands that the Banderole Commission had, upon a seizure of goods without banderoles, or goods using fraudulent banderoles or fraudulently-obtained banderoles, usually initiated a legal action against the seller under Article 81 of the Copyright Law. However, IIPA has learned that the Banderole Commission and prosecutors in Istanbul have recently agreed on a procedure whereby street sellers would not be prosecuted under Article 81, but under Law 3257 Relating to Cinema, Video and Musical Works. As the penalties provided for illegal street sales under the Cinema Law are small when compared with Article 81, this change further weakens the banderole regime.

<sup>44</sup> For example, in 2001 and into 2002, the motion picture industry reports that the amended law had a substantial deterrent effect on pirate retailers and on the levels of television and public performance piracy.

- **Protections Against the Circumvention of Technological Protection Measures:** The amendments implemented many of the requirements of the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). However, one important area the law as amended does not provide for is protection 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 or trafficking in circumvention devices).<sup>45</sup>
- **Confirm No Formality Requirements:** An additional transition article to the 2001 amendments to the copyright law (Supplemental Article 5) indicated that there would be compulsory deposit of five copies of any copyrighted material. Such a requirement, if imposed in practice and if it limits the exercise of right, may constitute a formality that violates Article 5(2) of the Berne Convention (and therefore, TRIPS). IIPA notes that failure to deposit can result in a fine of TL5 billion (currently about US\$3,116). This provision should not be applicable to foreign right holders.

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<sup>45</sup> One possible formulation of a prohibition on circumvention of technological protection measures that would satisfy the WIPO treaties is as follows:

1. Any person who
  - a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure; or
  - b) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products or components or offers to the public or provides services, which:
    - i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure, or
    - ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
    - iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure;
 shall be guilty of an offense, and shall be liable, upon the suit of any injured party, to relief by way of damages, injunction, accounts or otherwise.
2. This section prohibits circumvention of technological measures, and does not require an affirmative response to such measures. This section does not require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications or computing product provide for a response to any particular technological measure. This paragraph does not provide a defense to a claim of violation of paragraph 1(b).
3. “‘effective technological measure’ means any technology, device or component that, in the normal course of its operation, controls access to a protected work, sound recording, or other subject matter, or protects any copyright or any rights related to copyright as provided by this Act.
4. A violation of this section is independent of any infringement that might occur under this Law.

## Turkey Needs Optical Disc Legislation

The strategic location of Turkey in a region where copyright protection and border enforcement are weak makes Turkey an appealing site for pirate optical media production. The relatively high number of CD manufacturing facilities calls for the early introduction of an effective optical disc plant law in Turkey.

The government of Turkey should, therefore, craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following points:

- 1) **Licensing of Facilities:** Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and “production parts” (including “stampers” and “masters”), including requirements like production take place only at the licensed premises, a license only be granted to one who has obtained “manufacturer’s code” (e.g., SID Code) for optical discs and production parts, licensee take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.
- 2) **Licensing of Export/Import of Materials:** Centralized licensing of export of optical discs, and import/export of production parts (including “stampers” and “masters”), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- 3) **Requirement to Apply Manufacturer’s Code:** Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer’s code, and to cause each optical disc and production part to be marked with manufacturer’s code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer’s codes (including making, possessing or adapting an optical disc mould for forging manufacturer’s code; altering, gouging or scouring a manufacturer’s code on or from a mould or any disc; selling a production part not marked with manufacturer’s code, etc.).
- 4) **License Record Keeping Requirements:** Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) **Registration Requirement for Commercial Optical Disc Duplication:** Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such “commercial optical disc duplication,” giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.
- 6) **Plenary Inspection Authority:** Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.
- 7) **Search and Seizure Authority:** Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.
- 8) **Government Record-Keeping Requirements:** Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- 9) **Criminal Penalties for Violations:** Violation of any significant aspect of the regime is criminally punishable, including individual liability (fines and/or imprisonment).

- 10) **Possibility of Withholding, Suspending, or Revoking a License for Prior Copyright Infringement, Fraud in the Application Process, or Violation of the Optical Disc Law.**
- 11) **Possibility of Closure of a Plant.**

The copyright industries look forward to working with the authorities of Turkey to draft, implement and enforce comprehensive optical disc 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 also be updated to delete conflicting and confusing provisions and to bring weak penalties up to the amended copyright law standards. IIPA now understands that, as of the end of 2002, the process of amending the Cinema Law has been aborted, and that the Cinema Law will be replaced by a new law entitled "Law on the National Cinematography Institute."<sup>46</sup> The new law will apparently establish The National Cinematography Institute as a separate legal entity within the Ministry of Culture, which would act as an official central body for the overall cinema and audio-visual sectors in Turkey. Its duties would cover a wide range, from making administrative and legal arrangements, providing support for the industry to issue licenses, inspect, and classify productions, arrange for co-productions, and set up and operate establishments and facilities, including archives, libraries, studios and an observatory. The new law would also apparently also cover inspection and classification of audiovisual productions, meaning the "inspection" system (a kind of censorship) will not be fully abandoned. However, classification criteria were not stated in the law, and probably would be arranged by Ministry regulations.

Because the present Cinema Law (Law No: 3257) would be repealed and superseded by this legislation, IIPA notes that the courts and the Banderole Commission, among others, would no longer be able to apply the Cinema Law for piracy offenses rather than the Copyright Law in order to bypass the stiff criminal penalty provisions in the Copyright Law.<sup>47</sup> For the copyright industries, this would be an extremely positive development.

## **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 2002, \$426.6 million in Turkey's imports to the United States benefited from the GSP

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<sup>46</sup> The Minister of Culture announced on December 24, 2002 that a semi-independent "Turkish National Cinematography Institute" would be founded by a new piece of legislation and the Ministry posted a draft text of the proposed legislation on its website on December 30, 2002. The full title is "Draft Law on the Establishment and Terms of Reference of the Turkish National Cinematography Institute."

<sup>47</sup> Some prosecutors insist to refer a/p cases to municipalities for administrative fines per the Cinema Law instead of filing criminal cases under the Copyright Law.

program, accounting for 13.1% of its total imports to the U.S.<sup>48</sup> 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 went into force on March 6, 2002, and the WPPT went into force on May 20, 2002. 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 WIPO treaties would be a vital step toward Turkey's establishment of an adequate legal framework for electronic commerce.

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<sup>48</sup> In 2001, \$437 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

## 2003 SPECIAL 301 REPORT

# URUGUAY

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Uruguay be placed on the Special 301 Watch List this year, contingent upon adequate and effective implementation of the its recently amended copyright law and improved actions taken to reduce piracy in-country and at its borders. Effective implementation and enforcement of the amended copyright law is imperative because piracy levels remain high in Uruguay. Notwithstanding the fact that the amended law still falls short of fully meeting modern levels of copyright protection, IIPA proposes to withdraw our June 2001 petition to the U.S. Trade Representative which requested the initiation of a country practices review of Uruguay's intellectual property protection under the Generalized System of Preferences (GSP) trade program. IIPA requests that copyright issues remain high on the bilateral trade agenda.

**Overview of key problems:** After over a decade of efforts by the copyright industries and numerous government administrations, Uruguay finally amended its 65-year old copyright law. The new amendments entered into effect in -January 2003 and represent an improvement over the prior 1937 Law. While these amendments contain many provisions which do upgrade the prior Uruguayan copyright scheme, there remain several problematic provisions and omissions which leave the law short of modern standards.

In recent years, the major obstacle to copyright owners in Uruguay has been effective enforcement against widespread piracy. Simply put, more criminal raids and prosecutions are necessary, as are swifter judgments in civil infringement cases. Enforcement at the borders needs to be significantly improved, especially given the growth of optical media piracy throughout the Mercosur region and Uruguay's role in the transshipment of counterfeit goods into other countries in Latin America. The U.S. copyright industries lost at least an estimated \$10 million due to piracy in Uruguay in 2002.

**Actions which could be taken by the government of Uruguay:**

- Actively enforce the recently amended copyright law
  - Improve police coordination on criminal anti-piracy actions
  - Instruct prosecutors to swiftly pursue investigations and bring prosecutions
  - Provide training to educate judges on the new copyright law as well as the importance of deterrent sentencing
- Improve border enforcement to intercept suspect shipments of piratical products
- Reduce unwarranted delays, costs and expenses associated with bringing civil copyright infringement litigation
- Ratify the WIPO treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty).

**URUGUAY**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.0	65%	2.0	65%	2.0	65%
Records & Music	1.4	60%	4.0	50%	4.0	35%	4.0	35%	3.0	25%
Business Software Applications <sup>2</sup>	5.2	60%	6.4	63%	7.9	66%	16.0	70%	13.1	72%
Entertainment Software	NA	NA	NA	NA	16.3	82%	6.9	70%	7.6	74%
Books	1.5	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
<b>TOTALS</b>	<b>10.1</b>		<b>14.4</b>		<b>32.2</b>		<b>30.9</b>		<b>27.7</b>	

**Bilateral efforts:** Because of the lack of progress being made by Uruguay to amend its outdated copyright law and battle copyright piracy, IIPA filed a petition against Uruguay on June 13, 2001, 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 2001 Annual GSP Country Eligibility Practices Review.<sup>3</sup> IIPA's petition asked President Bush to (1) review the eligibility of Uruguay as a GSP beneficiary developing country, and, if Uruguay fails to make the necessary improvements in legislation and enforcement, then (2) the President should suspend or withdraw GSP benefits of Uruguay, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners.<sup>4</sup> Action on this GSP petition has not yet been taken by the U.S. government; the delay was primarily due to the expiration of the GSP program (which has since been renewed through 2006).

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$13.0 million at 74% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> 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." See 19 U.S.C. § 2462(c)(5).

<sup>4</sup> For the first 11 months of 2002, \$62.7 million worth of Uruguayan goods (or 35.9% of Uruguay's total imports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 14% decrease from the same period in 2001. For more information on Uruguay's placement on the 301 lists, see Appendices D and E of this filing.

Notwithstanding the fact that the amended copyright law does not fully meet the high levels of copyright protection of the WIPO Treaties and those contemplated by the U.S. industry and U.S. government in FTAA and bilateral FTA negotiations, IIPA proposes to withdraw our June 2001 GSP IPR petition against Uruguay.

Copyright issues must remain high on the bilateral trade agenda. Intellectual property rights and copyright issues currently are on the bilateral agenda for the Joint Trade and Investment Commission (JTIC) discussions. Before the U.S. considers entering into Free Trade Agreement (FTA) negotiations with Uruguay, there must be tangible and significant improvement in criminal and civil copyright enforcement and tangible reductions in the piracy levels in Uruguay.

## **COPYRIGHT LAW**

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### **1937 Copyright Law Amended in 2003**

On January 10, 2003, President Jorge Batlle signed Law No. 17616, which amended Uruguay's 1937 copyright law. This achievement reflects over a decade of efforts by industry representatives and various Uruguayan governments to achieve this much-needed reform. Until late 2002, the basis for copyright protection in Uruguay was its 1937 copyright law. Separate but deficient anti-piracy legislation aimed at combating piracy of sound recording producers was passed in the 1980s. The prior copyright law contained numerous deficiencies, many of which fell far below Uruguay's multilateral obligations under TRIPS as well as its bilateral IPR obligations.<sup>5</sup>

Many legislators as well as representatives from the industry to the U.S. government worked hard to refine this legislation: The December 2002 legislation improves the Uruguayan copyright legislation in several positive ways.<sup>6</sup> The amendments correct most of the TRIPS deficiencies in the prior legislation and also incorporates several key elements of the WIPO treaties. Based on our initial review of the Spanish text, the new amendments accomplish the following positive developments:

- Properly expand the definition of the reproduction right to cover temporary copies;
- Refine the right of distribution (including importation) for authors' works;
- Afford authors with rights of adaptation and transformation;
- Add authors' right of communication to the public for "works" (including those done with the direct participation of performers), including "making available to the public";
- Extend the old 40-year term of protection up to the TRIPS minima of life plus 50 years and 50 years post-publication for works, and 50 years. The law also appears to return to the private domain those products which fell into the public domain due to expiry of the short 40-year terms (without prejudice to third parties who may have acquired copies of such materials during the lapse in time);

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<sup>5</sup> The more obvious TRIPS deficiencies in the 1937 law (prior to 2003 amendment) included: an inadequate term of protection for works, phonograms and performances; no explicit protection in the law (as opposed to regulations) for computer programs, not expressly protected as literary works in the copyright law; unclear protection for compilations or other materials, whether in machine-readable or other form; an incomplete scope of retransmission rights; no express rental rights in the law (although some cases appeared to afford such protection as part of the distribution right); an overbroad broadcasting compulsory license; unclear application regarding full protection to pre-existing works, phonograms and performances.

<sup>6</sup> This discussion of the 2003 law is based on the Spanish text; an English translation is not yet available.



- Expressly incorporate computer programs and databases as protected subject matter à la TRIPS;
- Expressly incorporate rights of performers, producers of sound recordings and broadcasting organizations: for example, producers of sound recordings get exclusive rights to authorize reproduction, distribution (including the sale of parallel imported copies), rental and making available. Producers receive only a right of remuneration for broadcasting and communication to the public, per WPPT Article 15 (but this does not go far enough; see concerns, below);
- Permit tribunals (presumably both criminal and civil courts) to order confiscations, destructions and other dispositions of materials and equipment used in infringement;
- Allow criminal and civil judges to order judicial inspections (*ex parte* actions) and permit rightsholders to petition the court for injunctive relief;
- Expand provisions on the establishment of collecting societies, and leave implementation to future regulations. Continued monitoring of subsequent regulations will be necessary;
- Clarify that no formalities for copyright protection are required;
- Add language saying that the name of the author as well as those whose rights are protected under the law (presumably objects of neighboring rights) whose name appears on the work, phonogram or broadcaster are presumed as such.

Despite the improvements noted above, there are several problems and/or omissions remaining in the revised Uruguayan copyright law. IIPA and its members realize that no legislation is perfect. We would be remiss, however, if we did not identify provisions, with regard to many of which we expressed explicit concern during the 2002 legislative amending process but which were not adequately addressed in the final legislation. Furthermore, we note that several of these outstanding issues will have to be addressed again in the context of the FTAA (Free Trade Area of the Americas) negotiations. IIPA and its members expect that the FTAA IPR chapter will contain very high standards of copyright protection and enforcement. Therefore, with respect to Uruguay's 2003 amendments, we note the following issues. For example—

- Low levels of criminal penalties: The penalty for infringements in Article 46(C) provide for a low range of fines, ranging from 10 UR to 1,500 UR (adjustable units which are convertible to approximately US\$100–15,000). In some cases, a wrongdoer might find it cheaper to illegally reproduce the copyrighted materials and pay the fine rather than pay for the legal product; much will depend on whether the Uruguayan courts will issue deterrent level penalties (at the higher end of the statutory range). The penalties for the infringing acts outlined in Article 46(A) and 46(B) are three months to three years of jail. The sanctions should include deterrent levels of both fines and jail terms for infringing acts (not fines or jail). Another provision (Article 44) has been expanded to include infringing acts of reproduction, distribution, communication or other disposition of literary works, but no parallel amendments were made in that article regarding objects of neighboring rights (instead, sanctions involving those rights appear in the overhaul of Article 46). We want to make sure a similar scope of penalties is applicable to both works and objects of neighboring rights.
- Criminal intent and “unjustifiable harm”: Article 46(C) prescribes that anyone who reproduces or has reproduced protected works without authorization, by whatever method or procedure, without an intent to profit or without an intent to cause “unjustifiable harm,” shall be fined. It is imperative that this provision apply in the kinds of environment (like the

Internet and private businesses) where there is large-scale infringement and where sometimes a “for profit” motive is difficult to prove. Sadly, by its wording, this article does not succeed on that point. This “unjustifiable harm” standard could be a very hard one to prove before an Uruguayan court, as would the broad “*lucro*” standard. Finally, this article fails to mention jail time at all (as mentioned above). At the very least, jail time should be included in Article 46(C). Otherwise, what will likely happen is that Uruguayan judges will impose only minimal fines, a sanction which certainly does not deter piracy. It is essential that the law embodies and applies criminal sanctions to non-commercially motivated Internet offenses and to corporate end use.

- Term of protection: While the law extends the term of protection by 10 years—now to 50 years (life of the author plus 50 years, or 50 years post-publication for producers of sound recording)—these terms still fall short of international standards and the standards which the industry and the U.S. are seeking in Free Trade Agreement (FTA) arrangements.<sup>7</sup>
- Exclusive rights for producers of sound recordings: While the 2003 law does afford producers of sound recordings with exclusive rights to authorize reproduction, distribution, rental and making available, it fails to include an exclusive right over all transmissions, and in particular those effected through digital means. Market developments indicate that the future “delivery” of recorded music will increasingly be accomplished through the licensing of music services rather than the sale of physical products, and non-interactive transmissions will compete with on-demand communications.<sup>8</sup> The law gives producers an unsatisfactory right of remuneration for broadcasting and communication to the public; the industry had urged that Article 13(D) be amended so that it would not apply to producers of sound recordings. Finally, we wonder whether the language in the amended final paragraph of Article 1 creates an objectionable hierarchy of rights in that “none of the provisions in this law in favor of [the objects of neighboring rights protection] shall be interpreted to harm/discredit protection [for authors]”; such hierarchies must be eliminated from the law.
- Technological protection measures (TPMs): The 2003 law makes it a crime for anyone who makes, imports, sells, rents or puts into circulation, products, or whatever service which has

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<sup>7</sup> IIPA believes that the term of protection of a work, performance or phonogram should be calculated on the basis of the life of a natural person; the term shall be not less than the life of the author and 70 years after the author’s death; and where the term of protection of these are calculated on a basis other than the life of a natural person, the term should be not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance or phonogram or, failing such authorized publication within 25 years from the creation of the work, performance or phonogram, not less than 120 years from the end of the calendar year of the creation of the work, performance or phonogram.

<sup>8</sup> In fact, Uruguay recognized back in 1996 that such exclusivity was required. On February 2, 1996, Uruguay, along with Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, and Venezuela submitted a proposal to WIPO in consideration of the proposed Treaty for the Protection of Performers and Phonogram Producers (the treaty that was to be called the WPPT in December of that year). In that proposal (Doc. WIPO INR/CE/V/13), Uruguay called for the adoption of two provisions—an exclusive right with respect to “digital communications that allow the selection of the phonogram” and an exclusive right with respect to all digital transmissions, without prejudice to whether such a right was adopted at the national level as an “exclusive right of public communication,” or as a “right of distribution through transmission.” This group pressed for adoption of its proposal at the December 1996 Diplomatic Conference of the WIPO Performances and Phonograms Treaty. Ultimately their proposal did not advance. However, it makes no sense for Uruguay to refuse to accept a provision today that they championed more than six years ago.

the purpose or effect of preventing, deceiving, eliminating, deactivating or evading whatever technical measures that the rightsholders have used to protect their respective rights [draft Article 46(B)]. While this drafting could be read to cover services involved in the production, distribution, etc. of such devices, IIPA had requested that its scope be clarified in the statute itself. Also, it is not clear whether the provision covers components and tools; although that might be intended under the word “products” (this should be clarified to be the case). It is imperative that the provision applies to both access and copy controls. Finally, it is not clear from this draft itself whether any civil liability attaches for these acts; such liability should be afforded. Protection for TPMs is required under the new WIPO treaties, and the effective implementation and enforcement of TPMs are critical to the copyright industries.

- Ex officio authority for customs officials: The law contains a provision which permits rightsholders to request a judge to issue an order to seize and sequester shipments containing suspected infringing products. However, the amendments do not provide the kind of *ex officio* actions that customs officials need to more efficiently do their jobs. IIPA believes that this measure is a critical tool necessary to improve border enforcement. So far some of the copyright industries have reported successes in working with Uruguayan customs on various investigations which the industry presents. *Ex officio* authority goes one step further and gives the border officials the authority to take action on their own initiative.
- Statutory damages: Article 18 of the 2003 law provides that an aggrieved party may recover damages and a “fine” of approximately ten times the value of the infringed product. For practical purposes, this provision will act as a statutory damages provision. Statutory damages increase judicial efficiency in that they simplify the difficult process of proving actual damages. We note that Uruguay’s neighbor Brazil has a very effective statutory damages provision which includes fines of up to 3,000 times the price of each work infringed.
- Compulsory license: The overbroad, TRIPS-incompatible broadcasting compulsory license in Article 45(10) remains unchanged in the law. Despite information indicating that this license has never been used, the industries remain concerned about the specter of its future use.
- Overbroad exceptions to protection: A lengthy list of amendments, apparently added toward the end of the legislative debate in 2002, permitting exceptions for the exploitation of works and sound recordings has been inserted (amended Article 46). For example, one overbroad provision allows the representation, performance or reproduction of works in whatever form and whatever media in theaters or public places.
- Arbitration: Article 58 revises the rules regarding the obligations of collecting societies. It also introduces troubling concerns to rightsholders. If an agreement cannot be reached between various parties (including rightsholders like authors and producers of sound recordings, performers, collecting societies and broadcasters) regarding rates of payment for the broadcast of this material, then an arbitration tribunal is to be convened within 20 days. The problem is that the composition of the arbitration tribunal is not based on the voluntary agreement of the multiple parties; it appears to be able to be requested by one party only. This severely reduces the ability of rightsholders to pursue private contractual negotiations. During the arbitration, users basically will be able to enjoy a statutory license for such use, even though the rightsholders have not been paid.

## 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. 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. A year later, the bills passed to the Senate on March 3, 1999, where they have been under consideration of the Foreign Affairs Commission. 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.

## COPYRIGHT PIRACY IN URUGUAY

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Copyright piracy levels and estimated losses due to piracy have remained consistently high in Uruguay for the last few years.

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 at least six 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. 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 his 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 remained at 60% in 2002, and estimated losses suffered by the U.S. software industry were approximately \$5.2 million.

The recording and music industries report that the unrestricted illegal replication of CD-Rs (recordable CDs) has become their 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 \$1.4 million with a 60% piracy level in 2002.

Video piracy continues to hamper the legitimate video market in Uruguay in 2002. The motion picture industry reports that back-to-back copying in individual video clubs continues to be the dominant piracy method. Pre-release video piracy appears to originate from the contraband Paraguayan production and distribution structure. In addition, television cable piracy continues to increase, particularly within the country's interior. The 2002 estimated video piracy rate remained at 40%. Losses to the U.S. motion picture industry due to audiovisual piracy in Uruguay are estimated at \$2 million in 2002.

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.

The book publishing industry reports no improvement in reducing levels of book piracy in Uruguay in 2002. Photocopying remains the main source of piracy, especially within institutions of higher learning. Because of the difficulties with both the Uruguayan and Argentine economies, the Uruguayan book market shrunk. Estimated 2002 trade losses due to book piracy in Uruguay dropped to \$1.5 million.

## **COPYRIGHT ENFORCEMENT IN URUGUAY**

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### **Criminal copyright enforcement remains ineffective overall.**

The new challenge will be to effectively enforce the recently amended copyright law. Under the old copyright law, Uruguayan authorities did engage in some degree of criminal enforcement and some actions did take place (especially raids); however, there was room for much improvement. 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.

During 2001, BSA filed eight criminal complaints against resellers of illegal software. Six 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," 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 the cases are still 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 in these cases, the evidence will probably have disappeared. One of these pending cases was filed 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. A few weeks later, BSA submitted a new list of expert witnesses and the court, once again, rejected the proposed expert witness and dismissed the

case on April 23, 2002. In 2002, BSA did not file any criminal complaints but participated in two legal actions brought by the Prosecutor's Office against street vendors of illegal software.

MPA reports that police enforcement during 2002 was generally reliable. However, the Uruguayan system fails in that there has been general unwillingness by prosecutors to move forward expeditiously on cases. During 2002, MPA restructured its anti-piracy program in Uruguay to address the growth of audio-visual piracy in CD-R format, taking action against 29 small VHS-to-CD labs, several associated with internet sales, as well as taking action against four local internet sites selling CD-R pirate versions of MPA member company product. In all, MPA worked to conduct 61 criminal raids in which 60 cases were commenced, but only defendant was convicted (and received a suspended sentence).

The recording industry has invested heavily in building an anti-piracy program in Uruguay. Still, there are a number of problems in the anti-piracy fight. 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, 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. Cooperation from police departments depends more on personal attitudes than a central plan from the government to attack the problem. Prosecutors are still hesitant to apply the law because they have not received specific guidelines from their superiors regarding these cases. The government needs to take this problem seriously and commits to prosecuting pirates, enforcing the laws and implementing stricter laws, which protect the investments of legitimate businesses.

## **Civil enforcement in Uruguay continues to be difficult.**

The business software industry is the only copyright industry to use civil enforcement measures as part of their overall anti-piracy campaign. Even though BSA reports that it has experienced an improvement in software copyright enforcement, there are still some significant problems that copyright holders face when enforcing their copyrights in Uruguay.

**Substantial delays:** The Uruguayan courts continue to 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 over a month. 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. 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 of these cases were settled during 2001. In 2002, BSA filed ten civil complaints and only conducted civil inspections in five of these cases. One case was dropped and the remaining are still waiting for an inspection date.

**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. Such a cumbersome and costly procedure runs afoul of Uruguay's TRIPS obligations.

**Evidentiary burdens:** Other obstacles are also routinely encountered. For example, in November 2002, BSA filed a civil search and seizure request against an end-user on behalf of its members. On December 3, 2002, the court 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 an inspection date. The court's imposition of onerous and "unnecessarily complicated" evidentiary requirements illustrates the existing defects in the Uruguayan legal system. BSA faced similar situations in cases filed in May 1998 and May 2001.

## **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.

With respect to videogames, there has been some cooperation from Customs with an IDSA member company. The company reports that in April 2002, a Customs raid of a warehouse yielded over 2,000 counterfeit video game products. The warehouse, apparently owned by a repeat offender, was used to store counterfeit video game products before they were shipped to numerous retail stores across the country. The retailer/warehouse owner was previously implicated in raids initiated by the company in August 2001, which resulted in the seizure of tens of thousands of counterfeit videogame products, reportedly the largest action carried out in Uruguay.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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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. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions

which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# VENEZUELA

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Venezuela remain on the Special 301 Watch List in 2003. Continuing economic and political instability in Venezuela may have resulted in providing an increase in copyright piracy.

**Overview of key issues:** Given the instability in Venezuela, the copyright industries' ability to engage in commercial distribution and conduct anti-piracy campaigns safely and effectively were very limited in 2002. Piracy losses remain high, at an estimated \$99 million in 2002. The streets are flooded with pirated products. Widespread CD-R burning has hit the recording industry hard; there is very little left of a legitimate music industry in Venezuela. Home video piracy remains pervasive, supplied by both large-scale labs as well as small-scale back-to-back copying. The audiovisual industry is concerned that television and cable piracy may increase in the weak economic environment. The software industry reports that its most devastating piracy remains piracy done by legitimate businesses and government agencies using either infringing or unlicensed software; pirated and counterfeit software is also easily available on the streets. Pirated videogames are widespread, with most imported from Taiwan, Hong Kong and China, transshipped through Paraguay. There is about \$3.6 million worth of pirated handheld videogames (GameBoy, Gameboy Color, GameBoy Advance—at pirated prices) in the Venezuelan market. In addition, book publishers face widespread unauthorized photocopying, especially at the secondary and collegiate levels. Estimated U.S. trade losses due to piracy in Venezuela were \$99 million in 2002.

Actual enforcement of the copyright law remains poor. COMANPI, the anti-piracy brigade which was once well-regarded in the region, had its budget slashed years ago and copyright actions declined dramatically when its jurisdiction was expanded. The National Guard (*Guardia Nacional*) has attempted to fill this gap by working with the copyright industries. The Copyright Office (DNDA) has no real enforcement powers, but has helped the software industry by issuing administrative notifications to suspects and providing public support for the software industry enforcement campaigns. The single specialized IPR prosecutor is overburdened with both IP and human rights cases. Customs authorities do not have *ex officio* authority to inspect shipments on their own initiative; a judicial order is required. The courts continue to issue non-deterrent penalties and inadequate damages. A new system which distributes civil cases to judges randomly often delays the process because some judges are not familiar with the copyright law and its application. Frequent public demonstrations and court strikes and closings complicated efforts to enforce the law in 2002. The 1993 copyright law, while relatively comprehensive in many respects, needs to be revised to reflect the modern standards found in the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. The Special Law against electronic crimes (Ley Especial contra Delitos Informáticos) passed in December 2001, but has not been applied in-practice.

### **Actions which could be taken by the Venezuelan government in 2003:**

- Encourage senior government officials to instruct the enforcement agencies to make anti-piracy enforcement a priority in order to meet Venezuela's multilateral and bilateral IPR obligations, including the WTO TRIPS Agreement's enforcement text;
- Ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
- Promote high standards of copyright protection and enforcement in the negotiations in the Free Trade Area of Americas (FTAA);
- Apply the Special Law against Electronic Crimes, which was passed in December 2001.

### **VENEZUELA ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1998 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	65%	25.0	65%	25.0	65%	30.0	65%	35.0	65%
Records & Music	29.3	75%	54.0	62%	30.0	62%	30.0	62%	15.0	35%
Business Software Applications <sup>2</sup>	27.1	52%	25.7	55%	16.9	58%	46.4	60%	55.6	62%
Entertainment Software	NA	NA	NA	NA	47.0	78%	50.9	70%	53.8	73%
Books	18.0	NA	20.0	NA	22.0	NA	21.0	NA	20.0	NA
<b>TOTALS</b>	<b>99.1</b>		<b>124.7</b>		<b>140.9</b>		<b>178.3</b>		<b>179.4</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$19.7 million at 58% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

## COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

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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. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets. Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

Venezuela is a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program which requires beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners.<sup>3</sup> Venezuela is a WTO member and is obligated to have already implemented both the letter and the spirit (performance) of the TRIPS Agreement.

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<sup>3</sup> For the first 11 months of 2002, \$533 million worth of Venezuelan goods (or 4% of Venezuela's total imports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 10.5% decrease from the same time period in 2001. For more information on the history of Venezuela under Special 301 review, see Appendices D and E of this submission.

## **COUNTRIES DESERVING SPECIAL MENTION**

# **INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

## **2003 SPECIAL 301 REPORT**

### **SPECIAL MENTION COUNTRIES**

IIPA and its member associations have identified copyright-related issues requiring attention of the U.S. government in the following seven countries. Unlike the full country reports which appear elsewhere in this IIPA 2003 Special 301 submission, IIPA does not propose a Special 301 ranking for these countries.

#### **CAMBODIA**

Cambodia has not joined the WTO, the Berne Convention, or the WIPO digital treaties. We understand that a new copyright law was approved by the National Assembly on January 21, 2003, and hope to review this legislation. We remain concerned about the adequacy of Cambodia's enforcement mechanisms (or other regulatory schemes) to control the production, distribution, and importation of pirate optical media product or the raw materials for producing pirate product given that it now hosts a relocated optical disc plant with two production lines.

The proximity of Cambodia to Thailand makes the problem of plant migration a foreseeable event unless steps are taken at this early date to address the lack of an appropriate legal regime to deal with optical disc plant overproduction as well as the overall piracy situation. Crucial to the efforts to stem the unhindered movement of optical disc plants is the institution of an effective border enforcement regime.

#### **CROATIA**

The lack of effective and sustained enforcement activities is problematic in Croatia, particularly for the business software industry. The level of piracy experienced by this industry remains at unacceptably high levels. With respect to business software, BSA reports considerable delays with criminal raids. BSA found that the police took action in only about 40% of cases reported to them. More recently, the police now appear to be placing greater emphasis on these cases and shortened delays. While the police are generally cooperative, they lack sufficient resources, the appropriate equipment and expertise to effectively conduct enforcement efforts. 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 Motion Picture Association of America (MPAA).

With respect to videogames, IDSA reports that the market in 2002 improved over the prior year. IDSA member companies and local video game industry representatives are getting good cooperation from law enforcement agencies in anti-piracy efforts. As a result of these cooperative efforts, the police were able to take action against a videogame Internet pirate called "Thunder;" the case is currently with the State Attorney's Office. Over all, the entertainment software industry is generally quite pleased with Croatian law enforcement efforts.

On a positive note, in January 2002, the Croatian Minister of the Interior announced the creation of a special police unit specialized in computer crime and intellectual property protection within the Ministry. BSA reports that the State Inspectorate (market police) did act on referrals from the industry in a timely manner, but coordination between the State Inspectorate and police is minimal, leading to cases that are 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, on the average, for the rest of Central Europe. Finally, one of the most serious right holder concerns remains poor border enforcement. IDSA member companies and the local video game representatives began lobbying efforts to push for the enactment of the draft border enforcement legislation. However, despite hopes that the draft legislation would be enacted in 2002, such has not yet taken place. As a result, Croatia continues to experience an inflow of pirated product on a regular basis.

## **LAOS**

Two pirate optical disc plants with two production lines have relocated to Laos from other Asian territories. Like Cambodia, Laos is not a member of the WTO, Berne Convention, and WIPO digital treaties and currently has no copyright law that would enable it to deal effectively with factory overproduction. Laos also shares a border with Thailand, and this proximity makes plant migration almost inevitable. Strong border enforcement is needed to intercept pirated optical disc products coming from Thailand as well as to effectively quell additional plant relocation within its borders.

## **MACEDONIA**

Copyright enforcement is weak in Macedonia, according to all of the copyright industries active there. For example, high levels of piracy in the business software sector is reported, including the widespread use of unlicensed software in companies and public enterprises. CD shops routinely sell pirated business software, and computers regularly are sold with illegal software pre-installed. Furthermore, police, prosecutors and customs officials lack the necessary equipment and expertise to conduct raids, perform investigations, and commence cases against copyright infringers. Also, the Copyright Inspectorate (which can take administrative enforcement actions) has failed to refer cases that merit criminal investigation to the police and prosecutors. Unhelpfully, the State Market Inspectorate does not have the authority to enforce Macedonia's copyright law, thus burdening already scarce police resources. Although the criminal and copyright laws permit the seizure and destruction of equipment used to make pirated goods, police and other enforcement bodies fail to do so in-practice.

Piracy at the border is a particular concern, and customs authorities do not take appropriate action to prevent the shipment of pirated products to and across Macedonia. Two particular problem areas are Macedonia's borders with Kosovo and Bulgaria. Another issue is excessive procedural delays. The business software industry reports that court procedures take an inordinately long time (for example, cases of criminal software infringement begun in 2001 are still pending almost two years later). Also, it is rare for Macedonian courts to issue injunctions in criminal cases, even though there are legal provisions permitting such injunctions. When judgments are handed down by courts, they usually only involve minimal fines, rather than fines or prison sentences that constitute a deterrent to further infringement.

## **MYANMAR (BURMA)**

There are two known pirate optical disc plants with four production lines now in Myanmar—having likely relocated from Malaysia. It has not updated its copyright law (a version of the 1911 colonial British law is still in effect) nor has it joined any of the international copyright treaties or conventions. Although courts do occasionally decide copyright cases, the current law is still inadequate and enforcement is virtually nonexistent. The problem of plant migration is also an issue in Myanmar given that, like Cambodia and Laos, it shares a border with Thailand. Thus, the same border measures that are crucial to those countries are also required for Myanmar to prevent it from becoming a pirate haven

## **SPAIN**

Organized crime syndicates are taking over the recorded music market in Spain. Despite increased enforcement activities in 2002, music piracy exceeds 40%—probably the highest rate of any developed country in the world, and losses continue to mount. The entertainment software industry is also experiencing increasing difficulties in Spain. In 2002, Spanish authorities seized over 4,000 counterfeit multi-game cartridges for the Nintendo Game Boy, some which were shipped from China. Internet piracy is also growing; many top videogame titles are being downloaded from the Internet before they are localized for launch in the domestic market. Factory-produced pirate music CD products dominate the street market, although the availability of pirated videogames is increasing. There have been some positive developments for the business software industry in 2002, although Spain continues to have one of the highest business software piracy rates in the European Union.

## **VIETNAM**

Despite the entry into force of the Bilateral Trade Agreement between the U.S. and Vietnam, the country has not been the subject of a great deal of attention from the U.S. government. This must change as the country is now the location of two optical disc plants with two production lines. U.S. government efforts must seek to strengthen the country's institutional capacity to enforce its copyright law, as well as address market access barriers for U.S. copyright industries.

While Vietnam does not share a border with Thailand, its geographical location within the ASEAN territories makes Vietnam a viable country for migration of optical plants as other ASEAN nations step up enactment, implementation, and enforcement of optical disc licensing laws.

**APPENDIX D**

**CHART OF COUNTRIES'**  
**SPECIAL 301 PLACEMENT (1990 – 2002)**  
**&**  
**IIPA's 2003 SPECIAL 301 RECOMMENDATIONS**



## CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990-2002) AND IIPA 2003 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2003	USTR 301 PLACEMENT (as of April of each year)												
		2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Argentina	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL
Armenia (GSP)	WL	WL	WL	WL										
Australia					WL	WL	WL	WL		WL	PWL	PWL	PWL	
Austria						OO	OO							
Azerbaijan	WL	WL	WL	WL										
Bahamas	PWL	WL + OCR	OCR	OCR										
Bahrain						WL	WL	WL	WL					
Banladesh	WL													
Belarus	WL	WL	WL	WL	WL	OO								
Bolivia	PWL	WL	WL	WL	WL	OO	WL	OO						
Brazil (GSP)	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL
Bulgaria	WL					PWL	WL	OO	OO					
Canada		WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL
Cambodia	SM													
Chile	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Colombia	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL					
Croatia	SM													
Cyprus							OO	OO	OO	WL	WL	WL	WL	
Czech Republic	WL			WL	WL	WL	OO							
Denmark				WL	WL	WL	WL							
Dominican Rep.(GSP)	PWL	PWL	PWL	PWL	PWL	PWL	WL	OO						
Ecuador	WL			WL	WL	PWL	PWL	WL			WL	WL		
Egypt	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL
El Salvador								WL	WL	WL	WL	WL		
Estonia	WL					OO								
European Union		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
Georgia	WL		OCR											
Germany						OO	OO	OO	OO	OO		WL	WL	
Greece		WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Guatemala	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL		
Honduras						WL	WL	OO	OO	OO				
Hong Kong					OCR	WL	WL	OO						
Hungary	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL	
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL
Indonesia	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Ireland				WL	WL	WL	WL	OO						
Israel	PWL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO				

2003 Special 301: History of Special 301 Rankings

## CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990-2002) AND IIPA 2003 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2003	USTR 301 PLACEMENT (as of April of each year)												
		2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Italy	WL	WL	WL	PWL+OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL
Jamaica		WL	WL	WL	WL	WL								
Japan			OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL
Jordan					WL	WL	WL	OO	OO					
Kazakhstan (GSP)	WL	WL	WL	WL		OO								
Kenya	WL													
Kuwait	PWL	WL	WL	WL	PWL	PWL	WL	WL	OO					
Kyrgyz Republic	WL		OCR											
Laos	SM													
Latvia	WL	WL	WL	WL										
Lebanon (GSPP)	PWL (OCR)	PWL	PWL	WL	WL	OO								
Lithuania	PWL	WL	WL	WL										
Luxembourg							WL							
Macau			WL	WL	PWL	PWL								
Macedonia	SM													
Malaysia	WL (OCR)	WL	PWL	PWL	OCR									WL
Mexico		OCR			WL	OO	OO	OO						
Moldova	WL			WL										
Myanmar	SM													
Netherlands						OO								
New Zealand		WL	WL		WL							WL	WL	
Nicaragua						OO	OO							
Oman				WL	WL	WL	WL	WL	OO					
Pakistan (GSPP)	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority				OCR										
Panama						OO	WL	OO		OO				
Paraguay	PWL	306	306	306	306	PFC	PWL	WL	OO	OO		WL		
Peru	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL		
Philippines	PWL (OCR)	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL
Poland	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL		
Portugal								OO						
PRC	306 Monitoring	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL
Qatar	WL	WL		WL	WL	WL	OO	OO	OO					
Romania	WL	WL	WL	WL	WL	OO	OO	OO	WL					
Russian Federation (GSP)	PWL (OCR)	PWL	PWL	PWL	PWL	PWL	PWL	WL+OCR	WL	OO				
San Marino							WL							
Saudi Arabia	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL
Serbia & Montenegro	WL												WL	WL

2003 Special 301: History of Special 301 Rankings

## CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1990-2002) AND IIPA 2003 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2003	USTR 301 PLACEMENT (as of April of each year)												
		2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Singapore				WL	WL	WL	WL	WL	WL	OO				
Slovakia		WL	WL											
Slovenia				OCR										
South Africa	PWL				WL	WL		OO	WL					
South Korea	PWL (OCR)	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL
Spain	SM			WL	WL	OO				WL	WL	WL	WL	WL
Sri Lanka	WL													
Sweden					WL	WL	WL							
Taiwan	PWL	PWL	PWL	WL	WL			OO	WL	WL	PWL	PFC	WL	WL
Tajikistan	WL	WL	WL	WL										
Thailand (GSPP)	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL
Tunisia						OO								
Turkey (GSP)	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL
Turkmenistan	WL	WL	WL	WL										
UAE			WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	
Ukraine (GSP)	PFC	PFC	PFC	PWL	PWL	WL								
Uruguay (GSPP)	WL	PWL	PWL	WL	WL	OO	OO							
Uzbekistan (GSP)	WL	WL	WL	WL										
Venezuela	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	SM	WL	WL	WL	WL	WL	WL	OO	OO					
Yemen						OO								

PFC: Priority Foreign Country

PWL: Priority Watch List

WL: Watch List

[ ]: Empty cell means: (a) the country did not receive a ranking by USTR in its April decision; (b) the result of any OCR was no ranking by USTR; or (c) IIPA had no recommendation for that country in 2002.

OO: Other Observations (an informal listing formerly used by USTR)

SM: IIPA Unranked Special Mention Countries

OCR: Out-of-cycle review to be conducted by USTR.

GSP: GSP IPR Review Underway (based on copyright industries' petitions)

GSPP: GSP 2001 IPR Petition Pending Acceptance by USG

IIPA cover: IIPA highlighted attention of this country in its 301 cover letter to USTR

**APPENDIX E**

**IIPA HISTORICAL SUMMARY**  
**OF**  
**COUNTRIES' SPECIAL 301 PLACEMENT**

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS

FEBRUARY 2003

### 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. USTR has kept Argentina on the Priority Watch List every year since 1996. In the April 30, 2001 Special 301 Announcement, 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." In its April 30, 2002 Special 301 Announcement, USTR noted that despite some progress in improving Argentina's intellectual property regime, "significant barriers to the effective enforcement of intellectual property rights remain, including weak and inconsistently applied penalties for IPR violations." Furthermore, USTR pointed to the continued, extensive availability of pirated copyright material and counterfeit brand-name goods, as well as the widespread use of unlicensed software in businesses "and some government entities." As a result, USTR designated Argentina a Priority Watch List country for 2002.

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. One 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 2001, \$196.3 million worth of goods from Argentina entered the U.S. under the GSP duty-free code, accounting for roughly 6.6% of its total imports. During the first 11 months of 2002, \$250.5 million worth of Argentine goods (or 8.7% of Argentina's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 4.4% increase over the same period in 2001.

### ARMENIA

In 1995 and 1997, IIPA requested that 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, 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 that USTR place Armenia on the Watch List, and USTR agreed. 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, the 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 its April 30, 2002 announcement, USTR kept Armenia on the Watch List noting, as in the past, that the country has many steps to go to comply with the intellectual property requirements of the 1992 U.S.-Armenia Trade Agreement. In particular, USTR pointed out Armenia’s lack of protection for U.S. and other sound recordings, lack of retroactive protection for works or sound recordings under its copyright law, and weak enforcement of intellectual property rights. Despite continued deficiencies in its protection and enforcement of intellectual property, Armenia became a member of the WTO, effective February 5, 2003.

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. 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.

Armenia 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 2001, \$14.9 million worth of Armenian goods entered the U.S. under the GSP duty-free code, accounting for 45.3% of its total exports to the U.S. During the first 11 months of 2002, \$12.3 million worth of Armenian goods (or 43.8% of Armenia’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 11.2% decrease over the same period in 2001.

## AUSTRALIA

In 1994, Australia was named to the Watch List. Between 1991 and 1994, IIPA filings cited a number of issues that 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 USTR's 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, 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 1995 and 1997, IIPA requested that 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.

In 2002, IIPA recommended that Azerbaijan remain on the Watch List. In its April 30, 2002 announcement, USTR kept Azerbaijan on the Watch List. The announcement notes that the country "has several remaining steps to take before fulfilling its intellectual property rights commitments under the 1995 U.S.-Azerbaijan Trade Agreement." In particular, USTR pointed to Azerbaijan's lack of protection for U.S. and other foreign sound recordings and lack of a clear provision of retroactive protection for works or sound recordings. USTR also cited weak IPR enforcement, noting that "provisions under the Azerbaijani Criminal Code are minimal and are limited to copyright and patent violations, completely excluding neighboring rights violations."

## 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 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. 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 (OCR) would be conducted. On February 12, 2002, USTR announced the outcome of the OCR and placed the 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." The Bahamas' efforts to amend the copyright law, address remaining problems in its regulations, and engage right holders in the regulatory process have not resulted in concrete action to satisfy its bilateral commitments. In the April 30, 2002 Special 301 Announcement, USTR placed the Bahamas on the Watch List, citing the same, continued problems in its copyright law that were noted in the February 12, 2002 announcement. USTR also noted that it would conduct an OCR "to review actions in this regard." The results of that review are not yet available.

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 2001, \$75.8 million worth of Bahamian goods entered the U.S. under the CBI, representing 24.3% of the Bahamas' total exports to the U.S. During the first 11 months of 2002, \$63.9 million worth of Bahamian goods (or 15.6% of the Bahamas' total exports to the U.S. from January to November) entered under the CBI, representing a decrease of 7.2% from the same period in 2001.

## 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 1999, IIPA recommended that Bahrain remain on the Watch List because its law was out of sync with its international obligations under TRIPS, and because high piracy levels continued while enforcement was weak. USTR kept Bahrain on the Watch List through the 1998 cycle. However, due to concerted enforcement actions throughout 1998 and into 1999, USTR removed Bahrain from the Watch List in April 1999. Since it was removed from the 301 lists, Bahrain has not reappeared on any list.



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 2001, \$55.4 million worth of goods from Bahrain entered the United States under the GSP duty-free code, accounting for 13.1% of its total exports to the U.S. During the first 11 months of 2002, \$47.1 million worth of goods from Bahrain (or 13.5% of Bahrain’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 11.5% from the same period in 2001.

## **BELARUS**

In 1995 and 1997, IIPA requested that 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 2001, USTR again kept Belarus on the Watch List, noting its lack of protection for U.S. and other foreign sound recordings and its lack of clear, retroactive protection for pre-existing works or sound recordings. USTR also noted weak IPR enforcement and high piracy levels. Further, though Belarus had amended its criminal code, relevant government agencies did not have the authority “to initiate criminal cases concerning copyright infringement on their own initiative.” In its April 30, 2002 Special 301 Announcement, USTR again placed Belarus on the Watch List. Not only did USTR cite the continued problems noted in the 2001 announcement, but further noted that “Belarus has also become a transshipment point for pirate materials throughout the region. The United States is very concerned about recent reports that optical disk production capacity has migrated from Ukraine into Belarus due to lax border enforcement.”

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. 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, 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 12 months. As a result, USTR placed Bolivia on the Other Observations list for 1998. However, USTR has kept Bolivia on the Special 301 Watch List since 1999. In 2002, IIPA recommended that Bolivia remain on the Watch List, pointing to that country's continued high piracy rates and failure to meet basic TRIPS standards. USTR's April 30, 2002 Special 301 Announcement again placed Bolivia on the Watch List but noted that "[t]he United States is heartened by the appointment of a new director to head the intellectual property rights service (SENAPI), and encourages Bolivia to support the director's efforts to improve the IPR situation in Bolivia."

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 2001, \$9.5 million worth of goods from Bolivia entered the U.S. under the duty-free GSP code, accounting for 5.8% of its total exports to the U.S. Another \$54 million worth of Bolivia's exports to the U.S. received benefits under the ATPA program, accounting for 32.7% of its total exports to the U.S. that year. During the first 11 months of 2002, \$30.6 million worth of Bolivian goods (or 21% of Bolivia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 391% increase over the same period last year. Another \$32.6 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2002, representing a decrease of 37.9% from the same period in 2001.

## **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, 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 anti-piracy 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, 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.

In 2001, USTR kept Brazil on the Watch List, noting that “[t]he serious copyright piracy problem shows little sign of abatement.” Despite this, USTR was “pleased to see the establishment of an Inter-Ministerial Committee to Fight Piracy pursuant to the Presidential Decree of March 2001.” In its 2002 Special 301 submission, IIPA recommended that Brazil be elevated to the Priority Watch List. In its April 30, 2002 Special 301 Announcement, USTR did in fact elevate Brazil to the Priority Watch List. The announcement noted that despite enacting modern, largely TRIPS-consistent legislation, the country has taken “no serious enforcement actions against increasing rates of piracy.” Despite encouragement from some positive moves by the Brazilian government, including the income tax authority’s destruction of a large amount of seized pirated goods, and Sao Paulo’s creation of a piracy and related crimes division in the civil police force, USTR notes that there are still enforcement problems. For example, the Inter-Ministerial Committee has “taken very little action on the anti-piracy front.”

IIPA’s dissatisfaction with the lack of progress being made by Brazil to enforce its copyright law led IIPA to file an August 2000 petition with USTR requesting that Brazil’s eligibility 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 in March 2001, and the review remains underway. In 2001, \$2 billion worth of goods from Brazil entered the United States under the duty-free GSP code, accounting for 13.5% of its total exports to the U.S. During the first 11 months of 2002, \$2 billion worth of Brazilian goods (or 13.5% of Brazil’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 6.6% increase over the same period in 2001.

## **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 also that the Bulgarian government had begun to play a direct role in massive piracy. One of the compact

disc 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 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. 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 pirated product. It scheduled an out-of-cycle review (OCR), which concluded on October 2, 1996. At that time, USTR 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 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 2002, IIPA recommended that Bulgaria be placed on the Watch List, noting resurging problems with the production, distribution, and importation of optical disc media. Though Bulgaria was not placed on any 301 list in 2001 or 2002, USTR's April 30, 2002 announcement stated that "based on recent reports of increased piracy in Bulgaria, the United States will be closely monitoring the situation and will look to the Government of Bulgaria to ensure the maintenance of the Optical Disk (OD) regulations." U.S. Trade Representative Robert Zoellick noted that despite Bulgaria's reputation for tackling optical media piracy, "we are concerned by reports that it may weaken its optical media control regime."

In 2001, \$20.1 million worth of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 6% of its total exports to the U.S. During the first 11 months of 2002, \$26 million worth of Bulgarian goods (or 8.1% of Bulgaria's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 39.9% increase over the same period in 2001.

## CHILE

Chile was 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. USTR also noted that "[i]nadequate enforcement against piracy and counterfeiting also remains a serious problem." In 2002, IIPA recommended that Chile remain on the Watch List, pointing to the country's significant piracy problems and enforcement failures. In its April 30, 2002 Special 301 Announcement, USTR again placed Chile on the Watch List, noting deficiencies in both legislation and enforcement. The U.S. and Chile recently concluded negotiations on a bilateral Free Trade Agreement; President Bush notified Congress on January 29, 2003, of his intent to enter into this FTA.

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 2001, \$483 million worth of Chilean imports to the United States benefited from the GSP program, accounting for 14.7% of Chile's total exports to the U.S. During the first 11 months of 2002, \$462 million worth of Chilean imports to the United States benefited from the GSP program, or 14.4% of Chile's total exports to the U.S. between January and November, representing a 2.2% increase over the same period 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, USTR noted that “[p]iracy continues to be a significant problem and that the Television Broadcast Law discriminated again foreign content.” Because of the need for the Colombian government to license pay-TV operators and improve enforcement efforts, IIPA recommended that Colombia be elevated to the Priority Watch List in 1998. In 1998, 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 1999, USTR kept Colombia on the Watch List, noting that the 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 noted that “current enforcement efforts and penalties have not proven to be a significant deterrent.” In 2002, IIPA recommended that Colombia remain on the Watch List and that an out-of-cycle review be conducted to monitor legislative and enforcement improvements. In the April 30, 2002 Special 301 Announcement, USTR elevated Colombia to the Priority Watch List. USTR pointed to a need for stronger IPR enforcement, noting that despite occasional seizures of pirated and counterfeit goods, “prosecutions rarely follow.”

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 2001, \$68.2 million worth of Colombian goods entered the United States under the GSP program, accounting for 1.2% of its total exports to the U.S. \$718 million worth of Colombian goods entered the U.S. under the ATPA program, accounting for 12.8% of its total exports to the U.S. During the first 11 months of 2002, \$177.2 million worth of Colombian goods (or 3.6% of Colombia’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 228.8% increase over the same period last year. \$244.6 million worth of Colombian goods entered the U.S. under the ATPA program for the same period, accounting for a 65.4% decrease from the prior year.

## COMMONWEALTH OF INDEPENDENT STATES (CIS)

In 1995 and 1997, IIPA requested that 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, USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan. Belarus was also placed on the Special 301 Watch List in 2000. Russia and 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 2002, IIPA recommended that the CIS countries, excluding the Russian Federation and Ukraine, be placed on the Watch List. IIPA recommended in 2002 that Ukraine be designated a Priority Foreign Country and that the Russian Federation be placed on the Priority Watch List. Ukraine remained a Priority Foreign Country in 2002. In 2002, Russia remained on the Priority Watch List. In 2001 and 2002, all of the seven CIS countries, including Belarus, but not including Moldova, that appeared on the Watch List in 2001 remained on the Watch List in 2002. Moldova was not placed on any list in 2001 or 2002.

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 whether to withdraw or to 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.

## **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 the April 30, 2001 Special 301 Announcement, 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.” In addition, the announcement noted that “[t]he United States will conduct an out-of-cycle review 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 2002, IIPA recommended that Costa Rica remain on the Priority Watch List, until concrete results are obtained in the improvement of its enforcement regime. In its April 30, 2002 Special 301 Announcement, USTR downgraded Costa Rica, placing it on the Watch List. USTR noted Costa Rica’s “concerted government strategy for improving the enforcement of intellectual property rights [including]. . . appoint[ing] specialized prosecutors, intensify[ing] training activity for officials involved in enforcement, and implement[ing] a decree focused on legitimizing software used by government agencies.” In order to ensure that recent improvements continue, USTR announced that the United States would conduct an out-of-cycle review of Costa Rica. The results of that review are not yet available.

In 2001, \$55.3 million worth of Costa Rican goods entered the U.S. under the GSP, accounting for 1.9% of its total exports to the U.S. Under the CBI, Costa Rica had \$584.5 million worth of goods enter the U.S. in 2001, accounting for 2% of its total exports to the U.S. In 2001, \$426.8 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2002, \$456.6 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2002, \$11.7 million worth of Costa Rican goods (or .41% of Costa Rica’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 78.7% decrease from the same period in 2001. During the first 11 months of 2002, \$608.2 million worth of Costa Rican goods entered the U.S. under the CBI, representing an increase of 12.2% from the same period in 2001.

## CROATIA

Croatia has never appeared on a USTR Special 301 list. On October 10, 2002, USTR announced that it was conducting several out-of-cycle reviews (OCRs), including one on Croatia. The results of that review are not yet available. In both its 2002 and 2003 Special 301 submissions, IIPA identified piracy and copyright enforcement-related problems in Croatia, but did not make a formal 301 ranking recommendation. Croatia 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 means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.” In 2001, \$22 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 16% of its total exports to the U.S.). During the first 11 months of 2002, \$31 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 23% of its total imports from January to November), representing a 51% increase over 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 Cantor 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, 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, USTR notified Cyprus that USTR expected that the Government of Cyprus would 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 has not been on a USTR list since 1997.

## 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 that 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. In 2002, IIPA recommended that the Czech Republic be added to the Watch List, pointing to serious concerns about enforcement, particularly border enforcement. This lack of strong border enforcement means that the Czech Republic continues to be a source of, or a transshipment

point for, pirate materials. The Czech Republic currently does not appear on any 301 list, although IIPA called for its addition to the Watch List in 2002.

The Czech Republic 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 2001, \$351.8 million worth of Czech goods entered the United States under the duty-free GSP code, accounting for 31.5% of its total exports to the U.S. During the first 11 months of 2002, \$271.4 million worth of Czech goods (or 24.2% of the Czech Republic’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 17.8% decrease from the same period in 2001.

## 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 to press for the inclusion of intellectual property rights criteria in the Caribbean Basin Initiative (CBI) 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. USTR accepted that petition, and in 1993 the Dominican Republic took a number of initial steps to address those serious problems. Although piracy remained a serious concern, the Dominican government made promises for improvement, and MPA withdrew its GSP petition in September 1994.

USTR placed the Dominican Republic on the Special 301 Other Observations list 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 to engage in legal reform.

In 1998, USTR followed IIPA’s recommendation, and elevated the Dominican Republic to the Priority Watch List. The Dominican Republic has remained on the Priority Watch List every year since then. In the April 30, 2001 Special 301 Announcement, 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 2002, IIPA recommended that the Dominican Republic stay on the Priority Watch List in order that there be continued progress on effective implementation and enforcement of the copyright law. In its April 30, 2002 Special 301 Announcement, USTR kept the Dominican Republic on the Priority Watch List, noting enforcement difficulties and the “widespread sale of pirated

materials.” However, USTR noted that it was “encouraged by efforts of the National Copyright Office to investigate and punish copyright piracy,” and to educate the public on the copyright law.

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 in May 2000. The review remains ongoing. In 2001, \$33.7 million worth of Dominican goods entered the U.S. under the duty-free GSP code, accounting for 0.8% of its total exports to the U.S. During the first 11 months of 2002, \$14.2 million worth of Dominican goods (or 0.37% of the Dominican Republic’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 57.8% decrease from the same period in the prior year. In 2001, \$809.6 million entered under the CBI, accounting for 19.3% of its total exports to the U.S. During the first 11 months of 2002, \$827 million worth of Dominican goods entered under the CBI, representing a 10.7% increase over the same period in the prior year. In 2001, \$1.55 billion worth of Dominican goods entered under the CBTPA. During the first 11 months of 2002, \$1.63 billion worth of Dominican goods entered under the CBTPA, representing a 15.2% increase over the same period in the prior year.

## 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, USTR stated that it would initiate a WTO case against Ecuador, and it 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 was placed on the Watch List in 1999 and 2000. In the May 1, 2000 Special 301 Announcement, USTR noted that “serious enforcement problems remain, with piracy levels still high, difficulty getting court orders enforced by the national police and the customs service...” In 2002, IIPA recommended that Ecuador be returned to the Watch List, to monitor the implementation and enforcement of the country’s copyright legislation in fulfillment of its multilateral obligations and bilateral commitments. Currently, Ecuador does not appear on any Special 301 list, although IIPA did advocate its placement on the Watch List in 2002.

Ecuador 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 2001, \$33 million worth of goods from Ecuador entered the U.S. under the duty-free GSP code, accounting for 1.7% of its total exports to the U.S. During the first 11 months of 2002, \$69.6 million worth of Ecuadorian goods (or 3.7% of Ecuador’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 181.7% increase over the same period last year. In 2001, \$216.3 million worth of goods entered under ATPA, accounting for 10.9% of its total exports to the U.S. In the first 11 months of 2002, \$69.3 million entered under the ATPA, representing a 67.6% decrease from the same period in 2001.

## 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, non-deterrent 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. 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, USTR voiced concern regarding “Egypt’s approval of fraudulent licenses to distributors of pirated copyright works, which facilitated pirate operations while hampering legitimate producers.” In 2002, IIPA recommended that USTR’s April 30, 2002 Special 301 Announcement kept Egypt on the Priority Watch List, citing deficiencies in the draft copyright and patent laws, as well as lax enforcement and unchecked copyright piracy.

Egypt 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 2001, \$21.7 million worth of Egyptian goods entered the U.S. under the duty-free GSP code, accounting for 2.5% of its total exports to the U.S. During the first 11 months of 2002, \$21.3 million worth of Egyptian goods (or 1.7% of Egypt’s total exports to the

U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 3.5% increase over the same period in 2001.

## 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 either 2001 or 2002. In 2002, IIPA had recommended that El Salvador be placed on the Watch List, noting the country's defects in civil and criminal enforcement, and the legislature's efforts to eliminate criminal enforcement altogether.

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." IIPA's 1993 GSP/CBI petition was not accepted.

In 2001, \$12.2 million worth of Salvadoran goods entered the U.S. under the duty-free GSP code, accounting for .6% of its total exports to the U.S. During the first 11 months of 2002, \$10.2 million worth of Salvadoran goods (or 0.6% of El Salvador's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 4.5% decrease over the same period last year. In 2001, \$70.5 million worth of Salvadoran goods entered the U.S. under the CBI. During the first 11 months of 2002, \$81 million worth of Salvadoran goods entered the U.S. under the CBI, representing a 55.8% increase over the same period last year. In 2001, \$937 million worth of Salvadoran goods entered the U.S. under the CBTPA. During the first 11 months of 2002, \$960 million worth of Salvadoran goods entered the U.S. 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). In 2002, IIPA recommended that Estonia be placed on the Watch List, pointing to the country's piracy problem and the absence of deterrent penalties. Estonia has not been placed on any USTR 301 list since 1998.

Estonia 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 2001, \$14.1 million worth of Estonian imports to the United States benefited from the GSP program, accounting for 6.1% of its total exports to the U.S. During the first 11 months of 2002, \$13.6 million worth of Estonian goods (or 8.7% of Estonia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 4.4% increase over the same period last year.

## GEORGIA

In 1995 and 1997, IIPA requested that 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, 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 2001. On February 12, 2002, USTR 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." In its February 15, 2002 submission, IIPA recommended that Georgia be placed on the Watch List, pointing to that country's continued piracy and enforcement problems.

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. In 2001, \$2.1 million worth of Georgian goods entered the U.S. (or 5.6% of Georgia's total exports to the U.S.). During the first 11 months of 2002, \$7.3 million worth of Georgian goods (or 45.1% of Georgia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 250.1% increase over the same period a year before.

## GERMANY

Germany was placed on the Special 301 Watch List from 1991 to 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 ‘descrambling’ 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 has not appeared on any USTR list since 1998.

## GREECE

Greece was on the Watch List from 1989 to 1994 and was elevated to the Priority Watch List in 1995, where it remained until 2000. 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 the April 30, 2001 Special 301 Announcement, 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. In 2002, USTR kept Greece on the Watch List, noting persistent problems with “optical disk piracy and unauthorized book photocopying.” USTR also noted Greece’s “lack of deterrent penalties imposed on pirates and inefficient judicial action,” as well as the continued problem of unauthorized use of software in government offices.

## 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 its April 30, 2001 Special 301 Announcement, 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 was placed on the Watch List in 2001. In 2002, IIPA recommended that Guatemala remain on the Watch List, noting that much is needed before the country will meet its multilateral and bilateral intellectual property rights obligations. In its April 30, 2002 Special 301 Announcement, placing Guatemala on the Watch List, USTR noted with approval the June 2001 appointment of a special prosecutor for intellectual property rights. Despite this, USTR pointed to continued high piracy levels, most notably with regard to business software, that have not been met by adequate enforcement.

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 2001, \$31.3 million worth of Guatemalan goods entered the U.S. under the duty-free GSP code, accounting for 1.2% of its total exports to the U.S. During the first 11 months of 2002, \$16.7 million worth of Guatemalan goods (or .66% of Guatemala's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 45.2% decrease from the same period last year. In 2001, \$244.9 million worth of Guatemalan goods entered the U.S. under the CBI, accounting for 9.5% of its total exports to the U.S. During the first 11 months of 2002, \$300.5 million worth of Guatemalan entered under the CBI, representing a 38.5% increase (or 11.8% of Guatemala's total exports to the U.S. from January to November). In 2001, \$499.3 million worth of Guatemalan goods entered under the CBTPA, accounting for 19.3% of its total exports to the U.S. During the first 11 months of 2002, \$644.5 million entered under the CBTPA, representing 25.3% of Guatemala's total exports to the U.S. for the same period in 2001.

## 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, 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 anti-piracy 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. 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 has not appeared on any Special 301 lists since 1998.

## 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 were 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 2001, USTR elevated Hungary to the Priority Watch List, from its Watch List designation in 1999 and 2000, largely as a result of its failure to provide adequate protection of "confidential test data submitted by pharmaceutical companies seeking marketing approval." In 2002, IIPA recommended that Hungary be placed on the Watch List, noting the country's need to comply with TRIPS by remedying its criminal enforcement problems. USTR kept Hungary on the Priority Watch List in 2002, noting in its April 30 Announcement that despite progress bringing its legislation into compliance with TRIPS and the U.S.-Hungary bilateral IPR agreement, enforcement and piracy remain problems.

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 2001, \$371.6 million worth of Hungarian goods entered the U.S. under the duty-free GSP code, accounting for 12.5% of its total U.S. imports. During the first 11 months of 2002, \$342.1 million worth of Hungarian goods (or 14.1% of Hungary's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 0.4% increase over the same period in 2001.

## 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 USTR maintained India on the Priority 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.” In 2002, IIPA recommended that India remain on the Priority Watch List, noting the country’s high piracy rate and an overcrowded and ineffective court system that prevents conclusion of even the simplest criminal cases. In its April 30, 2002 Special 301 Announcement, USTR kept India on the Priority Watch List, citing patent protection problems as well as copyright legislation and enforcement deficiencies. USTR noted that it would “continue to consult with the Indian government to resolve outstanding TRIPS compliance concerns, but if these consultations do not prove constructive, [USTR] consider all other options available, including WTO dispute settlement, to resolve these concerns.”

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection. In 2001, \$1.3 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 13.7% of its total exports to the U.S. During the first 11 months of 2002, \$1.8 billion worth of Indian goods (or 16.9% of India’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 52% increase over the same period in 2001.

## 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 and 1992, 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 through 1999.

In 2000, IIPA recommended that Indonesia be lowered to the Watch List "[i]n recognition of the adverse conditions under which market liberalization, anti-piracy, and copyright law reform efforts must proceed in Indonesia." USTR agreed, and Indonesia appeared on the Watch List in 2000. In 2001, IIPA recommended that Indonesia be elevated back up to the Priority Watch List, due to the continuing domination of piracy in the market, and the emergence of optical disc piracy in Indonesia. 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 pointed 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."

In 2002, IIPA once again recommended that Indonesia remain on the Priority Watch List, noting its concern over rising optical disc pirate production in the country, and its defunct court system. In its April 30, 2002 Special 301 Announcement, USTR kept Indonesia on the Priority Watch List, noting weak enforcement of IPR, "a troubling increase in illegal production lines for optical media and pirated books far beyond Indonesia's domestic consumption capacity," and a "judicial system [that] continues to frustrate right holders with years of delay and a pronounced lack of deterrent penalties." The Announcement also stated that an out-of-cycle review (OCR) would be conducted in the fall "to assess progress toward achieving these benchmarks." That review was not conducted.

Indonesia 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 for intellectual property rights." In 2001, \$1.3 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 13.3% of its total exports to the U.S. During the first 11 months of 2002, \$1.4 billion worth of Indonesian goods (or 15.6% of Indonesia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 13.6% increase over the same period in 2001.

## 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. USTR noted 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, USTR did not place Ireland on any list during 2001. Ireland has not appeared on any list since 2000.

## ISRAEL

IIPA first reported serious piracy problems in Israel in 1993. At that time, IIPA noted the need for copyright law modernization and urged USTR to place Israel on the Special 301 Watch List. No action was taken by USTR until 1994, when Israel was placed on USTR’s Special Mention status, where it remained in 1995 and 1996. In 1997, USTR elevated Israel to the Watch List, noting the “rapidly growing rate of audio CD piracy for export” and the lack of a strong legal framework or effective enforcement to combat piracy.

In 1998, because of an antiquated copyright law, large-volume pirate CD production, lack of cooperation of Israeli government authorities in raids and enforcement, and the increasing influence of organized criminal elements in the manufacturing, distribution and export of pirated CDs, videos and software, IIPA recommended that USTR place Israel on the Priority Watch List. USTR agreed, and Israel has remained on the Priority Watch List since 1998. In the April 30, 2001 Special 301 Announcement, 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.” In 2002, IIPA once again recommended that Israel remain on the Priority Watch List, and USTR agreed, noting that despite progress achieved in 2001, problems such as “the lack of a clear definition for end user piracy of business software as a crime, court procedural delays, and inadequate compensatory and deterrent civil damages.” USTR also noted that an out-of-cycle review (OCR) would be conducted later in the year. That review was not conducted.

## ITALY

Italy was listed on USTR’s Watch List throughout most of the 1990s, 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. By February 1998, Italy had still not passed the Anti-Piracy Bill and IIPA

recommended its elevation to the Priority Watch List, from the Watch List where it had been listed since 1989. USTR agreed, and Italy was on the Priority Watch List in 1998 and 1999. In February 2000, USTR kept Italy on the Priority Watch List, and added a September out-of-cycle review (OCR). 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, USTR announced in November 2000 that Italy would be moved from the Priority Watch List to the Watch List. 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. 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. In 2002, IIPA recommended that Italy be maintained on the Watch List, noting enforcement problems and a need for judicial reform. USTR again placed Italy on the Watch List in 2002, noting that "Italy still has not clarified the Anti-Piracy Bill's implementing regulations for business software, that exempt copyright owners from a requirement to apply government-approved stickers, for which a fee would be charged, on their genuine copyrighted works."

## 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. On April 11, 2000, Jordan joined the World Trade Organization, thereby making it bound by the provisions of the TRIPS agreement. Six months later, Jordan signed a historic Free Trade Agreement with the United States. Jordan has not appeared on any Special 301 list since 1999.

Jordan 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 2001, \$9.5 million worth of Jordan's imports to the United States benefited from the GSP program, accounting for 4.1% of its total exports to the U.S. During the first 11 months of 2002, \$5.1 million worth of Jordanian goods (or 1.4% of Jordan's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 39.1% from the same period in 2001.

## KAZAKHSTAN

In 1995 and 1997, IIPA requested that 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 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. The U.S. government has not yet decided whether to withdraw or to suspend GSP benefits in Kazakhstan. In 2001, \$214.1 million worth of Kazakhstan's imports to the United States benefited from the GSP program, accounting for 61% of its total exports to the U.S. During the first 11 months of 2002, \$155.4 million worth of Kazakh goods (or 50.4% of Kazakhstan's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, accounting for a 21.5% decrease from last year.

In 2001, IIPA recommended and USTR agreed to keep Kazakhstan on the Watch List. 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." In 2002, IIPA recommended that Kazakhstan remain on the Watch List, noting, as with the other CIS countries, problems with legal reform and enforcement. USTR kept Kazakhstan on the Watch List in 2002, citing the remaining steps the country must take in order to fulfill its obligations under the 1992 U.S.-Kazakhstan Trade Agreement. USTR pointed to Kazakhstan's lack of full retroactive protection for works or sound recordings, weak enforcement, and potentially non-deterrent new Criminal Code provisions which have a very high burden of proof threshold.

## 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, IIPA 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. USTR agreed, stating that “the pace of work thus far has not been sufficient to complete the needed steps by January 1, 2000.” Again 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 December 1999, Kuwait averted being designated, and notwithstanding IIPA’s recommendation to keep Kuwait on the Priority Watch List, USTR lowered Kuwait to the Watch List in 2000. The same recommendation was made in 2001, with the same result. In 2002, IIPA once again recommended that Kuwait be elevated to the Priority Watch List, noting that it was the “worst country in the Gulf region when it comes to copyright piracy.” In its April 30, 2002 Special 301 Announcement, USTR kept Kuwait on the Watch List, noting “continuing problems with copyright piracy.” USTR noted that Kuwait would be elevated to the Priority Watch List if the process of documenting Kuwait’s intention to carry out a “work plan” with the United States was not completed satisfactorily by May 31, 2002.

## KYRGYZ REPUBLIC

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, USTR did not put the Kyrgyz Republic on any list. In the April 30, 2001 Special 301 Announcement, USTR noted that it would conduct an out-of-cycle review on the Kyrgyz Republic. On February 12, 2002, USTR 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 2002, IIPA recommended that the Kyrgyz Republic remain on the Watch List, noting, as with the other CIS countries, problems with legal reform and enforcement. The Kyrgyz Republic did not appear on any list in 2002.

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 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 2001, \$263,000 in Kyrgyz imports to the United States benefited from the GSP program, accounting for 8% of its total exports to the U.S. During the first 11 months of 2002, \$660,000 of Kyrgyz goods (or 18.6% of the Kyrgyz Republic’s total exports to the U.S. from January to November) entered the U.S. under the GSP duty-free code, representing a 268.3% increase over the same period in 2001.

## 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. USTR accepted our recommendation, and placed Latvia on the Watch List for the first time in 2000. Latvia remained on the Watch List in 2001. In its April 30, 2001 Special 301 Announcement, 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.” Again citing Latvia as a major transshipment point for large volumes of pirated products, USTR kept the country on the Watch List in 2002. USTR also noted the lack of effective *ex parte* search procedures, stating that “[t]he United States urges Latvia to pass legislation to ensure that customs and police authorities have the tools needed to combat this piracy.”

Latvia 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 2001, \$8.8 million worth of Latvia’s imports to the United States benefited from the GSP program, accounting for 5.9% of its total exports to the U.S. During the first 11 months of 2002, \$10.3 million worth of Latvian goods (or 7% of Latvia’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 30.2% increase over the same 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 recommended a Watch List placement, stressing pervasive TV piracy, an ineffective judicial system, and lack of any progress toward copyright and broadcast law reform. 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.”



Lebanon was kept on the Watch List in 2000 largely because of the continued international deficiencies in the copyright law, pervasive piracy and inefficient enforcement against piracy. 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. USTR agreed, and elevated Lebanon to the Priority Watch List, citing continuing piracy problems, particularly cable piracy. In June of 2001, the IIPA filed a request for review of Lebanon's GSP benefits for its failure to protect the intellectual property rights of U.S. copyright owners. USTR has not yet decided whether to accept the petition. In 2002, IIPA recommended that Lebanon remain on the Priority Watch List, and requested that USTR conduct an out-of-cycle review to ascertain whether sufficient progress was being made in the fight against cable piracy and pervasive retail piracy. USTR decided to keep Lebanon on the Priority Watch List in 2002, noting the country's "severe copyright piracy problem and the lack of a comprehensive governmental commitment to eliminate piracy and foster legitimate business."

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 2001, \$35.9 million worth of Lebanon's imports to the United States benefited from the GSP program, accounting for 39.1% of its total exports to the U.S. During the first 11 months of 2002, \$18.6 million worth of Lebanese goods (or 35.6% of Lebanon's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 45.6% decrease from the same period in 2001.

## 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 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, 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 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." In 2002, IIPA recommended that Lithuania remain on the Watch List, noting the continued lack of effective enforcement and high piracy rates. In its April 30, 2002 Special 301 Announcement, USTR kept Lithuania on the Watch List, citing the country's weak enforcement, position as a major transshipment point, that "the country remains flooded with pirated copyright materials, including large volumes of optical media products."

Lithuania 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 means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." In 2001, \$11.5 million worth of Lithuania's imports to the United States benefited from the GSP program, accounting for 6.8%

of its total exports to the U.S. During the first 11 months of 2002, \$3.6 million worth of Lithuanian goods (or 1.3% of Lithuania's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 68.2% decrease from the same period in 2001.

## 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 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." Macau was removed from the Watch List in April 2002.

## MALAYSIA

IIPA first identified Malaysia in 1985 as a country with a serious piracy problem, and supported the bilateral negotiations that led to Malaysia's adopting a comprehensive copyright law in 1987, and joining the Berne Convention in 1990, thus extending protection to U.S. works. In 1994, IIPA filed a "Special Comment" on Malaysia calling for judicial reforms so that deterrent sentences could be imposed on copyright pirates. In 1999, IIPA filed an "Open Recommendation" report on Malaysia focusing on optical media piracy and calling for the adoption and implementation of a comprehensive regulatory system for the import, export and operation of optical media production equipment and materials; sustained and consistent anti-piracy enforcement policies; and the prompt and consistent imposition of deterrent penalties on commercial pirates by Malaysian courts. In the April 30, 1999 Special 301 Announcement, 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 disc law. Because Malaysia was slow to enact and implement legislation to deal with the optical disc piracy problem, USTR placed Malaysia on the Priority Watch List in 2000.

IIPA recommended and USTR agreed to keep Malaysia on the Priority Watch List, and USTR also decided to conduct an out-of-cycle review (OCR) to assess Malaysia's enforcement

efforts and implementation of its new Optical Disc Act. On October 31, 2001, USTR kept Malaysia on the Priority Watch List as a result of the out-of-cycle review. In 2002, IIPA recommended that Malaysia be lowered to the Watch List, but provided a series of target actions the government needed to take to sustain progress achieved in 2001; IIPA also recommended that USTR conduct an out-of-cycle review to re-examine Malaysia's 301 status based on the degree of fulfillment of the target actions. USTR placed Malaysia on the Watch List in 2002, citing that country's serious optical media piracy problem, and stating, "there is concern that Malaysia has not established a climate of deterrence. Without criminal prosecutions and the imposition of serious criminal sentences, there is no true deterrence to piracy in Malaysia."

## MEXICO

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 1999. For the last few 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, and further copyright law reform, to other relevant matters. High-level government engagement, by both governments, on copyright matters is required, and IIPA requested such in a open letter to the U.S. government in March 2002. In its April 30, 2002 Special 301 Announcement, USTR did not place Mexico on any list, but did state that it would conduct an out-of-cycle review (OCR) "to assess where there has been an improvement in enforcement efforts . . . specifically whether raids against intellectual property piracy operations have led to prosecutions and convictions." On October 30, 2002, IIPA filed detailed recommendations on several countries, including Mexico, currently the subject of OCRs. The results of that review are not yet available.

## MOLDOVA

In 1995 and 1997, IIPA requested that 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, USTR placed seven CIS countries on the Special 301 Watch List, including Moldova. Though IIPA recommended that it be placed on the Watch List in 2002, Moldova has not appeared on any list since 2000.

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. In 2001, \$145,000 worth of Moldavian imports to the United States benefited from the GSP program, representing 0.2% of its total exports to the U.S. During the first 11 months of 2002, \$101,000 worth of Moldavian goods (or 0.27% of Moldova's total exports to the U.S. from January to November) entered the U.S. under the GSP duty-free code, representing a decrease of 28.5% over the same period in 2001.

## NEW ZEALAND

New Zealand appeared on the Special 301 Watch List in 1991 and 1992. In 1998, at the urging of IIPA, USTR initiated an out-of-cycle review in response to New Zealand's sudden decision to abolish the right to control unauthorized ("parallel") imports for all copyright owners. This erosion of intellectual property protection, combined with what USTR described as an "enforcement regime [that] does not effectively deter piracy," led 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, 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." By the time USTR made its designations for 2002, New Zealand had still not introduced this legislation. Therefore, in the April 30, 2002 Special 301 Announcement, USTR kept New Zealand on the Watch List.

## NICARAGUA

In April 1997, USTR added Nicaragua to the Special 301 Other Observations list. In January 1998, Nicaragua and the U.S. signed a bilateral intellectual property rights agreement obligating Nicaragua to provide a higher level of protection than the TRIPS Agreement by July 1999. In her May 1, 1998 announcement keeping Nicaragua on the Other Observations list, Ambassador Barshefsky noted, "piracy of video recordings, unauthorized video and sound recordings, and U.S. satellite signals by local cable television operators remains widespread. The copyright law does not explicitly protect computer software. . . . We look to Nicaragua to update its legal structure, to reduce piracy rates affecting all forms of intellectual property, and to bring its IP regime into compliance with the obligations of the IPR agreement quickly." Nicaragua has not appeared on a 301 list since 1998.

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 2001, \$66.8 million worth of Nicaraguan imports to the United States benefited from the CBI program, accounting for 11.1% of its total exports to the U.S. During the first 11 months of 2002, \$77.2 million worth of Nicaraguan goods entered the U.S. under the CBI, representing a 28.6% 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 2001, \$81 million worth of Nicaraguan goods benefited from the CBTPA program, accounting for 13.4% of Nicaragua’s total exports to the U.S. During the first 11 months of 2002, \$116.9 million worth of Nicaraguan goods benefited from the CBTPA program.

## 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 country’s intellectual property protection regime 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 Watch List, as Oman’s market was “dominated by piracy,” and was “a haven for pirates fleeing less hospitable neighboring states,” and in 2000, IIPA recommended keeping Oman on the Watch List primarily for failure to stop piracy of business software. USTR agreed all three years. On May 21, 2000, Oman enacted copyright legislation as one of the final pieces in Oman’s WTO accession process (Oman joined the WTO in November 2000). In the 2001 Special 301 submission, the IIPA recommended that Oman be placed on the Watch List, to ensure the market would be cleaned up, and encourage enforcement against corporate end-user piracy of business software. USTR decided to remove Oman from the Watch List, and they remained off the list in 2002 (IIPA did not file a report on Oman in 2002).

Oman 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 2001, \$39.5 million worth of Oman’s imports to the United States benefited from the GSP program, accounting for 9.2% of its total exports to the U.S. During the first 11 months of 2002, \$26.9 million worth of Oman’s goods (or 7.5% of Oman’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 26.7% from the same period in 2001.

## PAKISTAN

Pakistan has been on the Special 301 Watch List since 1989. 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 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 Pakistan’s GSP benefits for its failure to protect the intellectual property rights of U.S. copyright owners. USTR has not yet decided whether to accept IIPA’s petition. In 2002, IIPA recommended that Pakistan be elevated to the Priority Watch List, noting the alarming nature of CD pirate production. While USTR did not agree, in placing Pakistan on the Watch List on April 30, 2002, Ambassador Zoellick pointed to Pakistan’s position as “one of the world’s largest exporters of pirate CDs and optical media.”

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 \$104.6 million worth of products into the United States without duty in 2001 (4.7% of its total exports to the U.S.), and \$83.8 million worth of products (or 4.7% of Pakistan’s total exports to the U.S. from January to November) into the United States without duty during the first 11 months of 2002.

## 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 in 1999, IIPA also recommended that USTR conduct an out-of-cycle review (OCR) to monitor the anti-piracy and legal measures undertaken by the Authority. The Palestinian Authority did not appear on any Special 301 lists in 1999. In 2000, raising increasing concerns over pirate production for export, IIPA recommended that the Palestinian Authority be placed on the Priority Watch List. On May 1, 2000, USTR announced that it would conduct an OCR 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 OCR of the area when conditions permit. USTR did not place the Palestinian Authority on any list in 2001 or 2002.

The West Bank and the Gaza Strip currently participate 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/territory provides “adequate and effective protection of intellectual property rights.” In 2001, \$150,000 of products imported from the West Bank benefited from the GSP program, representing 75% of the Palestinian Authority’s total exports to the U.S. During the first 11 months of 2002, \$76,000 of products (or 30.3% of the Palestinian Authority’s total exports to the U.S. from January to November) imported from the West Bank benefited from the GSP program, representing a 26.5% decrease over the same period in 2001.

## 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." Because of progress made in Panama during that year, USTR terminated the GSP review on October 26, 1998. Panama has not appeared on any Special 301 list since 1998.

Panama 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/territory provides "adequate and effective protection of intellectual property rights." In 2001, \$3.5 million worth of Panamanian imports to the United States benefited from the GSP program, accounting for 1.2% of its total exports to the U.S. During the first 11 months of 2002, \$2 million worth of Panamanian goods (or .75% of Panama's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 41.1% decrease from the same period last year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$36.8 million worth of Panamanian goods entered the U.S., accounting for 12.9% of total exports to the U.S. in 2001. During the first 11 months of 2002, \$36.1 million worth of Panamanian goods (or 13.3% of Panama's total exports to the U.S. from January to November) entered under the CBI, representing a 12.3% increase over the same period last year. Under the Caribbean Basin Trade Partnership Act (CBTPA), which has IPR criteria similar to CBI and GSP, \$5.5 million worth of Panamanian goods entered the U.S. in 2001. During the first 11 months of 2002, \$3.8 million worth of Panamanian goods (or 1.4% of Panama's total exports 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, despite industry recommendations to elevate 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 (OCR) 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 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.” In late 1997, USTR conducted an OCR 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.

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 2001, IIPA continued to support USTR’s Section 306 monitoring of Paraguay. USTR’s April 30, 2001 Special 301 Announcement noted 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 2002, IIPA recommended that Paraguay remain subject to Section 306 monitoring. USTR agreed, noting in its April 30, 2002 announcement, Paraguay’s failure “to implement vigorous border enforcement measure, as agreed to in the MOU,” and that “pirate optical media production has been dispersed to smaller enterprises, in order to evade law enforcement efforts.” Paraguay remained subject to Section 306 monitoring in 2002. On October 30, 2002, IIPA filed comments, at USTR’s request, on the U.S. government’s 1998 MOU with Paraguay on intellectual property matters, including enforcement.



Paraguay 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 2001, \$11.2 million worth of Paraguayan imports to the United States benefited from the GSP program, accounting for 33.9% of its total exports to the U.S. During the first 11 months of 2002, \$11.5 million worth of Paraguayan goods (or 30% of Paraguay’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP program, representing a 30.8% increase 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. In 2001, China amended its copyright law and joined the World Trade Organization, stating it would implement its obligations under the TRIPS Agreement, from the time of its joining the WTO.

Since 1998, IIPA has continued to recommend, and 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. 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. 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 2002, IIPA recommended that USTR keep Peru on the Watch List, noting high piracy levels, weak enforcement, and a failure to require government agencies to use licensed software. Peru remained on the Watch List.

Peru 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 2001, \$73.4 million worth of Peru’s imports to the United States benefited from the GSP program, accounting for 4% of its total exports to the U.S. During the first 11 months of 2002, \$157 million worth of Peruvian goods (or 9% of Peru’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 154.3% over the same period in 2001. An additional \$686.3 million worth of Peruvian products benefited from the ATPA in 2001, accounting for 38% of total exports to the United States. In the first 11 months of 2002, an additional \$309.1 million worth of Peruvian goods entered the U.S. under ATPA, representing a 54.4% decrease in ATPA benefits from the same period in 2001.

## PHILIPPINES

The Philippines has been on USTR’s list for well over a decade, and IIPA has a long history of involvement with copyright issues there. 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. In 1992, USTR elevated the Philippines from the Watch List to the Priority Watch List. 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 that agreement, USTR dropped the Philippines from the Priority Watch List to the Watch List in 1993.

In June 1997, the Philippines enacted a comprehensive modernization of its copyright law (effective January 1, 1998). In its 1998 filing, IIPA, filing to keep the Philippines on the Watch List, did commend 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. USTR agreed to keep the Philippines on the Watch List in 1998 and 1999. In 2000, IIPA called for the Philippines to be elevated to the Priority Watch List, noting that optical disc pirate production had taken root in the country and that fundamental improvements in the investigative, prosecutorial and judicial systems were needed. In its May 1, 2000 Special 301 Announcement, 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 2002, IIPA recommended again to keep the Philippines on the Priority Watch List, due to rampant pirate optical disc production, and requested that USTR conduct an out-of-cycle review (OCR) to review whether the Philippines had passed and implemented an optical disc law. USTR agreed to keep the Philippines on the Priority Watch List, and also agreed to conduct an OCR “in order to monitor the situation in the Philippines.” That review was not conducted.

The Philippines 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 2001, \$676.1 million worth of Philippine imports to the United States benefited from the GSP program, accounting for 6% of its total exports to the U.S. During the first 11 months of 2002, \$646 million worth of Philippine goods (or 6.4% of the Philippines’ total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 3% from the same period in 2001.

## POLAND

In the May 1, 2000 Special 301 Announcement, USTR elevated Poland to the Priority Watch List, from the Watch List where it had been listed since 1994, 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. 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 (OCR), 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 2002, IIPA recommended that Poland be placed on the Watch List. USTR agreed, again pointing to the Warsaw Stadium as a glaring example of Poland’s failure to provide adequate enforcement of intellectual property rights. In order to monitor Poland’s enforcement efforts, USTR stated in the April 30, 2002 Special 301 Announcement that it would conduct an OCR. On October 30, 2002, IIPA filed recommendations for several on-going OCRs, including Poland. The results of that review have not yet been made available.

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 2001, \$286.9 million worth of Poland's imports to the United States benefited from the GSP program, accounting for 30% of its total imports. During the first 11 months of 2002, \$304 million worth of Polish goods (or 30.6% of Poland's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 14.9% from the same period in 2001.

## **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, USTR 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. In 2002, IIPA again recommended that Qatar be returned to the Watch List, to address serious software piracy issues, and in recognition that Qatar had failed to pass promised copyright legislation in 2001. In April 2002, USTR decided to place Qatar back on the Watch List, for failure to sign and implement the copyright law. On October 10, 2002, USTR announced that several countries, including Qatar, were currently undergoing out-of-cycle reviews. Those reviews were not conducted.

## **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 USTR designations in 1997 and 1998 because of its lax enforcement and the bilateral agreement shortcomings. Since 1999, IIPA has 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 enforcement of its copyright law. USTR agreed, and Romania has been on Watch List since 1999. Romania is making legal reforms, including its February 2001 deposit of 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 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 2001, \$101.4 million worth of Romania’s imports to the United States benefited from the GSP program, accounting for 19.4% of its total exports to the U.S. During the first 11 months of 2002, \$995.5 million worth of Romanian goods (or 14.9% of Romania’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 2.3% increase over the same period in 2001.

## RUSSIA

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. USTR again decided to keep Russia on the Watch List at that time (because of the expected passage of the criminal law amendments).

In our February 1997 submission, IIPA again pressed for a Priority Foreign Country designation if by April 1997 Russia had not taken a series of steps, including commencement of major enforcement actions, and the introduction of legislation providing full retroactive protection for both pre-1995 sound recordings and pre-1973 works. Some more aggressive enforcement actions were undertaken during this period, but there was no movement on even drafting a bill (or decree) on retroactive protection and little optimism that this would soon occur. Shortly following its submission, IIPA again petitioned USTR to deny Russia duty free trade benefits under the GSP program, for its clear failure to provide “adequate and effective” protection for U.S. copyrighted works. USTR moved Russia up to the Priority Watch List in its April 1997 announcement and later again denied IIPA’s GSP petition.

During the first year (1997) following adoption of the new criminal provisions making piracy a crime with real penalties, there was some progress in the enforcement area. In particular, raids commenced and some administrative actions were concluded; two criminal convictions with very low penalties were reported, only later to be voided by a government amnesty at the beginning of 1998. There was no progress at all with the legislative agenda concerning retroactivity or correcting other enforcement deficiencies. From 1998 through 2002, 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. USTR has followed IIPA’s recommendation, and Russia has remained on the Priority Watch List ever since 1997.

In August 2000, IIPA filed a petition with 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 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 the 1991 bilateral trade agreement and TRIPS. In its 2002 announcement, USTR noted provisions in Russia's enforcement regime that "appear to be inconsistent with the TRIPS Agreement and the intellectual property rights provisions of the 1992 U.S.-Russian Federation Trade Agreement."<sup>1</sup> USTR also pointed to other problems such as weak enforcement and "[l]ack of an effective OD law." In 2001, \$378 million worth of Russia's imports to the United States benefited from the GSP program, accounting for 6.1% of its total exports to the U.S. During the first 11 months of 2002, \$343 million worth of Russian goods (or 5.7% of Russia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 4.5% decrease from the same period in 2001.

## SAUDI ARABIA

Saudi Arabia was on the Priority Watch List from 1993 to 1995. 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 lowered 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. In 1998 and 1999, IIPA recommended, and USTR agreed, that Saudi Arabia should remain on the Watch List, 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 and 2001, IIPA recommended that Saudi Arabia be elevated to the Priority Watch List, for continued piracy, lack of effective and deterrent enforcement actions, and a TRIPS-incompatible copyright law. In both 2000 and 2001, USTR kept Saudi Arabia on the Watch List, but noted that "the level of activity undertaken by enforcement officials has been insufficient to deter piracy" in its 2000 announcement, and "[e]nforcement actions against copyright infringement are not carried out with sufficient regularity and are not accompanied by the appropriate level of publicity and sentences to reduce the level of piracy" in its 2001 announcement. In 2002, IIPA recommended that Saudi Arabia remain on the Watch List, noting increasing enforcement, but many of the same structural difficulties, including lack of transparency. USTR agreed, noting in its April 30, 2002 announcement that while "Saudi Arabia has made notable progress in improving the enforcement of intellectual property rights over the past year," that "the United States remains concerned about continued high losses experienced by U.S. copyright . . . industries and the absence of long-awaited revised intellectual property rights legislation."

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<sup>1</sup> 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.

## SINGAPORE

Singapore, notorious as the “world capital of piracy” until the late 1980s, 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, 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 or 2002; USTR did not place Singapore on any list in either of those years.

## 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 due 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 IIPA recommendations in 2000, 2001, and 2002 to place South Africa on the Watch List, South Africa has not appeared on any Special 301 list since its removal in late 1999.

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 2001, \$506 million worth of South Africa’s imports to the United States benefited from the GSP program, accounting for 11.4% of its total exports to the U.S. During the first 11 months of 2002, \$490.3 million worth of South Africa’s imports into the United States (or 12.8% of South Africa’s total exports to the U.S. from January to November) benefited from the GSP program, representing a decrease of 3.1% over the same period in 2001.

## **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. 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. Though IIPA recommended that South Korea remain on the Priority Watch List in 2002, USTR lowered the country to the Watch List. In its April 30, 2002 Special 301 Announcement USTR noted positive steps toward increasing South Korea’s intellectual property protections, including creation of a special enforcement unit, preparation of draft legislation on “exclusive transmission rights for sound recordings and performances,” and more open data on its enforcement efforts, in order to “address concerns

the U.S. government has raised about [the country's] failure to implement a transparent, non-discriminatory, and sustained enforcement regime." However, USTR also pointed to significant remaining concerns over "the protection of temporary copies, technical protection measures, ISP liability, . . . *ex parte* relief, [and] the lack of full retroactive protection of pre-existing copyrighted works."

## 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. 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 that year. Though IIPA did not make any formal recommendation for Spain in 2002, it did note the country in its Special 301 cover letter to USTR. Spain did not appear on any list in 2002.

## 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, 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) report.

In 1998, IIPA recommended that Taiwan be elevated to the Watch List, noting that Taiwan remained a “node” in a web of “Greater China” piracy of entertainment video games; 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). 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 2000, IIPA recommended that Taiwan remain on the Special 301 Watch List, with an out-of-cycle review to continue monitoring progress. 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 retained 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.

IIPA recommended that Taiwan remain on the Priority Watch List in 2002, pointing to extremely high piracy rates and a pirate trade in optical media that remains at epidemic proportions. In its 2002 announcement, USTR stated that “the lax protection of IPR in Taiwan remains very serious.” Calling the country “one of the largest sources of pirated optical media products in the world,” USTR kept Taiwan on the Priority Watch List in 2002. IIPA also recommended that an out-of-cycle review be conducted to determine whether Taiwan has made serious progress in combating its significant optical media piracy problem through legislative and enforcement efforts.

## TAJIKISTAN

In 1995 and 1997, IIPA requested that 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, USTR placed seven CIS countries, including Tajikistan, on the Special 301 Watch List.

In 2001, IIPA recommended that Tajikistan be kept on the Watch List. USTR kept it there. 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. For these same reasons, IIPA again recommended and USTR again kept Tajikistan on the Watch List in 2002.

## THAILAND

IIPA first identified Thailand in 1985 as one of the countries with the worst piracy records in the world. 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—the 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. The U.S. government has not yet decided whether to accept this petition.

In 2002, IIPA recommended that Thailand remain on the Watch List, and requested that USTR conduct an out-of-cycle review, noting, among other problems, exponential growth in its capacity for production of optical media. USTR agreed, noting in its April 30, 2002 announcement that “the significant and growing problems of optical media production and end-user piracy of business software remain largely unaddressed.” That review was not conducted.

As noted above, Thailand 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 2001, \$2.2 billion in Thailand's imports to the United States benefited from the GSP program, accounting for 15% of its total exports to the U.S. During the first 11 months of 2002, \$2.1 billion worth of Thai goods (or 15.5% of Thailand's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 2.4% 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. There has been sporadic progress on copyright issues during this decade-long engagement. Turkey has been on the Special 301 Watch List (1990-1991, 2001-2002) and the Priority Watch List (1992-2000). 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, but these recommendations were not accepted by USTR.

In 1997, USTR outlined six benchmarks for progress in Turkey, which included: (1) taking effective enforcement actions to their conclusions to address widespread piracy; (2) passing copyright and patent law amendments to bring Turkey into compliance with its TRIPS and Berne obligations; (3) amending the Cinema, Video and Music Works Law to include higher, non-suspendable fines and jail terms; (4) issuing a directive to all government agencies to legalize software, (5) starting a public anti-piracy campaign about the software end-use problem and continuing training of enforcement officials so that the levels of piracy decline; and (6) equalizing taxes on the showing of foreign and domestic films. Progress in meeting these benchmarks has been slow; for example, USTR noted in its May 1, 2000 Special 301 Announcement 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. However, USTR downgraded Turkey to the Watch List in April 2001, noting that “the Turkish Parliament passed amendments to the Copyright Law designed to bring Turkey into compliance with its TRIPS obligations.” In 2002, IIPA recommended that Turkey be elevated to the Priority Watch List, noting a worsening situation for most copyright industry sectors, specifically the abject failure of the “banderole” system and poor enforcement. Even though USTR again kept Turkey on the Watch List in April 2002, it acknowledged that “[l]ack of effective IPR protection in Turkey is a serious concern,” that “broadcasting regulations issued last year by the Ministry of Culture undermine the intent of the 2001 copyright law,” and that “[p]iracy levels remain extremely high and government efforts to control piracy, specifically the ‘banderole’ system, have failed.” Even more specifically, USTR specifically encouraged Turkey “to increase the number of raids on sources of piracy, increase control of pirated materials at the border, eliminate—or at a minimum reform—the banderole system, address the issuance of registrations to unauthorized distributors of pirate products, increase prosecution of IPR violations, and impose deterrent sentences.”

In addition to the Special 301 process, the copyright industries and the U.S. government have used the GSP program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries based on discretionary criteria, such as the provision of “adequate and effective” copyright protection, to evaluate Turkey’s progress on copyright matters. 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, hearings were held, and the case remains open, ten years later. USTR announced on January 16, 1998, that it would not consider any requests to expand the scope of preferential trade benefits Turkey receives under the GSP program; USTR noted there “Turkey’s future benefits under the Generalized System of Preferences (GSP) will depend on progress on the remaining benchmarks [outlined by USTR in 1997].” IIPA understands that some competitive need waivers under the GSP program have been granted to Turkey since that 1998 announcement. The GSP IPR investigation now enters its tenth year. In 2001, \$437 million worth of Turkey’s imports to the United States benefited from the GSP program, accounting for 14.4% of its total exports to the U.S. During the first 11 months of 2002, \$426.6 million worth of Turkish goods (or 13.1% of Turkey’s total exports to the U.S. from January to November) entered the U.S. under GSP.

## TURKMENISTAN

In 1995 and 1997, IIPA requested that 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, 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." Echoing the previous year's submission, IIPA recommended that Turkmenistan remain on the Watch List in 2002. USTR agreed, again pointing to the country's lack of protection for certain sound recordings and pre-existing works and sound recordings.

## UNITED ARAB EMIRATES

The UAE was on the USTR Watch List from 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 out-of-cycle review (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 list, to acknowledge the progress of the UAE government in "fighting piracy through a sustained

enforcement campaign.” Ambassador Barshefsky kept the UAE on the Watch List for certain deficiencies in the patent area, but finally dropped the UAE from the Special 301 lists 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. IIPA made no recommendation for UAE in 2002 nor did USTR place the country on any list in that year.

## UKRAINE

In both 1998 and 1999, IIPA made individual filings focusing on concerns in Ukraine, Belarus and Kazakhstan, the CIS 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, 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 Ukraine were placed 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 USTR designate Ukraine as a Priority Foreign Country. USTR placed Ukraine on the Priority Watch List, with the caveat that it was prepared to designate 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, 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 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 February of 2002, Ukraine enacted 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 reinstitute the GSP benefits. On January 17, 2002, USTR announced that it would begin implementing trade sanctions against Ukraine on January 23.

In 2002, IIPA recommended that Ukraine remain a Priority Foreign Country for its failure to adopt an effective optical media regulation and its continued failure to implement the Joint Action Plan of June 1, 2000. USTR designated Ukraine a Priority Foreign Country in 2002, pointing to the country's significant optical disc piracy problem and failure to enact an effective OD law. In 2001, \$37.8 million worth of Ukrainian imports to the United States benefited from the GSP program, accounting for 5.8% of its total exports to the U.S. There are no GSP figures for Ukraine in 2002, 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.

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. In 2002, IIPA recommended that Uruguay remain on the Priority Watch List, noting the country’s failure to pass much-needed copyright legislation, the continued legislative march to adopt an objectionable bill on computer software, and ineffective criminal and civil enforcement against high levels of copyright piracy. USTR kept Uruguay on the Priority Watch List in 2002, noting that “inadequate civil remedies and lax border enforcement have caused high piracy rates to persist, and have allowed Uruguay to become a major transshipment point for pirated products.”

Uruguay 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 August 2001, IIPA filed a petition to review Uruguay’s eligibility to maintain GSP benefits. The U.S. government has not decided whether to accept the petition. In 2001, \$80.7 million worth of Uruguay’s imports to the United States benefited from the GSP program, accounting for nearly 35.8% of its total exports to the U.S. During the first 11 months of 2002, \$62.7 million worth of Uruguayan goods (or 35.9% of Uruguay’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 14% decrease from the same period in 2001.

## UZBEKISTAN

In 1995 and 1997, IIPA requested that 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, USTR placed seven CIS countries on the Special 301 Watch List, including Uzbekistan.

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 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. IIPA again recommended that Uzbekistan remain on the Watch List in 2002. USTR agreed, noting in its April 30, 2002 Special

301 Announcement the many steps that Uzbekistan still must take in order to fulfill its obligations under the 1994 U.S.-Uzbekistan Trade Agreement: “[s]pecifically, Uzbekistan is not yet a party to the Berne Convention or the Geneva Phonograms Convention. Uzbekistan is not providing any protection or rights to U.S. and other foreign sound recordings, and it does not clearly provide retroactive protection for works or sound recordings under its copyright law.”

In 2001, \$2.5 million worth of Uzbek imports to the United States benefited from the GSP program, accounting for 4.7% of its total exports to the U.S. During the first 11 months of 2002, \$11 million worth of Uzbek imports to the United States (or 14.7% of Uzbekistan’s total exports to the U.S. from January to November) benefited from the GSP program, representing an increase of 504.3% from the same period in 2001.

## **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 2001, \$636.6 million worth of Venezuela’s imports to the United States benefited from the GSP program, accounting for 4.5% of its total exports to the U.S. During the first 11 months of 2002, \$533 million worth of Venezuelan goods (or 4% of Venezuela’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 10.5% decrease from the same period last year.

In 1999 and 2000, Venezuela remained on the Watch List, as recommended by IIPA. 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.” IIPA recommended that Venezuela remain on the Watch List in 2002, citing continued high piracy rates, lengthy judicial delays, and the failure to impose deterrent penalties. In its April 30, 2002 Special 301 Announcement, USTR kept Venezuela on the Watch List, noting that “limited resources and a lack of IPR enforcement by Venezuela customs have hampered the government’s efforts to lower copyright piracy levels.”

## **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, USTR agreed with IIPA’s assessment of continuing IPR problems in Vietnam, and retained Vietnam on the Watch List in both years. In 2002, USTR kept Vietnam on the Watch List, noting that “[e]nforcement of intellectual property rights. . . in Vietnam remains weak, and violations of IPR are rampant.”