

**IIPA's 2004
Special 301 Report
on
Global Copyright Protection
& Enforcement**



**Submitted to the
U.S. Trade Representative
on February 13, 2004
by the
International Intellectual Property Alliance**

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2004 SPECIAL 301 REPORT ON GLOBAL PROTECTION AND ENFORCEMENT
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February 13, 2004

Mr. James Mendenhall
Assistant USTR for Services, Investment
and Intellectual Property
Office of the United States
Trade Representative
600 17th Street, N.W., Room 303
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"), 69 Fed. Reg.
718-719 (Jan. 6, 2004)

Dear Mr. Mendenhall:

This filing responds to the Request for Written Submissions appearing on January 6, 2004 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 41 separate country reports. We also highlight seven challenges and initiatives in this letter that define our agenda for the coming year. Finally, we mention 15 additional countries that we have not recommended be on a Special 301 list but which merit 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 1,350 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 industries¹ 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 2004; (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 surveys² and at the end lists 15 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 1989; and

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

² Country surveys were prepared by Eric H. Smith, IIPA President; Steven J. Metalitz, IIPA Senior Vice President; Maria Strong, IIPA Vice President and General Counsel; Eric J. Schwartz, IIPA Vice President and Special Counsel; and Michael N. Schlesinger, IIPA Vice President and Associate General Counsel, and are based on information furnished by IIPA member associations. We also thank Ryan Lehning at Smith & Metalitz LLP and the firm's law clerks, Alina Morris and Marc Shaw, and our staff, Pam Burchette, Melissa Braford, Michael Murphy, Jayme MacDonald, 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 2004

Improving copyright protection by employing the various bilateral, plurilateral and multilateral tools available to the U.S. government is the goal of this submission. Without these trade tools and their full implementation, the U.S. copyright industries would still be facing a world of inadequate copyright laws, most not even protecting U.S. works at all, and 90% to 100% piracy levels in most developing countries — a world which our industries faced in the early 1980s. Since the first marriage of intellectual property and trade in the Trade and Tariff Act of 1984 and formation of the IIPA, the later adoption of the "Special 301" provisions in the 1988 Trade Act and the adoption or modification of the U.S. unilateral trade preference programs, such as GSP, CBERA, ATPA and others, U.S. government initiatives have produced significant legal and enforcement improvements. This largely untold success story has produced 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, the increased organization of commercial pirates, and the failure of governments to adequately enforce their new laws, require a renewed commitment to use both the old and new tools available to industry and governments.

In our last five Special 301 filings, IIPA outlined a series of challenges facing the copyright-based industries. This year, we have updated these challenges/objectives to take into account new developments and new challenges.

The copyright industries are extremely grateful for the U.S. government's effort in support of progress toward meeting these objectives. But, as is clearly demonstrated in the country surveys included in this report, organized commercial piracy, whether digital, analog or over the Internet, threatens to outpace the fight to combat it. IIPA believes that a significantly heightened effort to make further progress on these objectives is called for in 2004. We believe the tools exist to make significant progress — the issue is the political will of all governments to take the actions necessary to meaningfully address piracy and to lower piracy rates locally and globally. 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 causes grave losses to all the copyright industries. 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-Recordables (CD-Rs), digital versatile discs (DVDs) and DVD-Rs. An explosion in the world's capacity to produce optical disc products has been driven by the ever-growing worldwide demand for copyrighted high-tech and entertainment products and the potential for pirates to generate billions of dollars in illegal income. Unfortunately, production capacity now greatly exceeds legitimate demand, with the difference inuring to the benefit of illegal pirate enterprises. Increasingly, recordable optical media are also used to "burn" unauthorized copies on a commercial basis. Pirate CDs, VCDs, CD-ROMs and DVDs containing protected music, sound recordings, audiovisual works, business and entertainment software and books and journals have quickly decimated 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. (This chart does not address the issue of CD-R burning, a global problem whose impact is especially severe in Asia; in several European countries, such as Italy, Germany and Spain; and in Latin America).

Estimated Optical Disc Production Capacity in 45 Countries/Territories										
	Plants (Excl. CD-R)			Estimated Production Lines (Excl. CD-R)			Estimated Capacity in Millions (Excl. CD-R)		DVD Plants (Dedicated)	DVD Lines
	2003	2002	1999	2003	2002	1999	2003	2002	2003	2003
ASIA										
Australia	9.0	9.0	12.0	19.0	19.0	13.0	66.5	66.5	3.0	6.0
Cambodia	1.0	1.0	0.0	1.0	2.0	0.0	3.5	7.0	NA	NA
China	71.0	70.0	72.0	569.0 ³	196.0	156.0	1,991.5 ³	686.0	32.0	65.0
Hong Kong	112.0	93.0	94.0	623.0	554.0	414.0	2,181.0	1,939.0	28.0	50.0
India	9.0	9.0	8.0	14.0	14.0	8.0	49.0	49.0	1.0	1.0
Indonesia	27.0	19.0	12.0	31.0	36.0	16.0	108.5	126.0	2.0	2.0
Japan	34.0	34.0	34.0	66.0	66.0	62.0	231.0	231.0	10.0	14.0
Korea	31.0	31.0	24.0	96.0 ⁴	96.0	28.0	336.0	336.0	7.0	42.0
Laos	2.0	2.0	2.0	2.0	2.0	2.0	7.0	7.0	NA	NA
Macau	2.0	7.0	26.0	2.0	6.0	31.0	7.0	21.0	0.0	0.0
Malaysia	38.0	38.0	32.0	86.0	86.0	41.0	301.0	301.0	3.0	6.0
Myanmar/Burma	1.0	2.0	4.0	1.0	4.0	6.0	3.5	14.0	NA	NA
Pakistan	8.0	5.0	5.0	25.0	12.0	5.0	180.0 ⁵	66.0 ⁶	2.0	2.0
Philippines	7.0	9.0	5.0	21.0	23.0	7.0	73.5	80.5	0.0	3.0
Singapore	15.0	15.0	17.0	29.0	29.0	29.0	101.5	101.5	2.0	6.0
Taiwan	61.0	61.0	41.0	310.0	283.0	239.0	1,085	990.5	12.0	97.0
Thailand	39.0	51.0	20.0	126.0	102.0	56.0	441.0	357.0	8.0	14.0
Vietnam	3.0	2.0	3.0	3.0	2.0	3.0	10.5	7.0	0.0	0.0
SUB-TOTAL	470.0	458.0	411.0	2,024.0	1,532.0	1,116.0	7176.5	5,386.0	110.0	308.0
E. EUROPE/CIS										
Bulgaria	7.0	7.0	5.0	7.0	9.0	7.0	24.5	31.5	NA	NA
Czech Republic	4.0	4.0	3.0	25.0	24.0	NA	87.5	84.0	NA	NA
Hungary	3.0	3.0	1.0	3.0	3.0	1.0	10.5	10.5	NA	NA
Kazakhstan	1.0	1.0	NA	1.0	1.0	NA	3.5	3.5	NA	NA
Lithuania	1.0	1.0	0.0	1.0	1.0	0.0	3.5	3.5	NA	NA
Poland	9.0 ⁷	11.0	11.0	48.0	49.0	NA	385.6 ⁸	171.5	NA	NA
Romania	1.0	1.0	1.0	2.0	1.0	1.0	7.0	3.5	NA	NA
Russia	32.0	26.0	10.0	52.0	50.0	20.0	371.6 ⁹	175.0	NA	NA
Ukraine	4.0	3.0	7.0	7.0 ¹⁰	8.0	NA	24.5	28.0	NA	NA
SUB-TOTAL	62.0	57.0	38.0	146.0	146.0	29.0	918.2	511.0	NA	NA

³ May include lines devoted to production of blank media.

⁴ Number of verified lines; unverified lines not included.

⁵ This number represents actual production.

⁶ This number represents actual production.

⁷ Seven plants known to be operational.

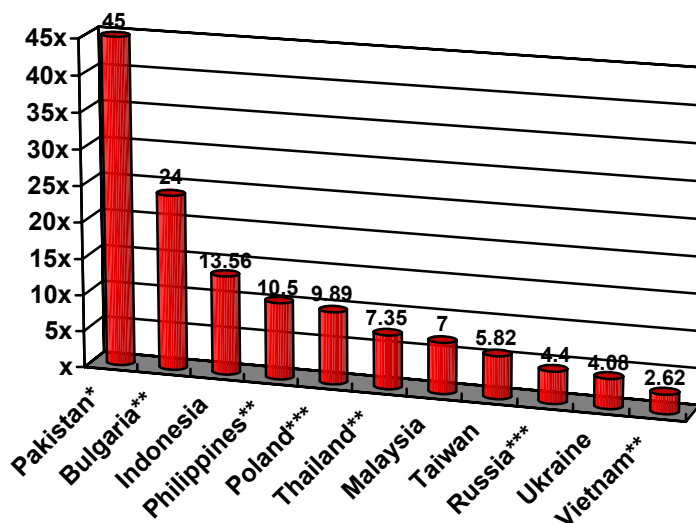
⁸ Estimated capacity based on a thorough investigation of plants, lines and their capacity in Poland in November 2003. May include blank CD-R.

⁹ Estimated capacity based on a thorough investigation of plants, lines and their capacity.

¹⁰ Number of verified lines; unverified lines not included.

Estimated Optical Disc Production Capacity in 45 Countries/Territories										
	Plants (Excl. CD-R)			Estimated Production Lines (Excl. CD-R)			Estimated Capacity in Millions (Excl. CD-R)		DVD Plants (Dedicated)	DVD Lines
	2003	2002	1999	2003	2002	1999	2003	2002	2003	2003
W. EUROPE										
Greece	5.0	5.0	NA	11.0	11.0	NA	38.5	38.5	NA	NA
Italy	23.0	29.0	11.0	51.0	57.0	NA	178.5	199.5	NA	NA
Spain	12.0	NA	NA	98.0	NA	NA	343.0	NA	NA	NA
SUB-TOTAL	40.0	34.0	11.0	160.0	68.0	NA	560.0	238.0	NA	NA
LATIN AMERICA										
Argentina	10.0	16.0	8.0	26.0	31.0	17.0	91	108.5	NA	NA
Brazil	9.0	9.0	9.0	11.0	11.0	NA	38.5	38.5	NA	NA
Chile	2.0	2.0	1.0	2.0	2.0	1.0	7.0	7.0	NA	NA
Colombia	2.0	2.0	2.0	8.0	8.0	8.0	28.0	28.0	NA	NA
Dominican Rep.	1.0	1.0	0.0	1.0	1.0	0.0	3.5	3.5	NA	NA
Mexico	12.0	14.0	5.0	136.0	49.0	NA	476	171.5	NA	NA
Peru	3.0	3.0	3.0	5.0	5.0	NA	17.5	17.5	NA	NA
Venezuela	2.0	2.0	2.0	4.0	4.0	NA	14.0	14.0	NA	NA
SUB-TOTAL	41.0	49.0	30.0	193.0	111.0	26.0	675.5	388.5	NA	NA
MIDDLE EAST										
Egypt	4.0	6.0	3.0	6.0	6.0	NA	21.0	21.0	NA	NA
Israel	5.0	7.0	5.0	5.0	18.0	NA	17.5	63.0	NA	NA
Lebanon	1.0	1.0	0.0	1.0	1.0	0.0	3.5	3.5	NA	NA
Palestinian Auth.	2.0	3.0	2.0	2.0	4.0	3.0	7.0	14.0	NA	NA
Saudi Arabia	1.0	1.0	NA	1.0	1.0	NA	3.5	3.5	NA	NA
Syria	1.0	1.0	NA	1.0	1.0	NA	3.5	3.5	NA	NA
Turkey	8.0	8.0	NA	18.0	18.0	NA	63.0	63.0	NA	NA
SUB-TOTAL	22.0	27.0	10.0	34.0	49.0	3.0	119.0	171.5	NA	NA
AFRICA										
South Africa	3.0	3.0	NA	7.0	7.0	NA	24.5	24.5	NA	NA
SUB-TOTAL	3.0	3.0	0.0	7.0	7.0	0.0	24.5	25.0	NA	NA
TOTALS	638.0	628.0	500.0	2,564.0	1,913.0	1,174.0	9473.7	6,720.0		

Ratio of Estimated Optical Disc Production Capacity to Estimated Legitimate Domestic Demand in 11 Countries (Excluding Blank Media)

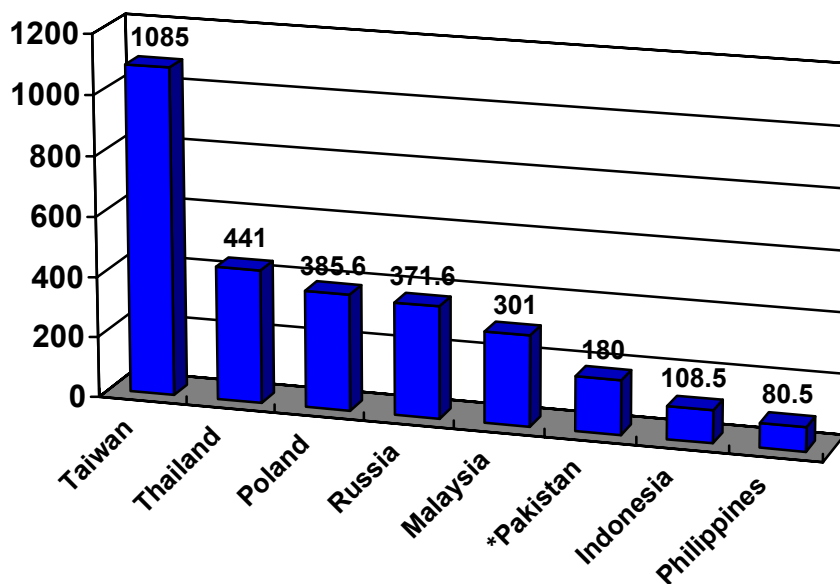


* Denotes actual production as compared to estimated production capacity; excludes legitimate demand for DVDs.

** Includes legitimate demand for audio only.

*** Denotes actual production as compared to estimated production capacity.

Optical Disc Production Capacity of Content (Excluding Blank Media) in Millions of Discs



* Denotes actual production as compared to estimated production capacity.

The growing optical disc problem confronting the copyright sector, now familiar to governments worldwide, has demanded new and creative legislative and enforcement 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 countries' WTO TRIPS obligations to provide deterrent enforcement against piracy "on a commercial scale," every country whose optical disc production facilities are producing significant pirate product should create and enforce a specialized regulatory framework for tracking the growth of optical disc production capacity, including the cross-border traffic in production equipment and raw materials, including optical-grade polycarbonate. These regulatory regimes must include strict licensing controls on the operation of optical disc mastering and replication facilities, and the requirement to use identification tools that identify 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, Philippines, Taiwan and Macau, and are under consideration in Thailand, Indonesia, India and other countries. Ukraine has adopted a system of regulatory controls as well, but this law is flawed and must be corrected.¹¹ Increasingly, pirate optical disc production is migrating from jurisdictions with optical disc production regulatory regimes to countries that as yet have not adopted these regulatory tools, such as Russia, Pakistan, India, Thailand, 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.

As these regimes have been adopted and enforcement under them matured, the pirates have, again, taken advantage of new technological developments, and moved production increasingly from the "factory" locus, to smaller venues that are more private and harder to police. The newest generation of pirates use much less expensive and more portable consumer "recordable" technology — CD and DVD "burning" on CD-Rs and DVD-Rs. That technology has now advanced so that with a very small investment, pirates can easily and cheaply replicate thousands of copies of copyrighted products for commercial sale. We refer here not to individual consumers "burning" copies but to aggressive commercial exploitation— often by the very same syndicates that operated the factories and generate millions of dollars for the pirate operators. In some countries, like Taiwan, Brazil, Mexico, Spain and countless others, seizures of pirate product in 2003 have been overwhelmingly of "burned" product. This new development calls for still newer responses — in this case, through tailored optical disc law provisions and improved enforcement machinery aimed at implementing zero tolerance policies against the offer for sale of pirate product.

IIPA and its members have developed a number of resources to help governments in fashioning an effective optical disc regulatory system. We also note that governments have recognized the importance of effective regulations. In October 2003, APEC leaders agreed on the need to "stop optical disc piracy" and agreed on a set of "Effective Practices" which we suggest that governments addressing this problem carefully study. We stand ready to work with USTR 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 to deal effectively with commercial "burning"

¹¹ 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.

operations, 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, and exploit complex distribution networks to engage in many kinds of criminal activity. In many cases, these powerful criminal networks are involved in multiple lines of criminal activities, including copyright piracy, drug smuggling, trade in illegal munitions, and money laundering. In some cases, the proceeds of copyright piracy have been used to fund terrorist organizations.

These syndicates control not only the production but 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, and other optical disc products. These criminal networks are highly sophisticated and are becoming increasingly dangerous to deal with. In 2003, responding to improved enforcement against factory pirate production, the syndicates have begun moving their illegal trade into CD-R and DVD-R “burning” and to the Internet (see, for example, the country survey on Taiwan).

Time Europe¹² has reported 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.
- A pair of shipments intercepted by **Australian** Customs in October 2003 and described as containing “staircase fittings” was found to contain four steel cylinders large enough to hold 200 DVDs each. The airfreight shipments, seized in Sydney on October 17th, were intended for an importer well-known to the Motion Picture Association (MPA) and involved in previous pirate disc smuggling operations. The “staircase fittings” shipment was interpreted as part of a long-term investigation into a very well organized syndicate operation.
- From late August to mid-October 2003, **Hong Kong** Police, Customs Department and Immigration Department personnel have conducted three major joint operations against criminal gangs (triads) in the West Kowloon district, an effort aimed at cutting off triad income from organized crime activities such as

¹² “Busting Software Pirates,” *Time/Europe*, November 18, 2002.

prostitution, illegal gambling and the sale of untaxed cigarettes, pornography and pirated optical discs. During the operations, 729 suspects were arrested and 237,738 pirated and obscene optical discs were seized.

- 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.
- Also in **Malaysia**, the police reported in October 2002 that pirate production of thousands of copies of protected films were 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.
- In February 2001 **Indonesian** Police broke into a heavily fortified factory and discovered four production lines, three of which were in operation. During the search the raiding team were forced to abandon the premises after a local armed militia group sought to engage the police in a fire fight in an effort to recover the premises.
- 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 **Lithuania**, distribution of pirated entertainment software product (especially manufactured discs produced in Russia) 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 11 houses, three linked internally by tunnels. Over one million blank CD-Rs, half a million pirated CD-Rs and 235 CD burners were found. Together the operation had the capacity to produce 14 million CD-Rs annually. It is believed the profits were invested in narcotics and prostitution.
- In February 2003, a high level Camorra crime boss in Naples, **Italy**, Luigi Giuliano, confessed to Italian prosecutors that the Camorra gang earned €100,000 per week (US\$125,000 or US\$6.5 million annually) from the drug trade, extortion and video and music piracy.
- A series of 13 raids by the National Police in Madrid, **Spain** led to the arrest of 40 persons involved in the mass duplication of CD-Rs. The suspects, many of whom were illegal immigrants from China and who had been brought to Spain by the other members of a criminal gang, were found in possession of 346 high speed burners, 168,400 blank CD-Rs, 24,450 recorded CDs, 39,000 DVDs, 10,500 VCDs containing movies, 515,000 jewel cases, 210,000 inserts and €48,000 (US\$60,000) in cash. The gang used a number of computer shops and restaurants to launder the money generated by the pirate product.
- Interpol has reported that in **Lebanon**, in February 2000, an individual was arrested for piracy and suspected of fundraising for Hezbollah. The individual sold pirated music CDs, Sega, Sony and Nintendo game discs to fund a Hezbollah-related organization. Among the discs recovered were discs containing images and short films of terrorist attacks and interviews with suicide bombers. The discs were allegedly used as propaganda to generate funds for Hezbollah. This individual is currently a fugitive.
- One individual, who has been identified by the U.S. Treasury Department as a "Specifically Designated Global Terrorist," is understood to be a principal financier of one or two of **Pakistan's** largest optical media plants.

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. The U.S. government should encourage countries with existing anti-organized crime laws and investigative procedures to bring them to bear against syndicate operations involved in piracy. Where such laws and procedures are not in place, the U.S. government should encourage governments to adopt them and to include, among predicate offenses, intellectual property right violations.

CORPORATE AND GOVERNMENT END-USER PIRACY OF BUSINESS SOFTWARE

The unauthorized use and copying of software by businesses 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 2003 was attributable to this end-user software piracy. To safeguard the marketplace for legitimate software, government must have in place both substantive standards of protection and adequate enforcement mechanisms.

For the business software industry, it is particularly critical, given the growing use of electronic networks, to make software available commercially to corporate and other end users, to ensure that the reproduction right covers both temporary as well as permanent reproductions. It is likely that very soon, virtually all consumers will engage in the full exploitation of software they license and receive over a network without ever making a permanent copy on their hard drive. They will simply access the software, in accordance with mutually agreed license terms, then load it into the random access memory (RAM) of their workstation or server, use the software and, when finished, close the program or shut down the computer — all without the software ever being permanently stored on the computer's or server's hard drive. Failure to make clear that such temporary reproductions are covered by the exclusive reproduction right is a violation of the Berne Convention, the WTO/TRIPS Agreement and the WIPO Copyright Treaty.

Great progress has been made globally on this critical issue and IIPA calls upon the U.S. government to continue to seek legislative changes and clarifications on this point. As of today, at least 48 countries either provide express protection, or do so by interpretation, for temporary reproductions, or have committed to provide such protection.

Enforcement is a critical part of reducing global piracy rates for business software, which exceed 50% in the developing world. 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 have 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.

PIRACY OF BOOKS AND JOURNALS

The book and journal publishing industry faces not only the same challenges faced by other entertainment and high-tech industries (digital and online piracy), but must contend with more traditional methods of infringement. This traditional piracy comes in two forms—commercial photocopying and print piracy.

Unauthorized commercial-scale photocopying of books and journals is responsible for the industry's biggest losses in most territories worldwide. This photocopying takes place in a variety of venues—commercial photocopy shops located on the perimeters of university campuses and in popular shopping malls, on-campus copy facilities located in academic buildings, libraries and student unions, and wholly illicit operations contained in residential areas or other underground establishments. Publishers also suffer from unauthorized photocopying for commercial research purposes in both profit and non-profit institutions (often accompanied by failure to compensate reproduction rights organizations ("RROs") in countries where they exist to collect photocopying royalties). These operations are highly organized and networked, and technology advances are making the problem worse. Digitally scanned covers, for instance, allow pirates to conceal text that is often of poor quality, misleading consumers into believing they are purchasing a legitimate product.

In addition, the U.S. publishing industry continues to lose hundreds of millions of dollars per year from unauthorized printing of entire books, including academic textbooks, professional reference books and trade books. These printers come in two varieties. Often, they are licensed printers or distributors who are engaged in offset printing beyond the scope of a valid license granted by the publisher. Others are wholly illegal pirate operations that have no license from the copyright owner at all. Print piracy is especially prevalent in China, Pakistan and India, where printing is to some extent still less expensive for pirates than photocopying. Sophisticated printing technologies result in extremely high-quality pirate editions of books, making it difficult for users to distinguish between legitimate and pirate products.

Publishers continue to suffer from unauthorized translations of books and journals of all kinds and genres, as well as counterfeiting in the form of “bogus” books or trademark misuse. Plagiarism also abounds, most often in the form of compilations of English language material or directly translated material marketed as a local professor’s own product.

These types of piracy call for the same kind of aggressive enforcement techniques discussed throughout this submission, accompanied by the political will and awareness of governments to recognize the serious damage done to economies, culture and the educational environment by letting such infringements persist. IIPA urges the U.S. government to ensure that such acts of piracy are fully covered in all bilateral, plurilateral and multilateral engagements.

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. While broadband offers exciting prospects for the legitimate dissemination of copyrighted materials of all kinds, too often increased access to high-speed Internet connections has fueled online piracy by making it faster and easier to distribute unauthorized copies of sound recordings, software, videogames, literary material, and motion pictures.

The unprecedented growth of the Internet, coupled with increased availability of broadband connections, has provided pirates with a highly efficient distribution network to reach the global market. Pirates offering and distributing infringing product can now reach any part of the world with 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.

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. 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.

The Legal and Enforcement Solutions: 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. These treaties are part of the international legal standards that countries must comply with in order to provide the “adequate and effective” copyright protection that is demanded under the Special 301 program. These standards include clarifying exclusive rights in the online world, and, in addition, specifically prohibiting the production of or trafficking in tools that circumvent technological protection measures (TPMs) for copyrighted works.

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.¹³

	WIPO COPYRIGHT TREATY (WCT)	WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)
NUMBER OF SIGNATORIES	51	50
NUMBER OF DEPOSITS WITH WIPO	44	42

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.¹⁴

¹³ As of February 12, 2004.

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

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.

These law reform and enforcement measures are critical if pirates are to be deterred from taking over this incredibly promising new tool for making copyrighted products available globally. IIPA members have significantly increased their monitoring of pirate product traveling over the Internet in many of the countries discussed in this submission. Webcrawlers and other search technologies have been employed to ferret out piracy occurring in many languages in addition to English. One of the essential tools that should be made globally available is the ability of copyright owners to notify ISPs through cease and desist letters and obtain their cooperation to immediately “take down” or block access to infringing material and to otherwise prevent infringing conduct of all kinds. The effective use of the “notice and takedown” tool is, in turn, dependent on a system of secondary liability, which exists in some but not all countries. And, finally, as we know from our own experience here in the U.S., we must find a global solution that discourages unauthorized peer-to-peer file sharing, through aggressive enforcement against unauthorized uploaders of infringing product, whether of musical recordings, movies, business or entertainment software or literary material, as well as against services that illegally provide these file-sharing tools. Room must be made for the new and growing legal Internet-based services for delivery of copyrighted material. Governments should help to ensure that Internet cafés use only legitimate software in the operation of their business, and that they prohibit use of their facilities for the commission of further infringements. It is also critical that governments, educational institutions and similar enterprises that provide broadband interconnections to their employees, students or others be encouraged to develop executive orders and other strong internal policies to prevent illegal file sharing, including through the use of peer-to-peer technologies.

Industry has been hard at work on these critical issues, but we need the help of the U.S. and foreign governments to make the Internet safe for e-commerce in copyrighted material.

IMPROVING COPYRIGHT PROTECTION AND ENFORCEMENT THROUGH FREE TRADE AGREEMENTS

The negotiation of bilateral and regional free trade agreements (FTAs) now occupies a place of overriding importance to the copyright industries and to 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. Since copyright issues are not being addressed in the Doha Round of multilateral negotiations under the World Trade Organization, the FTA process has become by far the most fruitful avenue to address the law reform challenges brought on by developments in technology. At the time of this letter, FTAs with Singapore and Chile have entered into force. FTAs with Central America and Australia have

been concluded, negotiations with Morocco are slated to end soon, and negotiations with Bahrain and the Dominican Republic have begun. IIPA trusts that the valuable precedents established in these earlier agreements will be carried forward to the on-going IPR negotiations with the South African Customs Union (SACU) and also to the newly announced, and expected, negotiations with Thailand, the Philippines, Kuwait, Tunisia and, hopefully, many more to come. In all these negotiations, we have achieved, and will continue to seek, full implementation of the WIPO Internet treaties; stronger substantive protection in other areas, including the extension of the term of copyright; and detailed and effective enforcement obligations that make clear the obligation to enforce copyright in all areas, including on the Internet, with expeditious and deterrent civil and criminal remedies. We again compliment the Administration and Ambassador Zoellick 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 in which the standards of copyright protection and enforcement continue to reflect the new global framework of protection established in the FTAs negotiated to date. IIPA looks forward to working closely with U.S. negotiators to achieve these goals in the FTA and FTAA fora.

IMPLEMENTATION OF THE TRIPS ENFORCEMENT TEXT

On January 1, 1996, the World Trade Organization (WTO) TRIPS Agreement entered into force for the U.S. and for all other WTO members that do not qualify for, and take advantage of, the transition periods of four and ten years.¹⁵ 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, 1996.¹⁶

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 developing 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.¹⁷ Accordingly,

¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Articles 65 and 66.

¹⁶ 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 12, 2004, 146 countries were members of the WTO, including all countries surveyed in this submission with the exception of Azerbaijan, Belarus, Bosnia and Herzegovina, Cambodia, Kazakhstan, Laos, Lebanon, the Russian Federation, Saudi Arabia, Serbia and Montenegro, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam,.

¹⁷ Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314(c), 108 Stat. 4809 (1994) (also known as the URAA).

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 301,¹⁸ 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 against 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 also piracy of works in traditional formats. We refer here to piracy of movies on VHS tapes, as well as broadcast/cable/satellite piracy 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.¹⁹

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. Most important, USTR and the U.S. government should carefully monitor Chinese compliance with its TRIPS obligations, given the magnitude of the piracy problem in China. In addition, the U.S. government should seriously consider whether Pakistan is complying with the enforcement obligations of the TRIPS Agreement, given its nearly 100 percent piracy rate and the massive exports of pirated product flowing out of Pakistan.

IIPA urges USTR to use all the tools available to it, including GSP,²⁰ CBI,²¹ CBTPA,²²

¹⁸ 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, 18-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).

¹⁹ Snapshot of WTO Cases in the United States (updated Oct. 22, 2003) 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).

²⁰ 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.*).

²¹ 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.*).

ATPA,²³ ATPDEA,²⁴ and AGOA,²⁵ 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.

D. IIPA RECOMMENDATIONS FOR THE 2004 SPECIAL 301 LISTS

This year IIPA has considered deficiencies in copyright protection in 41 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 mention specific issues in 15 additional countries.

This year IIPA recommends that Pakistan be designated as a Priority Foreign Country. The government of Pakistan has ignored the growing production of pirate U.S. copyrighted products by illicit optical disc factories. Exports of these pirate goods are flooding the world market. Efforts to persuade the Pakistani government to halt such pirate production and export have, to date, produced no results. Furthermore, the Pakistani government has failed to take adequate measures to stop rampant book piracy and commercial photocopying, which collectively decimate the market for legitimate publishers.

IIPA recommends that USTR should keep Ukraine as a Priority Foreign Country (PFC) and that trade sanctions continue accordingly in 2004. 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 four years after it agreed to a Joint Action Plan signed by then-President Clinton and President Kuchma which 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 and Paraguay under Section 306 of the Trade Act of 1974.

We recommend that the remaining countries be placed on, or maintained on, the Priority Watch List or the Watch List, where they are subject to ongoing bilateral scrutiny.

²² 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.*).

²³ 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.*).

²⁴ Andean Trade Promotion and Drug Eradication Act, Pub. L. No. 107-210 (2002) (codified at 19 U.S.C. § 3201 *et seq.*)

²⁵ 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.*).

IIPA recommends that 17 countries be placed on the Priority Watch List: Argentina, Brazil, Bulgaria, Colombia, the Dominican Republic, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, the Philippines, Poland, the Russian Federation, South Korea, Taiwan, and Thailand. IIPA also recommends that 20 countries be designated on the Watch List. We also recommend that out-of-cycle reviews be taken in six countries that already appear on the various 301 lists: Malaysia, the Philippines, Poland, the Russian Federation, Saudi Arabia and Taiwan.

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
Pakistan (GSP) Ukraine	Paraguay People's Republic of China	Argentina Brazil (GSP) Bulgaria Colombia Dominican Republic (GSP) Egypt India Indonesia Israel Kuwait Lebanon (GSP) Philippines + OCR Poland + OCR Russian Federation (GSP) + OCR South Korea Taiwan + OCR Thailand	Bolivia Chile CIS (6) ²⁶ Azerbaijan Belarus Kazakhstan (GSP) Tajikistan Turkmenistan Uzbekistan (GSP) Ecuador Estonia Hungary Italy Latvia Lithuania Malaysia +OCR Peru Romania Saudi Arabia + OCR Spain Turkey	Bosnia and Herzegovina Cambodia Canada CIS (4) Armenia (GSP) Georgia Kyrgyz Republic Moldova Costa Rica Guatemala Hong Kong Laos Serbia and Montenegro Singapore Uruguay Vietnam
2	2	17	20	15

Appendix D provides a history of countries appearing on IIPA and USTR lists since 1989, a year after the Special 301 legislation became effective. Seventeen of these countries have appeared on a Special 301 list each year since 1989, 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."²⁷ Under this criterion, these 17 countries named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 16 years that Special 301 has been in existence.

²⁶ "CIS" in this filing denotes ten former Soviet republics. Russia and Ukraine are treated separately from the CIS in this filing.

²⁷ 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 11 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 copyright 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. On August 6, 2002, the GSP program was renewed for four years through December 31, 2006.

On September 3, 2003, USTR announced its decisions in both the 2001 and 2002 GSP Annual Reviews for country practices. USTR accepted IIPA's GSP IPR petition against Lebanon; acknowledged IIPA's requests to withdraw its petitions against Thailand and Uruguay; announced the termination of the IPR reviews against Armenia and Turkey; and postponed its decision whether to accept or reject IIPA's petition against Pakistan. GSP hearings were held on October 7, 2003, and IIPA presented testimony in its six active cases against Brazil, Russia, the Dominican Republic, Kazakhstan, Uzbekistan and Lebanon.

E. COUNTRIES DESERVING SPECIAL MENTION IN 2003

In addition to the 41 countries for which IIPA has provided comprehensive country reports, IIPA also highlights issues in 15 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 2004." These countries are: Armenia, Bosnia and Herzegovina, Cambodia, Canada, Costa Rica, Georgia, Guatemala, Hong Kong, Kyrgyz Republic, Laos, Moldova, Serbia and Montenegro, Singapore, Uruguay 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 significant damage due to piracy. Because piracy statistics from the Business Software Alliance (BSA) were not available by the date of this submission, it is not possible to provide a meaningful estimate of total trade losses for 2003. As soon as these BSA estimates become available, they will be posted on the IIPA website at <http://www.iipa.com> and the totals for these 56 countries provided. On a global basis, however (that is, in all countries including the U.S.), IIPA conservatively estimates that total losses due to piracy were at very minimum \$20-22 billion in 2003, not counting significant losses due to Internet piracy, for which meaningful estimates are not yet available.

Appendix A presents a chart which quantifies losses for four of the five copyright-based industry sectors—the entertainment software, motion picture, sound recording and music, and

book publishing industries—for 2002 and 2003. As noted above, the BSA losses for 2003 are not yet available (2002 final loss estimates for business software applications do, however, appear in the chart). In most surveys, IIPA has described the piracy levels in each of the sectors 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 2003
(in millions of U.S. dollars)**

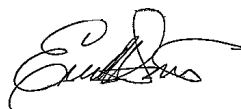
Industry	Estimated Losses
Motion Pictures	1,528.0
Records & Music	2,260.7
Business Software Applications	NA
Entertainment Software	1,549.9
Books	499.6
Total	NA

Appendix B summarizes the methodology used by each IIPA member association to calculate these estimates. They represent 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 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 (2002-2003) FOR IIPA's 2004 SPECIAL 301 RECOMMENDATIONS

APPENDIX A: IIPA 2004 "SPECIAL 301" RECOMMENDATIONS

IIPA 2002-2003 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and 2002-2003 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Motion Pictures				Records & Music				Business Software Applications ¹				Entertainment Software				Books		TOTAL LOSSES ³	
	Loss		Piracy Level		Loss		Piracy Level		Loss		Piracy Level		Loss ²		Piracy Level		Loss			
	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002
PRIORITY FOREIGN COUNTRY																				
Pakistan (GSP petition pending)	12.0	12.0	95%	95%	70.0	60.0	100%	83%	NA	11.2	NA	80%	NA	NA	NA	NA	44.0	44.0	NA	127.2
Ukraine	45.0	40.0	90%	90%	125.0	150.0	75%	80%	NA	58.8	NA	89%	NA	NA	85%	NA	NA	NA	NA	248.8
306 MONITORING																				
Paraguay ⁴	2.0	2.0	80%	80%	154.6	204.4	99%	99%	NA	2.2	NA	71%	NA	NA	NA	NA	2.0	2.0	NA	210.6
People's Republic of China	178.0	168.0	95%	91%	286.0	48.0	90%	90%	NA	1637.3	NA	92%	568.2	NA	96%	96%	40.0	40.0	NA	1893.3
PRIORITY WATCH LIST																				
Argentina	30.0	30.0	45%	45%	30.6	26.0	53%	60%	NA	10.7	NA	62%	NA	NA	NA	NA	4.0	NA	NA	66.7
Brazil (GSP)	120.0	120.0	30%	35%	338.7	320.4	52%	53%	NA	260.8	NA	55%	125.7	NA	56%	NA	14.0	14.0	NA	715.2
Bulgaria	4.0	3.0	25%	20%	7.0	7.2	80%	83%	NA	6.2	NA	68%	NA	21.9	NA	91%	0.3	0.3	NA	38.6
Colombia	40.0	40.0	75%	90%	49.4	56.3	70%	65%	NA	21.7	NA	51%	NA	NA	NA	NA	5.4	5.3	NA	123.3
Dominican Republic (GSP)	2.0	2.0	20%	60%	9.9	6.9	65%	65%	NA	3.6	NA	61%	NA	NA	NA	NA	1.0	1.0	NA	13.5
Egypt	NA	NA	NA	NA	8.0	8.2	45%	41%	NA	12.7	NA	52%	NA	NA	90%	NA	25.0	28.0	NA	48.9
India	77.0	75.0	60%	60%	6.0	6.6	40%	40%	NA	257.7	NA	70%	113.3	NA	84%	NA	36.5	36.5	NA	375.8
Indonesia	29.0	28.0	92%	90%	44.5	92.3	87%	89%	NA	109.6	NA	89%	NA	NA	NA	NA	30.0	30.0	NA	259.9
Israel	30.0	30.0	50%	50%	40.0	34.0	63%	50%	NA	29.9	NA	37%	NA	17.2	75%	68%	1.0	1.0	NA	112.1
Kuwait	12.0	10.0	95%	95%	3.0	3.4	55%	64%	NA	4.7	NA	73%	NA	NA	95%	NA	2.5	2.5	NA	20.6
Lebanon (GSP)	10.0	8.0	80%	80%	2.5	2.0	70%	65%	NA	3.5	NA	74%	NA	NA	80%	NA	2.0	2.0	NA	15.5
Philippines (OCR)	33.0	30.0	89%	80%	22.2	20.9	40%	40%	NA	25.0	NA	68%	NA	NA	95%	NA	45.0	45.0	NA	120.9
Poland (OCR)	30.0	25.0	30%	30%	34.0	45.0	45%	45%	NA	107.9	NA	54%	NA	337.7	NA	91%	5.0	5.0	NA	520.6
Russian Federation (GSP) (OCR)	275.0	250.0	75%	80%	405.0	371.9	64%	66%	NA	370.0	NA	89%	NA	NA	80%	90%	40.0	40.0	NA	1031.9
South Korea	40.0	27.0	20%	25%	3.5	6.9	20%	20%	NA	285.9	NA	50%	248.4	381.0	36%	36%	38.0	36.0	NA	736.8
Taiwan (OCR)	42.0	42.0	44%	44%	58.0	98.6	42%	47%	NA	91.2	NA	43%	261.8	596.1	42%	56%	20.0	20.0	NA	847.9
Thailand	28.0	26.0	60%	70%	26.8	30.0	41%	42%	NA	57.3	NA	77%	NA	47.3	82%	86%	28.0	28.0	NA	188.6
WATCH LIST																				
Bolivia	2.0	NA	100%	100%	16.0	15.0	90%	85%	NA	2.5	NA	74%	NA	NA	NA	NA	NA	5.5	NA	23.0
Chile	2.0	2.0	40%	40%	21.1	14.0	40%	35%	NA	34.0	NA	51%	NA	NA	NA	NA	1.1	1.1	NA	51.1
CIS (group of 6, listed below)																				
Azerbaijan	NA	NA	NA	NA	12.2	14.8	83%	84%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	14.8
Belarus	NA	NA	NA	NA	22.0	22.0	74%	73%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	22.0
Kazakhstan (GSP)	NA	NA	NA	NA	22.7	23.0	70%	78%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	23.0
Tajikistan	NA	NA	NA	NA	5.2	5.0	82%	87%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	5.0
Turkmenistan	NA	NA	NA	NA	7.0	6.5	89%	<90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.5
Uzbekistan (GSP)	NA	NA	NA	NA	30.5	32.0	81%	<90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	32.0
Ecuador	NA	NA	95%	95%	19.0	18.0	95%	90%	NA	6.0	NA	59%	NA	NA	NA	NA	2.3	2.3	NA	26.3
Estonia	2.0	2.0	35%	30%	6.5	9.0	60%	60%	NA	4.2	NA	53%	NA	NA	60%	NA	NA	NA	NA	15.2

APPENDIX A: IIPA 2004 "SPECIAL 301" RECOMMENDATIONS

IIPA 2002-2003 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and 2002-2003 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Motion Pictures				Records & Music				Business Software Applications ¹				Entertainment Software				Books		TOTAL LOSSES ³	
	Loss		Piracy Level		Loss		Piracy Level		Loss		Piracy Level		Loss ²		Piracy Level		Loss			
	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002	2003	2002
Hungary	20.0	18.0	30%	30%	8.0	6.0	30%	30%	NA	32.8	NA	45%	NA	NA	NA	NA	4.0	4.0	NA	60.8
Italy	140.0	140.0	20%	20%	42.0	42.0	22%	23%	NA	363.4	NA	47%	168.5	215.4	47%	55%	23.0	23.0	NA	783.8
Latvia	NA	NA	85%	85%	10.0	8.0	80%	67%	NA	7.4	NA	58%	NA	NA	95%	NA	NA	NA	15.4	
Lithuania	NA	NA	NA	90%	13.5	12.0	85%	85%	NA	4.6	NA	53%	NA	NA	90%	80%	NA	NA	NA	16.6
Malaysia (OCR)	38.0	42.0	50%	75%	40.0	110.2	45%	70%	NA	79.2	NA	68%	NA	NA	90%	NA	9.0	8.3	NA	239.7
Peru	4.0	4.0	45%	50%	87.0	70.2	98%	98%	NA	14.7	NA	60%	NA	NA	NA	NA	8.5	8.5	NA	97.4
Romania	8.0	6.0	35%	55%	18.0	15.0	80%	75%	NA	20.7	NA	70%	NA	35.2	NA	97%	2.0	2.0	NA	78.9
Saudi Arabia (OCR)	20.0	20.0	40%	35%	16.0	16.0	40%	42%	NA	13.3	NA	50%	64.0	NA	83%	NA	14.0	14.0	NA	63.3
Spain	30.0	25.0	10%	7%	60.0	63.0	25%	25%	NA	79.4	NA	47%	NA	NA	NA	34%	NA	NA	NA	167.4
Turkey	50.0	50.0	45%	45%	15.0	18.0	75%	75%	NA	38.5	NA	58%	NA	NA	NA	NA	25.0	25.0	NA	131.5
SPECIAL MENTION																				
Bosnia and Herzegovina	4.0	3.3	90%	95%	3.0	3.0	99%	99%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.3
Cambodia	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0
Canada	120.0	122.0	NA	NA	NA	NA	NA	NA	NA	236.5	NA	39%	NA	NA	NA	NA	NA	NA	NA	358.5
CIS (group of 4, listed below)																				
Armenia	NA	NA	NA	NA	4.1	4.0	86%	82%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.0
Georgia	NA	NA	NA	NA	8.0	8.0	80%	86%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	8.0
Kyrgyz Republic	NA	NA	NA	NA	5.0	5.0	85%	85%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	5.0
Moldova	NA	NA	NA	NA	4.0	6.0	69%	77%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.0
Costa Rica	2.0	2.0	35%	40%	7.2	7.0	56%	50%	NA	6.7	NA	61%	NA	NA	NA	NA	NA	NA	NA	15.7
Guatemala	2.0	2.0	60%	60%	5.0	4.8	60%	NA	NA	10.6	NA	61%	NA	NA	NA	NA	2.5	2.5	NA	19.9
Hong Kong	28.0	29.0	20%	25%	14.4	2.8	30%	28%	NA	63.2	NA	56%	NA	NA	NA	NA	9.0	NA	NA	95.0
Laos	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0
Serbia and Montenegro	NA	NA	90%	NA	9.0	14.0	75%	95%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	14.0
Singapore	8.0	8.0	15%	15%	3.2	4.9	10%	12%	NA	24.6	NA	48%	NA	NA	NA	NA	2.0	NA	NA	37.5
Uruguay	2.0	2.0	35%	40%	1.4	1.4	60%	60%	NA	3.4	NA	60%	NA	NA	NA	NA	1.5	1.5	NA	8.3
Vietnam	7.0	7.0	100%	100%	NA	NA	NA	NA	NA	29.1	NA	95%	NA	NA	NA	NA	12.0	NA	NA	36.1
	1528.0	1452.3			2260.7	2179.6			NA	4442.7			1549.9	1651.8			499.6	478.3	NA	10204.7

Endnotes:

¹ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at www.iipa.com. BSA's statistics for 2003 will be finalized in mid-2004 and also posted on the IIPA website. BSA's statistics for 2002 were finalized in mid-2003, and revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in each country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in each country (including U.S. publishers) and (b) losses to local distributors and retailers in each country.

² ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

³ "Total Loss" figures will appear on the IIPA website, www.iipa.com, when BSA 2003 piracy statistics become available.

⁴ 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.

"GSP" means that the U.S. government is reviewing this country's IPR practices under the Generalized System of Preferences trade program.

"GSP Petition Pending" means that IIPA has submitted a petition before the GSP subcommittee for its acceptance to initiate a review.

"OCR" means out-of-cycle review to be conducted by USTR.

APPENDIX B

METHODOLOGY USED TO CALCULATE ESTIMATED PIRACY LOSSES AND PIRACY LEVELS

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

APPENDIX B: 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

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

ESA 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 distinguished from 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 rights holders 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

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

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, in most cases, the projected displacement of sales of U.S. repertoire. This does not take into account downstream (or value chain) losses from high piracy levels acting as a drag on the economic development of legitimate markets. 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.

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

The book publishing industry relies on local representatives and consultants to determine losses. These representatives base their estimates on the availability of pirate versions and illegally photocopied books, especially those found within or near educational institutions, book stores and outdoor book stalls. Publishing industry representatives also take into account the number of users in a jurisdiction, the estimated need for the product (based, in the case of educational materials, on university and school adoptions) and the number of legitimate sales. Given the diverse types of products offered by different publishing companies, these estimates cover only a portion of the market lost in each territory and are thus rather conservative in most cases.

APPENDIX C

COUNTRY SURVEYS

PRIORITY FOREIGN COUNTRY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

PAKISTAN

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Pakistan be designated as a Priority Foreign Country. The government of Pakistan has been ignoring the problem of copyright piracy, and likely will continue to do nothing to stem piracy unless the U.S. elevates Pakistan to bring the severity of this problem to the Pakistani government's attention. If the government of Pakistan continues to turn a blind eye to piracy concerns, the U.S. should consider all possible avenues to address this intolerable situation, including suspending GSP benefits or any other benefits Pakistan receives through other trade programs.

Overview of Key Problems: Pakistan is one of the world's leading producers and exporters of pirated optical discs (CDs, DVDs, VCDs, CD-ROMs) of copyrighted material (sound recordings, motion pictures, business software, published materials). Eight known facilities in Pakistan produced upwards of 180 million discs in 2003, nearly all illegal, and most being exported around the world to at least 46 other countries. The Pakistan government, which met with the U.S. government and private industry several times in 2003, took no serious steps to curtail production or export of pirated product. Book piracy also remains a serious problem in Pakistan, and other piracy phenomena (e.g., cable piracy, end-user piracy of business software) must continue to be addressed by the government. In 2001, IIPA filed a GSP petition against Pakistan in response to the frightening growth of production of optical discs in the country. At the same time as that petition remained pending in 2003, the United States and Pakistan signed a Trade and Investment Framework Agreement (TIFA) on June 27, 2003, which paves the way for more serious trade discussions. It is crucial in the context of the larger trade relationship, and in view of the IIPA's pending GSP petition, that Pakistan live up to its obligations to provide adequate and effective copyright protection and take immediate steps to eradicate piracy in all forms, including optical disc piracy. Pakistan's enforcement system fails to "prevent infringements" and fails to provide "remedies that constitute a deterrent to further infringements," as required by TRIPS. Despite skyrocketing production, distribution and export of pirate optical discs, Pakistan has not initiated any action—criminal, civil or administrative—against its fast-growing pirate producers.

Actions to be taken in 2004

- Pass and implement an effective optical disc law (or temporary order) to enable control over optical disc production, including monitoring and control on imports of production equipment and raw materials (including optical grade polycarbonate), as well as requirements to use unique source identifiers (SID code) to track the location of production.
- Shut down known production facilities (if necessary, by temporary order), pending their ability to demonstrate that they have licenses to produce legitimate materials (whereupon supervised access to the plant could be granted so as to permit the legitimate production). Licensing documents aimed at proving legitimate manufacture should be forwarded to interested private parties to ensure the legitimacy of the licensing documents; right holders should be permitted to visit the optical disc plants and obtain exemplars of discs.
- Stop exports of pirated optical discs and other copyrighted materials from Pakistan.
- Conduct effective anti-piracy enforcement actions with active Federal Investigation Agency (FIA) involvement; establish an IPR task-force within FIA.

- Combat other forms of piracy that hurt the domestic markets, including book piracy, cable piracy, and end-user piracy.
- Issue a directive to courts on the seriousness of copyright crime and the need to impose deterrent penalties in cases of commercial piracy.
- Develop a group of prosecutors and judges familiar with copyright, including selective training on bringing copyright cases and deterrent enforcement practices.
- Pass a law to strengthen maximum criminal fines and to implement the WIPO “Internet” treaties, and join those treaties.
- Conduct a public anti-piracy awareness campaign.

For more details on Pakistan’s Special 301 history, see IIPA’s “History” Appendix to this filing.¹ Please also see previous years’ reports.²

PAKISTAN
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	12.0	95%	12.0	95%	11.0	NA	10.0	60%	9.0	60%
Records & Music	70.0	100%	60.0	83%	60.0	90%	65.0	90%	3.0 ⁴	90%
Business Software ⁵	NA	NA	11.2	80%	9.2	83%	24.5	83%	14.1	83%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	44.0	NA ⁶	44.0	NA	44.0	NA	45.0	NA	42.0	NA
TOTALS⁷	126.0		127.2		124.2		144.5		68.5	

COPYRIGHT PIRACY IN PAKISTAN

Pakistan Is One of World’s Leading Optical Disc Producers/Exporters

Eight plants/production facilities in Pakistan (one devoted to DVD production, and six which have DVD production capability), with as many as 25 production lines, produced an estimated 180 million discs during 2003 (including sound recordings, VCDs of motion pictures, DVDs of motion pictures, and business software) as well as other media (e.g., videocassettes, audiocassettes).⁸ While a minimal amount of production is for Pakistani licensees (believed to

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission, at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ This number represents the domestic losses due to sound recording piracy in 1999 (excluding exports).

⁵ BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA’s statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ While no overall piracy rate for published materials is available from the Association of American Publishers, many publishers report unacceptably high piracy levels, ranging from 65% to around 90%.

⁷ In IIPA’s 2003 Special 301 report, IIPA estimated the total losses due to piracy in Pakistan for 2002 at \$116 million. IIPA’s revised loss figures are reflected above.

⁸ The number of discs produced has been ascertained by calculating the amounts of optical grade polycarbonate

be about 10%), to our knowledge, the remaining 90% of discs produced are unauthorized, since there are no legitimate licensees producing in Pakistan or licensed to produce such product in Pakistan. Industry and the U.S. government have informed the Pakistan government exactly where these plants are and have supplied ownership information, but the government has done nothing in 2003 to eradicate this form of piracy. Legitimate domestic demand in Pakistan is dwarfed by the number of discs being produced, meaning Pakistan's production is destined for export.⁹ Product exported out of Pakistan is showing up all over the world.¹⁰ Pirate optical disc piracy in Pakistan generates enormous profits which are channeled into other organized criminal activities and thwart the establishment of rule of law in Pakistan.

In addition to the export problem, pirate optical discs and other media of all types of copyrighted content (music, audio-visual, business software, videogames, reference software) severely hurt the domestic market.¹¹ There are seven major duplicating centers for VHS videocassettes and which burn CD-Rs to order (of motion pictures not yet released in Pakistan, as well as previously released home videos). Over 12,000 retail outlets, kiosks and stores remain in operation in Karachi, Lahore, Islamabad, Faisalabad, Peshawar, Quetta, and elsewhere, selling pirated product for a fraction of the cost of legitimate.¹² Markets like Rainbow Centre in Karachi and Hafeez Center in Lahore still contain hundreds of retail outlets filled with pirated product. Even the duty-free area of Karachi International airport has a retail shop filled with pirated optical media. Pirate retailers even belong to "trade associations" which are powerful and pose additional threats (e.g., threats of violence) to anyone attempting to uphold the law. An individual who has been identified by the U.S. Department of Treasury as a "Specifically Designated Global Terrorist," is understood to be a principal financier of one or two of Pakistan's largest optical media plants.

Little Overall Improvement in the Book Piracy Situation in 2003, Despite Some Criminal Convictions

Book piracy in Pakistan (mainly illegal printing of medical texts, computer books and other academic titles, English Language Teaching materials, and reference materials such as dictionaries, but also commercial photocopying) remains rampant in Pakistan. Publishers report pirate editions of popular children's books such as the Harry Potter[®] series, as well as works of popular adult fiction. All popular titles have several illegal editions, with pirates competing for market share. The book bazaars in Karachi and Lahore are teeming with pirated engineering and computer science books. This activity is not limited to the large cities, as booksellers in

coming into Pakistan. The 2003 production numbers (180 million discs) compares with 66 million discs produced in 2002, which, while still representing massive over-capacity for Pakistan, is dwarfed by this year's figure.

⁹ Exports of optical discs out of Pakistan had until 2003 occurred through "personal" couriers; this modus operandi, however, is now in decline. Optical discs are now being smuggled in bulk quantities by sea and air. In a recent survey by the International Federation of Phonographic Industries over the period from March to May 2003, it was revealed that a total of 461 air shipments derived from Karachi, containing 307,275 DVDs and 669,549 CDs (229 of the shipments were destined for the U.S.).

¹⁰ Pakistani-produced discs showed up in the following countries/territories in 2003: Australia, Austria, Bahrain, Belgium, Burundi, Canada, France, Fiji Island, Germany, Iceland, Italy, Kenya, Kuwait, Maldives, Mauritius, Mozambique, Nepal, Netherlands, New Zealand, Nigeria, Norway, Qatar, Singapore, South Africa, Tanzania, Uganda, United Arab Emirates, the United Kingdom and the United States.

¹¹ See, e.g., Amir Zia, *Pirated Movies, Software Swamp Pakistan Markets*, Reuters, May 21, 2003 (noting that Windows XP was selling on the street for 40 rupees, which is about US\$0.70).

¹² For example, pirate music CDs sell for around PKR35 to 65 (US\$0.61 to 1.13) per unit, while proliferating pirate DVDs, often containing movies that have not yet or have just begun their theatrical release, sell for PKR100 to 150 (US\$1.73 to 2.61) per unit for international motion pictures, to PKR210 (US\$3.66) per unit for Indian or Pakistani motion pictures.

smaller towns produce pirated versions to meet local demand. Also rampant are unauthorized Urdu translations of popular trade books.

Entire books are photocopied and available for sale in stalls and bookstores. University authorities often encourage students to photocopy books or sections of books by making photocopying facilities available on their campuses. Some universities even prepare course packs for sale to students by photocopying sections of different books and binding them. In addition, pirate producers have set up networks within the universities themselves, whereby lecturers buy one copy of the required text and hand it over to the pirate operators along with an order for pirate versions for the class. In exchange, the lecturers receive full reimbursement for the legitimate copy ordered. In addition to saturating the domestic market, book piracy remains a net-export business to India, the Middle East, and even Africa.

No Improvement in Cable or Business Software Piracy in 2003

There are an estimated 50,000 satellite dishes in Pakistan, and an undetermined number of small, in-house cable TV systems, creating the potential for large-scale unauthorized retransmissions of MPA member company motion pictures. A Neilson survey in 2002 indicated that 19.0 million Pakistanis viewed pirate VCDs and DVDs each month through pirate cable channels. Despite significant public awareness and enforcement drives by the business software industry, the piracy situation for that sector remained serious in 2003.

COPYRIGHT ENFORCEMENT IN PAKISTAN

The enforcement snapshot for Pakistan in 2003 is mostly disheartening. The enforcement environment remains difficult given the general social instability (particularly the problems in nearby Afghanistan), as well as a lack of education on the part of police officials charged with enforcement. Government-initiated enforcement actions against piratical operations are virtually nonexistent, forcing right holders to undertake and fund enforcement actions on their own. Nonetheless, some raiding continued on suspected locations of piracy, especially for the book publishing and business software industries. The publishing industry reports that there were 41 raids in the first six months of 2003, resulting in the seizure of over 35,000 books. Of those 41 raids, prosecutors have secured 8 convictions, while 26 cases remain pending. Unfortunately, fines have been paltry and non-deterrent (US\$163 to \$271).

The business software industry reports some raids against pirate hard-disk loading (the unauthorized loading of software onto a computer) and retail sales of pirate copies of business software on optical discs.¹³ That industry also had some successes in the fight against corporate end-user piracy of business software.¹⁴ In 2003, actions were initiated against end-

¹³ For example, in March 2003, police in Lahore seized 2,384 CDs and two computers containing pirate business software for promoting and selling pirated software in Lahore. *Police Crack Down on Software Pirates*, Daily Times, March 18, 2003, at http://www.dailytimes.com.pk/default.asp?page=story_13-3-2003_pg7_28. In May 2003, police in Karachi arrested four unauthorized sellers and seized and confiscated nine computers and 2,846 illegal CDs containing pirate business software in four separate raids. *Law enforcement agencies arrest four software pirates*, Pakistan Press International Information Services, May 9, 2003. In October 2003, Lahore Police arrested a pirate retailer and confiscated about 330 pirate CDs. *330 pirated CD's confiscated in Lahore*, Pak Tribune, Oct. 24, 2003, at <http://www.paktribune.com/news/index.php?id=42719>.

¹⁴ In October 2002, there were two raids against large end-users using unlicensed software. In both cases, the raids were conducted on the basis of Anton Pillar orders (*ex parte* civil search orders), a measure recently added to the Copyright Act. One case, against Dollar Industries (Pvt) Limited, revealed 48 personal computers using a range of unlicensed software. Another case, against Al-Karam Textiles, revealed 40 computers using a range of unlicensed

user piracy using Anton Pillar orders/searches. While the availability of Anton Pillar orders is a positive aspect of the system in Pakistan, results in court cases continue to be non-deterrent.

The establishment of the Pakistan Intellectual Property Rights Organization (PIPRO) in 2002 was a hopeful sign that things might improve in terms of commitment of resources and recognition by the government of the seriousness of the piracy problems in Pakistan, coupled with the will to combat them. Unfortunately, the group has yet to be funded by the Pakistan government (although the United States in July offered technical assistance to the body), and to date has not shown any concrete activities. Other efforts to coordinate enforcement have similarly failed. For example, specialized police (anti-piracy task) forces devoted to intellectual property enforcement were established in 1999 in Pakistan's three major cities, but these forces still have not had the expected impact because of insufficient commitment by the government. Industry representatives continue to report that since responsibility for copyright is spread among the Education, Home, Commerce, Industry and Law Ministries of the government in Islamabad, the result is lack of coordination regarding anti-piracy activities, information gathering and knowledge-sharing.

A further dilemma for copyright owners is the unenlightened or sometimes hostile attitude copyright representatives face from pirates and even officials in Pakistan when trying to uphold the copyright law.¹⁵ On occasion, raids have resulted in threats or violence against copyright representatives.¹⁶ Even when raids have resulted in the recovery and seizure of pirated books, police have on several instances failed to file a police report, being influenced by "irregular" practices of pirate booksellers and the "trade associations" running the retail markets (i.e., some corruption as well as coercion has been reported). In these cases, copyright representatives have had no choice but to prepare cases themselves without the help of the Pakistan authorities, and at their own cost.¹⁷

Courts Must Hand Down Stricter Sentences

Pakistan's courts have traditionally done an acceptable job finding civil or criminal liability for copyright infringement, but fines meted out have been only a fraction of the maximum fine of US\$1,745 (PKR100,000). In addition, judges still require significant documentation to support prosecutions, which further delays adjudication of cases. Imprisonment is never imposed in Pakistan for copyright infringement, notwithstanding that the maximum imprisonment for infringement is three years. It is obvious from the rise of optical disc piracy and other continuing piracy problems that court decisions are having little or no deterrent effect on piracy in Pakistan. The Pakistan government should issue a directive to courts on the seriousness of copyright crime and the need to impose deterrent penalties in cases of commercial piracy. In addition, minimum penalties, including imprisonment, should be provided for in the copyright

software. In both cases, injunctions issued against the defendants, and the cases remain before the courts.

¹⁵ In one instance in 2003, a Home Ministry official indicated to a U.S. publisher's representative that piracy is good, since it supplies less fortunate persons with free books and copyrighted materials. In another, following one raid, the "trade association" of the retail market in which pirated books were found announced a boycott of the publisher.

¹⁶ In a bookshop raid in Lahore, as soon as pirated books were seized, a mob, including all the pirate booksellers, began surrounding and threatening to attack the representatives, while the Pakistan Police officer looked on. The fact remains that enforcement actions in Pakistan are complicated by threats of violence against legitimate booksellers and publisher representatives, and the police have advised that publishers hire security guards to protect them.

¹⁷ In one case in 2003, which is typical of the problems encountered, failure of the police officer to file the police report at the outset after the raid caused a delay of two weeks (the amount of time it took the District Court to order the Superintendent of Police to register the police report), and cost the copyright owner's representative attorney's fees and court costs (since he had to go to the "sessions court" for that district, engage a lawyer, lodge the complaint, produce evidence, e.g., photographs of the raid, samples of books seized, and witnesses).

law. Training of judges, in conjunction with PIPRO, would be useful, to ensure that only those judges who are specifically trained in copyright handle such cases; the government should also consider the establishment of a specialized intellectual property court with judges dedicated to hear such cases.

Pakistan's Government Should Devise and Carry Out a Coordinated Enforcement Plan

In 2004, it is imperative that the government of Pakistan begin to address the piracy difficulties in the country, and the failure to deter further infringements, in a systematic and coordinated manner. In particular, the government should:

- Shut down known optical disc production facilities (if necessary, by temporary order), pending their ability to demonstrate that they have licenses to produce legitimate materials (whereupon supervised access to the plant could be granted so as to permit the legitimate production, but thereafter closed again). As a critical first step, the government of Pakistan must permit right holders organizations to visit optical disc plants to obtain sample discs.
- Combat other forms of piracy, including book piracy and cable piracy.
- Begin the process of solidifying a cadre of specially trained law enforcement officials (including police and prosecutors), by training them in copyright law to handle all copyright cases. Such a core group would have *ex officio* authority, and would work with all governmental departments having functions necessary to achieve proper enforcement against piracy (e.g., customs) to prepare cases and see them through to final prosecution.
- Begin the process of solidifying a cadre of specially trained judges in the area of copyright protection.
- Instruct all police authorities to carry out raids, with active involvement of the Federal Investigation Agency, on a more frequent and sustained basis and to seize all pirate products discovered during such raids
- Take all necessary steps to stop pirate shipments out of or into Pakistan. In particular, customs authorities should be able and encouraged to take *ex officio* action without a formal complaint in order to seize any suspected pirate product entering into or being exported or transited out of Pakistan
- Issue a decree making the fight against piracy a high priority and carry out an awareness campaign underscoring the need to fight piracy.

COPYRIGHT LAW AND RELATED ISSUES

Pakistan Should 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 2004, the Pakistani government must take steps to implement effective measures against optical disc piracy.¹⁸ In 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

¹⁸ The global copyright community has agreed on the key elements of an effective optical disc law; please see the 2003 Special 301 report on Pakistan, at <http://www.iipa.com/rbc/2003/2003SPEC301PAKISTAN.pdf> for a full discussion of what is needed in Pakistan's optical disc regulation.

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 Needs Strengthening, and Motion Picture Ordinance Should be Amended

The Copyright Ordinance, 1962 (as last amended in 2000) 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.¹⁹ Remaining problems in the ordinance include criminal fines that remain far too low to deter piracy, in violation of TRIPS,²⁰ and at least criminal penalties must be amended to include minimum fines and prison terms. The law also retains a TRIPS-incompatible compulsory license to use published materials,²¹ other overly broad exceptions to protection, and unclear full retroactive protection for works and sound recordings as required by TRIPS. Pakistan should further amend its law to fully implement the WIPO "Internet" treaties, which establish the framework for the protection of copyrighted works as they travel over the Internet, and should accede to these treaties. Finally, Pakistan should adopt the 1971 (Paris) text of the Berne Convention and should join the Geneva (phonograms) Convention.

IIPA also encourages Pakistan to amend its Motion Picture Ordinance to more clearly cover home video products, and understands that the Ministry of Culture has announced plans to do this. The motion picture industry has reviewed and provided comments on drafts of the proposed amendments, which would require licensing of video shops and would include minimum penalties for infringements, all of which would be helpful in the fight against this form of piracy.

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. That petition remains pending. 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." There is little doubt but that Pakistan is failing to provide adequate and effective protection for U.S. intellectual property as contemplated in the GSP statute. In addition to optical disc pirate

¹⁹ Please see the 2003 Special 301 report on Pakistan, at <http://www.iipa.com/rbc/2003/2003SPEC301PAKISTAN.pdf> for a full discussion of the Pakistan Copyright Act.

²⁰ Some industries have suggested that the minimum fine must be increased to PRs 500,000 (US\$8,300).

²¹ 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.

production for export, 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. At the same time as the GSP petition remained pending in 2003, the United States and Pakistan signed a Trade and Investment Framework Agreement (TIFA) on June 27, 2003, which paves the way for more serious trade discussions. It is crucial in the context of the larger trade relationship, and in view of the IIPA's pending GSP petition, that Pakistan live up to its obligations to provide adequate and effective copyright protection and take immediate steps to eradicate piracy in all forms, including optical disc piracy. During the first 11 months of 2003, \$84.6 million of products from Pakistan were imported into the U.S. duty-free, representing 3.61% of Pakistan's total imports into the U.S.²² 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.

²² During 2002, the United States imported \$89.9 million worth of products into the United States duty-free, or 3.89% of its total imports to the U.S.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

UKRAINE

EXECUTIVE SUMMARY¹

Special 301 Recommendation: IIPA recommends that Ukraine remain a Special 301 Priority Foreign Country (PFC). Consistent with this designation, IIPA recommends that the trade sanctions and the suspension of Ukraine's duty-free trade benefits under the Generalized System of Preferences ("GSP") currently in place should continue until Ukraine fulfills its obligations under the Joint Action Plan signed by then-President Clinton and President Kuchma in 2000. In order to terminate the PFC designation and the trade sanctions (and to restore GSP benefits), Ukraine must amend the Optical Disc Law of 2002 to correct and fully implement the optical media regulatory scheme set out in the Joint Action Plan, including the necessary criminal enforcement tools. At present, Ukraine is neither in compliance with the 2000 Bilateral Agreement, nor the 1992 Bilateral NTR Trade Agreement with the United States (which Ukraine agreed to implement by December 31, 1993). Ukraine's overall legal system for the protection of copyright and the related enforcement regime still falls short of compliance with the TRIPS obligations of the World Trade Organization. As a result, Ukraine should be prevented from accession to the WTO until it is in complete compliance.

Overview of key problems: The three problems that continue to be of the highest priority in Ukraine are: (1) the inadequate regulation and ineffective enforcement of optical media production and distribution facilities, that, for example, permitted a fourth optical disc plant to began operations last year under the defective laws in place; (2) the complete absence of criminal prosecutions and deterrent sentencing, and a dramatically ineffective 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.

Actions to be taken by the government of Ukraine: In order to reinstate GSP benefits and to end the trade sanctions, the Ukrainian government must meet the following six benchmarks:

- Amend the existing optical media law in several key areas, including licensing the production of matrices, clearly imposing an obligation to engrave all manufacturing equipment with a source identification code ("SID Code"), including equipment used for the production of blank (recordable) optical media and abolishing the SID Code requirement for imported optical discs;
- Fully implement a comprehensive optical media enforcement scheme by regularly carrying out effective (surprise) CD 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;

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

- Enact and enforce effective border measures to stop the export and import of illegal material;
- Commence raids and follow 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 and, refraining from returning previously seized pirated goods to the market;
- Undertake a review of the hologram system and its administration/enforcement to stop the practice of issuing holograms (currently, in the thousands) to *maile fide* companies using fraudulent license agreements; and
- Introduce the necessary legal reforms in the criminal code and administrative code (to impose criminal liability for licensing violations), and to the civil procedure code to facilitate better enforcement.

COPYRIGHT PIRACY AND ENFORCEMENT IN UKRAINE

Optical Media Production and Distribution Must Be Fully and Completely Regulated—Amendments Necessary to 2002 Law

Three years ago, after significant worldwide pressure to act, Ukraine took several important steps to try to remedy its position as one of the world's largest producers and distributors of illegal optical disc media (CDs containing musical works, audiovisual VCDs, and CD-ROMs containing entertainment and business software). CD-R production by the plants is creating a growing problem where, through coordinated efforts, the plants sell such discs (often with pre-printed artwork) to pirates who subsequently illegally burn the music onto discs for public sale.

The problem of wide-scale piratical activity in Ukraine, much of it by organized criminal syndicates, flourished in the 1990s because of Ukraine's weak criminal enforcement regime. Legal reforms were adopted in 2000 and 2002. However, as noted at the time by the copyright industries and the U.S. government, these reforms fell far short of the needed comprehensive steps necessary for effective enforcement. It was unfortunate that the Verkhovna Rada did not follow the government of Ukraine's proposal for proper optical disc regulation and instead adopted flawed laws; the consequence was the imposition of trade sanctions and suspension of GSP benefits. Over the past two years, the Rada has rejected long-awaited amendments to cure the problem. In fact, in May 2003, a bill to remedy the flawed system was given a first reading. However, the May 2003 bill was itself watered down from the original proposal worked on extensively by the copyright industries and the government of Ukraine. Provisions were added into the May 2003 bill with the support of the pirates that would have made the existing legal regime even weaker; in any case, the Rada never considered the bill after the first reading and, for another year, the necessary legal reforms were not adopted.

The benchmarks that the Ukraine government needs to meet to end the sanctions and restore GSP requires complete compliance with the 2000 Action Plan. For two years, the IIPA and its members have spelled out the details of what this compliance looks like in numerous filings. Instead, IIPA and the U.S. government have watched in frustration as myriad attempts to remedy the flawed enforcement provisions have either been stalled or defeated (with the

support of the pirates) in the legislature.² It is also true that over the past two years optical disc production has slowed in Ukraine. However, within the last year a fourth plant (formerly Lazer-Inform, now Replitec) has come on line and there is the real possibility that others will follow now that the pirates have discovered that the government is not serious about regulating and effectively controlling their practices. That is why adoption of the necessary amendments is critical.

At present, the deficient laws have meant that: (1) there is no reliable mechanism for adequate surprise inspections of the plants; (2) mastering codes have been issued to plants that have no mastering facilities thus allowing facilities to produce masters and engraving codes without any oversight by the copyright owners; and (3) key enforcement tools (the use of production samples) that could aid in the detective work for uncovering illegal activity have been held back by the agency responsible for optical media licensing, the State Department for Intellectual Property (SDIP).

Although overall optical disc production has slowed, Ukraine, with the continuing involvement of organized crime groups, remains a major transshipment point (by trucks, railroads and boats), and a storage facility, for illegal discs produced in Russia and elsewhere because of very poor border enforcement. Pirate material from these countries continues to flood the Ukraine market. In 2003, one alleged Ukrainian pirate of software, whose operations are based in Russia, was arrested in Thailand.

At present, four plants are in operation in Ukraine, albeit at limited capacity (and with even a government acknowledgement of some illegal production still). The slowdown, or more accurately the “stall,” in overall 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, which entered into force on April 22, 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 of these implementing regulations were put into place; however, many key regulations have not been put into place.

In short, the 2002 Law is flawed and its deficiencies cannot be undone by regulation alone. IIPA was encouraged in 2001 and 2002 by the fact that the SDIP and the Ministry of Economy was willing to work with industry representatives to draft the necessary amendments, but such progress has stalled for almost two years. 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.

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 immediately seize infringing product and machinery used for its production (including spare parts and certain pieces of equipment) as well as equipment lacking the appropriate SID code; 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

² For a full history of the imposition of trade sanctions and the withdrawal of GSP benefits imposed against Ukraine by the U.S. government, see <http://www.iipa.com/rbc/2003/2003SPEC301UKRAINE.pdf> at page 12, i.e., last year's IIPA Ukraine filing.

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.

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. 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), after producing CD-Rs without SID codes for more than a year, decided to produce blank CD-Rs with a SID code. There are no legal obligations to monitor molds (a major shortcoming of the licensing law). As a result, Rostok could be using a coded mold for one production run, and any number of other molds for undeclared production—all as a result of other regulatory shortcomings including the lack of checks on polycarbonate imports/use and production records. 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).

Rostok, 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. The SDIP was not even aware of the DVD equipment in the plant, even though, under the optical disc licensing law, it should have been notified of the existence and operation of the additional DVD line. Once presented with this evidence by IFPI, SDIP failed to investigate the matter satisfactorily and instead accepted the plant's explanation that the code was being used by another facility. This illustrates the highly inefficient and flawed way in which the optical disc regulation is enforced in practice.

Even with the slight reduction in operational plants, key optical disc plant enforcement problems remain under the current law and regulations:

- The licensing authorities are not conducting effective plant inspections, let alone surprise inspections—the only means of effective plant production enforcement;
- The plants in operation were issued SID codes without proper verification at the time of issuance. No comprehensive and in-depth follow-up inspections have taken place since in order to verify the maintenance of these codes on all equipment and molds (and mirror blocks);
- 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 (the 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 four 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.

In the absence of any legal authority to control and, where necessary, prevent import or export of equipment suspected of having been used in illegal production, two of the Ukraine plants suspended their operations in 2002 and moved their production lines to Belarus, Russia, and Bulgaria. Most of these former Ukrainian plants immediately recommenced pirate production, utilizing their traditional distribution routes and channels in Ukraine. The line that moved to Bulgaria returned to Ukraine last year; IFPI alerted the authorities of its return. The movement of these plant lines out of and then back into Ukraine was facilitated by the very weak border enforcement system in place, along with the SDIP's failure to properly regulate optical disc equipment—and it illustrates the overall failure of the optical disc plant licensing law and its enforcement.

The government of Ukraine has failed to use its existing criminal enforcement tools against illegal producers and distributors of optical media material. This was evident in 2002 by the termination (after 8 months of investigation) of one plant investigation because of a lack of sufficient evidence of any violations of the law against the illegal plant operators. This occurred 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 U.S. government).

Another misstep that undercut effective enforcement was the adoption of the controversial Hologram Sticker law in 2000. The implementation of the Ukrainian hologram system (administered by the government) is seriously harming the interests of legitimate record companies while it permits suspect companies to receive thousands of holograms for foreign repertoire for which they have no licenses despite objections from the legitimate licensees. These holograms are ultimately found in the market on pirate products.

In January 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. This registry, in place as of March 2003, was intended 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. According to the government, as of January 2004, 109 companies that produce and distribute software had used the registry. Under the order, all software manufacturers/distributors can 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 was intended to improve the level of copyright protection for computer programs and databases, as well as to provide information to the public regarding software manufacturers, distributors and licensing information. The Business Software Alliance (BSA) reports that the registry, to date, has been ineffective likely due to its voluntary nature.

The details of the six basic features of an effective optical media regulatory scheme, many of which are missing from the 2002 Law, can be found in prior IIPA filings available on the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301UKRAINE.pdf> at page 5.

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 and on all equipment including all molds (and mirror blocks), 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).

Lack of Criminal Enforcement, Border Enforcement and Other Enforcement Deficiencies

In addition to the optical media law, other key enforcement tools include: (1) criminal enforcement efforts targeted at 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.

In recent months there have been encouraging signs of increased police activity, both in Kiev and elsewhere, against the retail sale and distribution of pirate products. However, significant improvement will only occur when the number of actions and cases of effective police action undertaken against large-scale commercial piracy grow. There remain serious concerns over the very few deterrent prosecutions or sentences by the courts, and the 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. Over the past few years there have been some successful raids and seizures (detailed in previous IIPA filings), but few, if any, resulted in successful deterrent criminal prosecutions. In fact, as a result of the too-high threshold for criminal prosecution (i.e., material damage amounting to at least UAH 12,300/US\$2,306), most

cases result in administrative actions. IPR related offenses are hampered by procedural problems such as the use of expert evidence, and instead need to have clear sets of rules guiding procedure. In addition, there are overall problems with police competence pertaining to IPR criminal investigations.

Ukraine must also target criminal prosecutions against organized criminal syndicates for activities including IPR crimes. Provisions do exist in the Ukrainian criminal code (e.g., Art. 28) to prosecute organized groups or criminal organizations, including those engaged in IPR offenses, but to date they have not been used for this purpose.

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. The possible establishment of a common trade regime between Russia, Ukraine, and Belarus will only exacerbate the border enforcement problems, putting additional pressure on neighboring countries such as Slovakia, Hungary and Romania. There have been some minor seizures by customs authorities of CDs and other materials over the past few years, but cooperation has been spotty and the activity has not nearly been enough to stem the flow. Comparisons of seizures by Polish and Czech customs officials against those by Ukraine officials bear out the paucity of seizures by Ukraine border enforcers. Plus, customs authorities have not commenced or undertaken criminal investigations of pirating operations, especially against organized crime syndicates. Ukrainian customs officials are unable and unwilling at present to cooperate with local industry officials. This lack of cooperation is not helping to improve the training and experience that customs officials need to acquire for effective enforcement.

There are two reasons why border enforcement remains weak: (1) a lack of willpower and coordination in the government, and (2) improper authority. 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. Effective in January 2004, a new Customs Code went into force 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 proper implementation of 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. Waiting for the rightholders to file complaints in each instance given the widespread scope of the illegal activity is a recipe for failure. Also, a statutory deficiency still exists because the Customs Code narrows its sanctions to only those activities meeting a “commercial purpose” threshold, which hampers effective enforcement (especially against the widespread cross-border suitcase trade in pirated goods).

There is an additional matter hampering effective enforcement. Almost five years ago, 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. This needs to be corrected. The lack of coordination for enforcement is a long-standing problem. Clear government strategies and lines of authority should be developed.

In addition to the enforcement against hard copy piracy, Ukraine enforcement officials must also begin actions against on-line piracy. It is estimated that there are over 400 ISPs in Ukraine and that over 150 of these sell pirate DVDs (for on average US\$10).

In 2003, the recording industry, hardest hit by the optical disc production and distribution problem, estimated piracy levels at 75% for international repertoire, and losses estimated at \$125 million (including losses from exports of pirate product made in Ukraine).

In 2003, estimated losses for the motion picture industry were \$45 million.

During the first half of 2003, Ukraine law enforcement officials reported that officers had inspected shops, businesses and warehouses and provided anecdotal evidence of effective enforcement. For example, the Tax Police conducted 1,322 inspections, and in one instance (in the Petrivka market in Kiev), seized 11,000 illegal items worth UAH 184,000 (US\$34,500). Customs officials reported total seizures in the first half of the year of 10,218 discs plus 12,594 audiovisual materials (tapes and DVDs). No year-end totals were available as of the time of this filing for the total number of inspections, raids and seizures by police and customs officials.

LEGAL REFORMS

A history of the key legal reforms made by Ukraine in the past few years is available on the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301UKRAINE.pdf> at page 13, including Copyright Law and Criminal Code reforms, as well as accession to the Geneva Phonograms Convention and the WCT/WPPT.

The Law of May 2003 actually introduced broad changes to numerous laws relating to the protection of intellectual property; it amended Article 176 of the Criminal Code pertaining to violations of the rights of authors and neighboring rights, adding new sanctions for IPR violations. The 2003 amendments maintained the existing practices regarding the confiscation of infringing (including imported) material; and no amendments were made to the administrative offenses code.

Even with these improvements, Ukraine is not in compliance with WTO TRIPS obligations; 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 (the customs code revision, effective January 1, 2004, omitted the necessary IP-related provisions); and (3) the addition of key administrative remedies. The Law of May 2003 included in the Civil Procedure and Commercial Procedure Codes *ex parte* search provisions necessary for effective end-user (software) piracy actions. However, these provisions have not yet been applied in practice.

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. The most important next step to create legitimate markets for music and motion pictures is for the Ukrainian police to use these provisions 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.

Several other provisions in the 2001 Law are also troubling, such as Article 43.3; this provision permits the over-regulation and consolidation of power into government collecting rights societies. The Ukrainian Cabinet of Ministers has, under this provision, adopted fixed tariffs for the broadcasting of sound recordings, which 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 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.

Other Legal Reform Issues

Criminal Code and Criminal Procedure Code Reforms

A revised criminal code came in force on September 1, 2001, and was further amended in May 2003. As revised in 2003, Article 176 provides sanctions including fines ranging from 200 to 1000 minimum tax-free incomes, approximately US\$640 to US\$3,200, (up from 100 to 400 times), or correctional labor for a term of up to two years, or imprisonment for a term of up to two years with confiscation of infringing material. The threshold for criminal liability is met when material damage caused by an infringement equals or exceeds 200 minimum tax-free incomes (i.e., “substantial material damage”). The sanctions foresee an increase for repeated offenders and cases where the material damage equals or exceeds 1,000 minimum tax-free incomes (i.e., “very substantial material damage”), such as for officials abusing their “official positions.” In those cases fines can reach up to 1,000 to 2,000 minimum tax-free incomes (previously 500 to 1,000 times), and the term of imprisonment ranges from two up to five years. Effective in January 2004, a new system for the calculation of minimum tax-free incomes entered into force, applicable to the Article 176 provisions—the current minimum monthly wage is UAH 205 (US\$38.43). The criminal code provisions do sanction both copyright and neighboring rights violations (the latter of which were first included in the criminal code in 2001).

In general, the criminal penalties can only be imposed for “substantial material damage”—this represents an unwarranted threshold for copyright piracy. As a result of the May 2003 amendments, the threshold for criminal liability is now UAH 12,300 (US\$2,306), whereas before January 2004, it was UAH 3,400 (US\$637)—obviously, this is a substantial increase in the threshold for activities to qualify as a crime. The 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. Activities that fall below the threshold can be sanctioned by the much weaker administrative offenses code; while far short of deterrent sanctions, if properly implemented and prosecuted, those penalties can provide some relief for certain low-level offenses.

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 also 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. Another missing element in the criminal code (or copyright law) is a provision that makes the possession for commercial purpose of illegal copies of works or sound recordings a criminal offense; the government of Ukraine should introduce and push for the passage of such a provision. Even more troubling than the statutory

shortcomings is that now, two years after enactment of the criminal code amendments, deterrent criminal sanctions (under the old or new code) have yet to be imposed in a copyright or neighboring rights case.

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 in 2000, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy as well to enact 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

Effective January 1, 2004, the Customs Code of Ukraine (Law No. 92-IV, "On Amending the Customs Code of Ukraine") entered into force. It provides clear *ex officio* authority to customs officials to seize suspected illegal material at the border. This closes a legal loophole previously missing from the enforcement regime of Ukraine. Unfortunately, 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. In addition, the registration requirements and fees (which we understand were not repealed by the new law) must be abolished; these provisions act as a bar to effective border enforcement action by causing a confusing maze of unnecessary regulation.

Civil Code Should Not Weaken Copyright Law

A new civil code was adopted in January 2003, and came into force on January 1, 2004. Chapter IV of the Civil Code (Intellectual Property Rights) contains 90 articles in total, 15 in the section on copyright, and 8 pertaining to neighboring rights. Most of the copyright and neighboring rights provisions duplicate provisions in the Copyright Law of 2001. For many years, IIPA had urged that civil code reform exclude anything but passing reference to copyright and neighboring rights because of fears that duplicate provisions would jeopardize effective application of the copyright law (and breach the bilateral trade agreement). This exercise is a phenomenon not unique to Ukraine, as civil code reform, with contradictory provisions to the copyright law, 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.

Experts in Ukraine report that the new civil code provisions, since they duplicate the copyright law ones and do not contradict them, will not weaken implementation or enforcement of the copyright law. IIPA continues to monitor the progress of copyright law implementation

and enforcement. In sum, IIPA urges that the enforcement agencies and the judiciary in Ukraine rely on the copyright law for effective enforcement, and that the Civil Code Chapter IV provisions should not be used in any way to weaken these activities.

Government Software Asset Management

In September 2003, the Cabinet of Ministers of the Ukrainian government passed a regulation establishing procedures for the use of software in government agencies. It provides for (among other things) government institutions to use properly licensed and legally held software, and prohibits public servants from installing, using, or copying software without prior consultation with a responsible system administrator. This regulation comes into force on March 25, 2004.

WIPO Digital Treaties

In 2001 Ukraine acceded to both of the digital treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). 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). Ukraine needs to fully implement the treaties with amendments to its copyright law.

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306 MONITORING

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

PARAGUAY

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Paraguay continue to be monitored under Section 306 of the U.S. Trade Act of 1974.

Overview of key accomplishments/problems: Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. In December 2003, Paraguay signed another Memorandum of Understanding on Intellectual Property Rights with the U.S. Officials in the new Paraguayan administration have exhibited a renewed interest in tackling copyright piracy in-country and at its borders. Several decrees were issued in 2003 to establish special measures to combat piracy and counterfeiting, create a specialized technical unit, and amend the customs law regarding importation of blank optical media discs. IIPA members are hopeful that improvements will occur in Paraguay.

Despite the renewed energy among some Paraguayan officials to combat piracy, the piracy situation in Paraguay remains dire. Unfortunately, enforcement efforts taken by Paraguayan authorities, however well intended, continue to be largely ineffective in deterring widespread piracy there. Organized crime elements remain intimately involved in the production and distribution of pirated products, thus making enforcement even more difficult. There are still too few criminal investigations, raids and prosecutions against copyright pirates. The copyright law and criminal code works to frustrate the application of deterrent sentences because they treat intellectual property violations as minor offenses. The borders remain porous, despite cooperative efforts between industry and border officials to halt suspect shipments and review false documents. Amendments to the criminal code to increase penalties are urgently needed. The Paraguayan judiciary remains largely unwilling to issue deterrent sentences.

Actions which the government of Paraguay should take in 2004

- Promptly enact the obligations in the 2003 IPR Memorandum of Understanding;
- Improve border enforcement, including the interception and seizure of piratical goods as well as the inspection of blank optical disc media;
- Enact the legislation to amend the criminal code to increase penalties for copyright infringement (elevating IPR violations for treatment as major crimes), establish *ex officio* actions, and criminalize the circumvention of technological protection measures;
- Impose deterrent remedies against pirates, including criminal penalties;
- Control the points of entry for the importation of CD-Rs into Paraguay;
- Continue to support review by Customs, the Ministry of Industry and Commerce (MOIC) and rightsholders in examining the shipping invoices for blank CD-Rs;
- Audit large-scale importers of blank CD-Rs who are suspected suppliers to pirate organizations for possible tax evasion;
- 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 (reports are that the sunset currently is not being applied in practice);
- Reduce the problem of widespread street vendors offering pirate product;
- As a preventive measure, Paraguay may want to consider raising tariffs for the importation of CD-Rs.

PARAGUAY
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	154.6	99%	204.4	99%	253.6	99%	200.0	90%	200.0	90%
Motion Pictures	2.0	80%	2.0	80%	2.0	80%	2.0	80%	2.0	80%
Business Software Applications ³	NA	NA	2.2	71%	3.5	72%	8.5	76%	6.7	83%
Entertainment Software	NA	NA	NA	NA	NA	NA	9.7	99%	8.1	99%
Books	2.0	NA	2.0	NA	3.0	NA	3.0	NA	3.0	NA
TOTALS⁴	NA		210.6		262.1		223.2		219.8	

New Memorandum of Understanding on IPR

On December 19, 2003, the Paraguayan Ministry of Foreign Relations and the U.S. Embassy in Paraguay announced the conclusion of the first meeting of the Joint Council on Trade and Investment (JCTI) and the completion of a new Memorandum of Understanding on Intellectual Property Rights (IPR MOU). This new IPR MOU includes elements on legislative, administrative and enforcement-related issues designed to strengthen that government's ability to effectively fight copyright piracy and trademark counterfeiting and to improve its overall intellectual property system. There will be a regular review of Paraguay's progress under the IPR MOU throughout 2004. The text of this document is not yet publicly available (as of February 2004); thus, IIPA and its members reserve more detailed comments until after our review of this agreement. The bottom line remains that the Paraguayan government needs to

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² RIAA reports that its estimated piracy losses include both domestic piracy in Paraguay and estimated losses caused by transshipment. The decrease in 2003 estimates is due to lower average prices of recorded music and currency devaluation.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$4.3 million and levels of 69% were identified as preliminary. BSA's revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Paraguay, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Paraguay (including U.S. publishers) and (b) losses to local distributors and retailers in Paraguay.

show, with concrete results, a real commitment to consistent and transparent copyright enforcement.

The 2003 IPR MOU is a new agreement which replaces the 1998 IPR MOU which expired on January 1, 2003. To review, in February 1998, USTR initiated a nine-month investigation into Paraguay's IPR practices, after designating Paraguay as a Priority Foreign Country under Section 301 of the U.S. trade law. On November 17, 1998, USTR announced its determination that certain acts, policies and practices of the government of Paraguay regarding the protection and enforcement of intellectual property rights were "unreasonable and discriminatory and constitute a burden or restriction on United States commerce." The investigation was concluded when Paraguay and the U.S. signed a "Memorandum of Understanding on Intellectual Property Rights" in which the Paraguayan government committed to take a number of near- and long-term term actions (e.g., strengthen enforcement efforts, pass certain legislation, improve training of enforcement officials, enhance public awareness, and provide deterrent penalties and civil remedies).⁴ The 1998 IPR MOU contained nine articles and an annex which comprised the "Enforcement Action Plan."⁵ In previous IIPA Special 301 submissions, we outlined the numerous key elements in the IPR MOU which the copyright industries believe the Paraguayan government did not implement effectively.⁶

COPYRIGHT PIRACY IN PARAGUAY

Optical Media Piracy: Transshipment and CD-Rs

Paraguay continued to serve as one of the favored destination in 2003 for much of the pirated optical media product being produced in Southeast Asia (e.g., Thailand, Malaysia, Macau, Hong Kong, Singapore, and Taiwan). This sourcing continued Paraguay's significant regional role as a transshipper of pirate product to its neighbors.

Blank CD-Rs and CD-R burning: Pirates in Paraguay have continued to shift their products from pre-recorded OD product to importing blank recordable CD (CD-R's) into Paraguay. In 2003, about 119 million units were imported, up slightly from the approximately 100 million units in 2002 and 104 million in 2001. All these statistics represent a significant increase from the 34 million units in 2000. Paraguay clearly does not have the legitimate markets to absorb these immense amounts of product. 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 replaced the previous

⁴ Also in 1998, 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. For the first 11 months of 2003, \$14.4 million worth of Paraguayan goods (or 31.4% 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 25.7% increase from the same period last year. For more information on Paraguay's history under Special 301, see Appendix D (<http://http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁵ The full text of Paraguay's 1998 IPR 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>.

⁶ For example, see IIPA's 2003 Special 301 country report on Paraguay, available at <http://http://www.iipa.com/rbc/2003/2003SPEC301PARAGUAY.pdf>.

underground illegal CD plants, but it is obvious that those burning facilities are supplied by 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.

It is obvious that the importation of 119 million CD-Rs in 2003 and another 100 million in 2004 for a market that may absorb no greater than 1 million units per year is a mechanism that supports other activities, among which is piracy of music, software and other copyrighted products. As a preventive measure, Paraguay may want to consider raising tariffs and the valuation for the importation of CD-Rs.

Local optical disc and blank CD-R manufacture: Back in 1999, Paraguay's role as a substantial local manufacturer of pirated optical media was revealed when the recording industry confirmed that clandestine CD manufacturing companies had made their way into Paraguay via Brazil. Two CD plants were later closed down, and, at last report, no real evidence has surfaced regarding any new plants. Industry is aware that there appears to be one operational CD-R manufacturing plant, SCA Technologies in Ciudad del Este, which is producing approximately 40-50,000 blank CD-Rs daily. 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 potential exists for more manufacturers to set up CD lines locally. The Paraguayan government may want to consider implementing optical disc legislation to control the installation of new plants and licensed production.

In October 2003, a public scandal erupted in which the President dismissed his Minister of Interior and the Director General of Customs for their non-transparent and possibly illegal release of 1.3 million seized optical discs that had no legal origin. This case demonstrates the depth of corruption in Paraguay and its relation to optical disc piracy. It also may be an optimistic sign that the new President will seriously address corruption in Paraguay.

Organized Crime Elements Still Control Piracy in Paraguay

Organized criminal groups remain involved in the production and distribution of pirated and counterfeit product in Paraguay. Organized crime elements from Taiwan, the Far East and the Middle East control much of the distribution in Ciudad del Este and in other cities. It remains the case that in 2003, 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 again reports that 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. Total legitimate sales in 2003 were approximately 200,000 units, although Paraguay 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. Estimated trade losses due to recording and music piracy in Paraguay were approximately \$154.6 million in 2003 (this figure includes both losses due to local piracy as well as those caused by transshipment).

The entertainment software industry reports that Paraguay continues to permit the manufacture, sale, import and export of pirated entertainment software in all formats. Both CD-based piracy of videogames (which includes console CDs for PlayStation®) and cartridge-based piracy remain major problems. Counterfeit videogame components (such as semi-conductor chips and packaging) and cartridges are imported from the People's Republic of China, Taiwan, Hong Kong, for assembly in Paraguay, and then exported to other countries in the region. The industry continues to have some success working with local district attorneys and Paraguayan customs to seize shipments and destroy infringing product.⁷ An ESA member company reports that more than 4.4 million pirated and counterfeited products have been confiscated in Paraguay since the 1998 IPR MOU, the largest number of infringing products the company has seized in the entire western hemisphere.

The business software industry reports that 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. Severe problems with end-user piracy in businesses inflicts the most economic harm on the potential growth of a legitimate software base in Paraguay.

The motion picture industry reports that its primary concern is Paraguay's position as a transshipment and organization hub for optical disc piracy. The commercial interests of MPA member companies in the Paraguayan market are very limited, which may be a reflection of Paraguay's minimal trade in general with the United States. Ciudad del Este is the central distribution point for an increasing amount of blank optical discs (CD-R and DVD-R) and locally reproduced CD-R and DVD-R. This product is primarily exported to Brazil, Chile and Argentina. As a result, Paraguay remains a significant threat to other Latin American markets because of the large pirate transshipment operations in Ciudad del Este. The border city has long been a transshipment point for other forms of optical disc piracy (music, software and videogames), so as the market for DVDs continues to grow in Latin America, Paraguay may become the origin of pirated DVDs in the region. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Paraguay are estimated at \$2 million in 2003 (this figure is for in-country market losses only; the damage inflicted on neighboring countries is not calculated).

⁷ A recent raid on a large warehouse in Ciudad del Este resulted in seizure of close to 40,000 counterfeit Nintendo products, including semi-conductor chips, stickers and packaging boxes. A criminal case is now pending against the warehouse owner.

AAP reports that commercial piracy (full reprints) exist 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 trade losses due to book piracy remained at \$2.0 million for 2003.

COPYRIGHT ENFORCEMENT IN PARAGUAY

There is a wide variety of enforcement challenges in Paraguay, all of which have existed for years, despite bilateral promises and legal reform. In 2003, the Paraguayan government issued three decrees regarding enforcement: (1) establishing special measures to combat piracy and counterfeiting; (2) creating a specialized technical unit; and (3) amending the customs law regarding importation of blank optical media discs.

Paraguayan border measures remain ineffective. Not surprisingly, many piracy problems in Paraguay are centered in the border cities. It remains imperative that the government improve its customs procedures to combat cross-border piracy and corruption of its agents. 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.

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 to curtail Paraguay's participation as a major transshipment point for pirates. The recording industry indicates that communication with customs is strained because that agency views product seizures as lost opportunities to increase revenues.

Even though Paraguayan Customs has cooperated more with the industry over the last two years, 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.

Controlling the points of entry for the importation of CD-Rs into Paraguay is critical. In September 2003, Paraguayan Customs issued a press release stating they were limiting the points of entry for blank CD-R product to five ports via a resolution. In November 2003, Paraguayan customs did limit the ports of entry for blank CD-Rs to 7, down from 17 (as required by Decree No. 126 of October 8, 2003).

Also in September 2003, the recording industry secured an agreement with Customs and the Ministry of Industry and Commerce (MOIC) which provides that no blank CD-R shipment will be released until these groups verify that the submitted invoices and documents are valid and accurate. As a result of this new system, over 6 million blank CD-Rs with false or questionable invoices have been seized between September 2003 and early February 2004.

ESA reports that in February 2004, the Asuncion Airport authorities detained an individual who was suspected of transporting pirate copyright material from Malaysia to Paraguay. The individual, already under surveillance by recording industry representatives, arrived in Asunción with ten bags and was immediately detained by the anti-drug authorities for questioning. His bags were confiscated by customs authorities and held while the individual was questioned. While this person was then released, his bags were held in custody. A warrant was subsequently obtained and the bags searched. The bags' contents were 16,000 PlayStation 2[®] video games. As is customary for pirate products replicated in Malaysia, SID codes on these discs had been gouged out. (The individual did not return to retrieve his bags.)

Police are generally helpful, but only after industries' investigations. The Paraguayan police still 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 are later submitted to the Prosecutor's Office with a criminal complaint.

There remains a question about the status of copyright infringements and whether they are "public" or "private" crimes. In order to implement the 1998 IPR MOU, 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. Despite a statement issued by the Office of Implementation of the Criminal Procedure Code of the Supreme Court of Justice of the Republic of Paraguay interpreting that this law was scheduled to sunset in July 2003, prosecutors still treat copyright offenses as "public" crimes. To IIPA's knowledge, no judicial decision has yet challenged the prosecutors' ability to pursue these crimes on their own initiative.

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. The more sophisticated criminals involved in music piracy groups have adopted the "cell" structure of operations. The recording industry continued to conduct raids based on its own investigations. In 2003, the recording industry conducted 236 raids, which resulted in the seizure of over 2,115,925 units of infringing products (mostly music CDs) and the closure of 40 manufacturing facilities, most of them small to mid-sized CD-R replication facilities, and 135 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 8,477,930 million units, allegedly destined for the pirate market, were seized by Paraguayan authorities based on information provided by APDIF/Paraguay.

Regarding business software enforcement, during 2003, BSA conducted four (4) civil end-user actions as opposed to seven in 2002. In addition, in 2003, BSA assisted the Prosecutor's Office in six criminal raids against software resellers in Ciudad del Este and Asunción compared to seventeen criminal raids in 2002. Several of these criminal raids were conducted against the same resellers that were raided during 2000 and 2001. Most 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.

MPA does not take enforcement actions in Paraguay. MPA reports that it has never had positive results coordinating with Paraguayan enforcement officials, but it has had success coordinating its investigative efforts in Paraguay with Brazilian and Chilean enforcement officials in order to stop the contraband shipment of optical discs out of Paraguay to those countries. MPA will continue to focus its efforts on coordinating with enforcement officials of neighboring countries instead of with the to-date ineffective Paraguayan enforcement agencies.

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. At present, only one of these prosecutors is assigned full time to IPR cases.

In April 2003, an executive from one of Paraguay's biggest importers of blank disc was issued a suspended sentence for tax evasion regarding the importation of blank CD-Rs. He was sentenced to two years in jail (suspended), fined \$14,000, and ordered to pay importation taxes of \$53,000 and VAT of almost \$149,000. The recording industry reported that in 2003, Paraguayan courts issued 36 criminal judgments against pirates of sound recordings. Sentences included imprisonment of up to 2½ years, but 16 were suspended, 20 became fines and the rest were benefited by probation. The recording industry initiated 30 judicial actions in 2003.

BSA reports that in 2003, the courts of first instance issued three convictions against resellers of illegal software. The defendants in these three 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. The fact that the defendants received suspended sentences detracts from the deterrent effect that this news would otherwise have had. In addition, during 2003, the Criminal Court of Appeals of Paraguay (*Tribunal del Crimen Cuarta Sala*) issued a decision substantially reducing the amount of the fines that two defendants were ordered to pay in a prior conviction.

Civil end-user actions and civil *Ex Parte* searches: In 2003, BSA conducted four civil copyright infringement actions (compared to seven inspections conducted in 2002). All of the cases conducted in 2003 are currently pending. 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. It takes an average of three years to reach a decision from a district court and an additional year if the case is appealed.

COPYRIGHT LAW IN PARAGUAY

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. 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.⁸ Paraguay already has deposited its instruments of ratification to both the WIPO treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. In order to achieve the kind of comprehensive implementation desired by the copyright industries, further refinements to Paraguayan laws will be necessary.

Criminal Code

Paraguay reformed its criminal code in October 1998. This reform, however, has caused more problems, for several reasons (all of which IIPA has identified in previous 301 submissions). 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. 1.444 of June 10, 1999) was signed on June

⁸ Problems in the 1998 copyright law include: a term of two to three years' imprisonment (with levels of fines remaining unchanged), which were shorter than prior drafts; failure to make copyright infringement a “public action,” in which police and prosecutors can take action on their own initiative (this problem was temporarily corrected by legislation in mid-1999); the hierarchy of authors over neighboring rights remains in the law, contrary to international norms (including the WIPO treaties); 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 remains; terms of protection for various works varies throughout the law—industry had argued for longer terms for certain products; the administrative authority for the National Copyright Office to carry out surprise inspections and seizures was removed.

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, according to an interpretation issued by the Paraguayan office in charge of judicial training, this law was scheduled to sunset in July 2003. Despite this interpretation, prosecutors have continue to bring public actions in copyright infringement cases. To IIPA's knowledge, to date no judicial decision has contested this interpretation of the law.

Need to amend the criminal code: To mitigate the obstacles above, the recording industry (led by 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 two years and maximum of eight 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 Republic of Paraguay has renewed its commitment to legalize its installed software base in the IPR MOU. Even though, up to date, only the Ministry of Industry and Commerce and the Ministry of Foreign Affairs have legalized their software, IIPA welcomes the Government of Paraguay's efforts to start an audit process of its installed software base. While this positive step was not enough to fulfill its obligations under the first IPR MOU, it is still clearly a step in the right direction.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2004 SPECIAL 301 REPORT
PEOPLE'S REPUBLIC OF CHINA

EXECUTIVE SUMMARY

Special 301 recommendation: Despite extensive raiding on behalf of some industry sectors, piracy rates remain at over 90% across all copyright industries. IIPA again recommends that China remain subject to Section 306 Monitoring.

Overview of key problems in China: China has now been a WTO member for over two years and has been obligated under its bilateral arrangements with the U.S. (1995-1996) for 8-9 years. China can no longer excuse its failure to lower piracy rates to below 90%, among the highest rates in the world. Despite continued government expressions of concern and commitment to root out piracy (and many admissions of the seriousness of the problem) and a major anti-piracy campaign begun in September 2003, piracy rates have simply not come down. Exports, particularly of pirate DVDs, began again last year and continue at alarming levels, affecting even major markets like the U.S. and the U.K. OD factories, despite seizure of lines and some closures of underground factories (and a few deterrent sentences involving underground plants), continue to produce massive amounts of pirate product to satisfy a huge domestic demand which legitimate right holders, due to continuing market access restrictions (and piracy), are unable to satisfy. While the Chinese government continues to take some welcome action against pirates in certain industry sectors, applies administrative fines (which are notoriously low) and occasionally convicts a pirate under its various criminal provisions, piracy rates do not come down, indicating lack of coordination and deterrence in the system.

This lack of deterrent penalties for piracy as well as a lack of a coordinated, transparent enforcement program continue, in industry's view, to be a key cause for the failure of piracy rates to decline. Central to the problem is the failure of the Chinese government to commit to bring criminal cases against piracy *per se* (as distinct from the few prosecutions taken under other laws). This political unwillingness is combined with legal deficiencies, both in the substance of the criminal law provisions (which remain TRIPS non-compliant), and in the official "Interpretation" by the Supreme People's Court (high criminal thresholds and other procedural deficiencies making criminal enforcement virtually impossible), all resulting in the failure to apply the criminal law to piracy "in practice" in violation of TRIPS Articles 41 and 61. Despite promises to lower the thresholds that would permit deterrent criminal enforcement—an obligation from China's WTO Working Party Protocol—this much-needed first-step action has yet to be taken, though there are continuing, but unconfirmed, rumors that changes may be made. Also on the law reform front, IIPA has also recently learned that the Supreme People's Court has revised its "Interpretations" on how the copyright law is to be applied to Internet piracy (growing at alarming rates in China), but IIPA has not yet analyzed the changes.

Other piracy problems persist after years of prodding by industry and the U.S. government: (1) failure to devote sufficient resources to, and take effective action against, business and ministry unauthorized (unlicensed) use of business software; (2) failure to apply deterrent administrative penalties to the production, wholesale and retail sale of pirate

entertainment and business software, sound recordings, movies and books; (3) failure to take action under the criminal piracy laws against underground optical disk plants or against the massive import and increasing export of pirate product; (4) failure to effectively organize an effective enforcement infrastructure to fight growing Internet piracy; and (5) failure to coordinate enforcement at the Vice Premier level, though Wu Yi's apparent naming as IPR "czar" may bode well for a change.

China's fight against piracy is also severely hampered by onerous market access barriers (some enshrined in China's WTO agreements). These barriers severely hinder the ability of the copyright industries to satisfy growing demand (thus contributing to the high piracy rates) and prevent much-needed cooperation of government and industry in the fight against piracy.

Actions to be taken by the Chinese government: The following actions closely track IIPA's recommendations for 2003; industry's frustration at the lack of action has now reached the breaking point—

- Vice-Premier Wu Yi's overall responsibility for intellectual property issues must be accompanied by providing her full political support and resources to finally bring some overall national coordination to the anti-piracy effort and giving her the authority to revise the various "Interpretations" and regulations which now stand in the way of an effective market for copyrighted products in China;
- 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, under Vice-Premier Wu Yi's leadership, establish a national anti-piracy criminal task force to deter OD factory, wholesale and retail, Internet, and enterprise end-user piracy of software, piracy of books, and piracy and counterfeiting of cartridge-based entertainment software with arrests and the imposition of severe criminal penalties. Amend the Criminal Code to clarify its full and effective application to all piracy crimes (including enterprise end user piracy of software), thus bringing it into compliance with TRIPS;
- 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;
- Significantly increase administrative fines for piracy and better utilize that process against all forms of piracy, including enterprise end user piracy of software;
- Through amended copyright legislation or regulations, correct the deficiencies in China's implementation of the WCT and WPPT, and ratify the two treaties;
- China must ensure that its WTO market access commitments are fully implemented and begin now to liberalize its business climate to permit effective operations by copyright industries.

PEOPLE'S REPUBLIC OF CHINA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	178.0	95%	168.0	91%	160.0	88%	120.0	90%	120.0	90%
Records & Music²	286.0	90%	48.0	90%	47.0 ²	90%	70.0	93%	70.0	90%
Business Software Applications³	NA	NA	1637.3	92%	1140.2	92%	765.1	94%	437.2	91%
Entertainment Software⁴	568.2	96%	NA	96%	455.0	92%	NA	99%	1382.5	95%
Books	40.0	NA	40.0	NA	130.0	NA	130.0	NA	128.0	NA
TOTALS	NA		1893.3		1932.5		1085.1		2137.7	

COPYRIGHT PIRACY AND ENFORCEMENT IN CHINA

China needs to take immediate steps to improve each of these enforcement mechanisms, particularly criminal enforcement, if China is to even approach the minimum standards for IPR enforcement established by the TRIPS Agreement.⁵

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² The estimated losses to the sound recording/music industry due to domestic piracy are US\$286 million for 2003, and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁵ United States Trade Representative, 2003 Report to Congress on China's WTO Compliance, December 11, 2003 at p. 51-2; <http://www.ustr.gov/regions/china-hk-mongolia-taiwan/2003-12-18-china.pdf>.

Optical disc piracy continues almost completely to dominate the local market, despite massive seizures of pirate product.

The levels of optical disc piracy in China continued across all lines of copyright business at critical levels (90% and above) in 2003 despite a record number of seizures in 2002 and 2001. Statistics for audiovisual product put out by the National Anti-Pornography and Piracy Working Group (NAPPWG) were revised upward for 2002 with the seizure of almost 115 million pirate disks—a staggering number indicating the massive dimension of the problem. The NAPPWC arrested 6,400 offenders in that year, and impounded 23 illegal production lines. This dwarfed the then-record 51 million pirate VCDs and 4.9 million DVDs seized in 2001. In 2003, by comparison (in the first eight months), 49.5 million discs were seized. The lowered amounts are reportedly due in part to the difficulties associated with the SARS epidemic. At the same time, 2,117 arrests were made. Through October 2003, 24 lines were seized. Since the China 1996 Enforcement Action Plan (with the U.S), NAPPWC reports that it has seized 180 production lines from both registered and underground OD plants. However, all this welcome and indeed necessary raiding and seizure activity has failed to make any dent in the marketplace, which remains dominated by cheap OD product—pirate DVDs, for example, sell in China for as little as \$0.95 per unit, the lowest price in the world. This is due to the massive quantity of pirate product in the market that continues to drive down its price. China has 71 OD factories with an estimated 569 production lines churning out optical media products containing protected content of all kinds.

As reported in the last few years' submissions, pirate production is not limited to underground, unlicensed plants that are found throughout China, many in locations more inaccessible than in the past. Registered/licensed plants continue to produce some pirate product. 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 and motion picture industry against licensed plants. CD-R "burning" is also on the increase in China, as it is throughout Asia.

The gravity of the OD piracy problem has recently hit the motion picture industry particularly hard. The piracy rate has gone up in 2003 to 95%, the highest since 1996. Home entertainment (VCDs, DVDs etc) revenues to the U.S. motion picture industry have plummeted and in 2002 were less than \$3 million in a domestic market (legitimate and pirate) estimated at \$1.3-\$1.5 billion and in which the legitimate market was only 5% or \$65 million. At the same time, the number of VCD and DVD players in China exceeded 90 million in 2002 and is rapidly climbing. Theatrical revenues have also declined precipitously. MPA's losses have now reached their highest level since 1995: \$178 million.

While imports of pirate OD product continue from the rest of Asia, the most alarming new development is the rapid and unexpected growth of pirate OD exports in 2003. MPA reports, for example, that during the first three quarters of 2003, customs officials in the U.K. have witnessed a significant escalation in seizures of pirate DVDs originating in China. In the first quarter of last year, 2,000 DVDs were seized. In the second and third quarters, over 77,000 Chinese origin DVDs were seized, in spite of NAPPWC's seizure of 24 lines through the end of the third quarter. These exports have also reached the U.S. According to the statistics from the Department of Homeland Security, seizures of "media" (including pirate optical discs) shipped from China to the United States accounted for US\$1.7 million and amounted to 6% of the total IPR seizures involving China in the first half of 2003.

The crisis in the local music industry continues for a fourth year in a row. This year, the industry has revised its methodology of calculating losses in China to count estimated displaced sales. Losses are estimated at \$286 million in 2003 with the piracy rate remaining at 90% of the market. Cassette piracy remains a significant factor in China but pirate CD production for the local market has taken a huge toll on domestic producers as well as on U.S. record companies, who also face severe market access restrictions. The recording industry remains encouraged by the cooperation of the courts in imposing civil damages against pirate plants but without real criminal remedies doubts whether the piracy level can decrease.

Piracy of entertainment software in OD formats remains prevalent in the Chinese market. High quality factory produced pirate entertainment software products (in the English language) are widely available in the market, though it is unclear whether production is taking place in China or elsewhere. CD-R burning of pirate material continues to increase. Sony Playstation® entered the market in full force in 2003 but faces massive piracy challenges. Pirate entertainment software for the console format sells for between US\$0.85 and \$3.00, as opposed to the US\$20.00 retail price for legitimate product (priced specifically for the Chinese market and significantly lower than the average retail price for the U.S. market). Unauthorized console machines, all containing mod chips allowing the play of pirate games, sell for around \$180 vs. \$240 for the legitimate console. Nintendo also announced its entry into the Chinese console market in 2003. The company will be marketing a console specifically developed for China in an effort to thwart piracy. It is critical that China amend its copyright law to ensure that enforcement against circumvention devices like mod chips can be fully effective, including making the trafficking in such devices a criminal offense which does not exist under current law.

Enterprise end-user piracy of business applications software causes the highest losses to the software industry, followed by counterfeiting and hard disk loading.

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. The software industry has struggled for years to persuade NCAC to devote sufficient resources to raiding/auditing enterprises that use unauthorized software. Very few such cases have been brought and concluded, and those few only very recently. The trend has been encouraging with respect to the Chinese civil court system's willingness to take on and decide end-user cases. There have been, as of this date however, only four such cases. The first two, involving AutoDesk and Adobe, were decided in favor of the copyright owner but evidence of actual damages (which were substantial—in one case over US\$250,000) ended up being rejected and the cases were decided under the new statutory damages provisions of the copyright law amendments. In one case the damages were RMB500,000 (US\$60,410) and in the other RMB115,000 (US\$13,894 including court costs). A third case was settled under pressure from the judge for only RMB50,000 (US\$6,040). In the fourth case, against a large interior design company in Beijing with 15 operations, NCAC finally agreed to raid two locations. After about eight months, NCAC awarded only RMB270,000 (US\$32,621) in fines and the copyright owner then sought to bring civil actions in the courts against four other branches of the enterprise. In October 2003, the Beijing High Court, for the first time ever, awarded damages based upon the number of copies times the retail price—a total in damages of RMB1.49 million (\$180,021). While this is a major victory for the software industry (the decision is on appeal), any significant dent in the rate of software piracy in China will need the widespread application of administrative enforcement by

NCA and the criminalization of enterprise end-user piracy. NCA has regularly balked at bringing administrative cases against enterprise end-users and when it has acted, has unfortunately not rendered deterrent penalties. Indeed, only a very few such administrative actions have been brought. The NCAC released a “Circular on Printing and Distributing Implementation Scheme for Movement Outline of Work Plan to Revitalize the Software Industry (2002-2005) Fight against Pirated Software.” This document refers to retail piracy, hard disk loading and Internet piracy but fails to mention enterprise end-user piracy, the most serious form of software piracy.

The government, through the State Council, the NCAC and the Ministry of Information Industry, should issue a policy statement or order, accompanied by a national public education campaign, requiring enforcement authorities to more vigorously enforce the law against enterprise end-user piracy.

Unauthorized use of software in government ministries remains a problem, even though in February 1999, the State Council reissued a “Notice” originally released by the National Copyright Administration of China in August 1995 ordering all government ministries at all levels to use only legal software (the so-called “Red Top Decree”). A number of other decrees requiring the legal use of software were issued after this, including a joint decree by four ministries. Some progress has been made but the problem continues to persist, causing large losses for the industry. The value of these decrees is in showing transparent implementation not only to the software industry but also, more important, to the private sector. The government should issue a public report on the status of its internal legalization.

While enterprise end-user piracy is the most pressing problem for the business software industry in China, counterfeiting and hard disk loading are also major problems. Indeed, China is the source of some of the most sophisticated counterfeit software anywhere in the world. Industry representatives report that high quality counterfeits are produced in large quantities both for the domestic Chinese market and for worldwide distribution, with software available in multiple languages. In order to deal with the counterfeit and hard disk loading problem, the Chinese government needs to: 1) undertake legislative reform to facilitate criminal investigations and prosecutions (including refining the standards for criminal liability for copyright and trademark offenses); 2) allocate sufficient resources to justice and enforcement officials charged with investigating these types of IP-related crimes; 3) engage in sustained crackdowns on the manufacture, distribution and sale of pirate software; and 4) strengthen mechanisms for both intergovernmental and public/private sector cooperation in this area.

Internet Piracy

Internet piracy continues to grow rapidly in China, with a reported 78 million people now on line (up from 58 million users in 2002 and 33.7 million in 2001). While China appears to recognize the problem and has reportedly recently issued new “Interpretations” dealing with Internet infringements and is working on more comprehensive regulations on the subject, further delays in establishing a full legal and enforcement infrastructure must be avoided.

A large number of websites provide fee-based or free download services (or streaming of musical recordings) without permission. A large number of Chinese ISPs are also hosting these infringing websites organized by overseas syndicates targeting users outside China—again involving China in the “export” of pirate products.

While Internet piracy has primarily targeted the music industry, motion pictures, business and entertainment software and academic journals are also significantly affected. For audiovisual works, this piracy, which is increasing, involves the sale of “hard goods” (VCDs and DVDs—all formats) as well as the illegal streaming of films. In the first seven months of 2003, MPA has issued 231 cease & desist letters to ISPs in China, requesting the ISPs to “take down” infringing websites. However, the compliance rate is an unacceptably low 37%. The new “Interpretations” and Internet regulations, plus more effective deterrent enforcement, must change this result.

For the entertainment software industry, piracy at Internet cafés remains a significant problem. In 2002, 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 has not been addressed. To our knowledge, there still have been no efforts to address this situation. In 2003, some entertainment software companies slowly began licensing Internet cafes; however, a large number of these establishments will continue to use both unlicensed and/or pirate video games unless the government begins to address this problem. Although the government reportedly announced, in early 2003, that it would launch a crackdown on Internet game piracy at Internet cafes—which would have been a promising step in combating such piracy—there has been no such action taken, as far as is known to the industry.

Book and journal publishers report a significant, and growing, Internet piracy problem, especially in the electronic academic journal sector, in 2003. Downloads of entire books is also a problem. In fact, publishers now report more illegal downloads of online journals as well as digital license violations in China than anywhere else in the world. Journal publishers have been working with librarians to try to minimize unauthorized file transfers and to prevent pirate “document delivery services” from developing, but the Chinese government must work to promote digital copyright compliance as well.

Internet piracy continued at crisis levels for the recording industry in 2003, and, as predicted in last year’s submission, the situation has worsened. 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 estimates that there millions of music files being offered for download and listening (through audio streaming) from over a thousand active pirate music websites in China.

RIAA/IFPI has been engaged in an active campaign to warn ISPs about their infringing activities. In a number of cases, RIAA/IFPI located sites that were offering new releases of Western artists for downloading with their MP3 files mainly stored in servers located in China.

One welcome development was the order issued in November by a court in Chengdu, China’s Sichuan Province, ruling against one of China’s most popular websites for illegal downloads of music, “Tianfu.” The plaintiffs were three Hong Kong record companies, and the damages awarded were significant, though still too low given the damage done, RMB370, 000 (US\$45,000). With many of these civil damage judgments of recent vintage, Judge Jiang Zhipei’s recent statement that “A [civil] judicial system to protect intellectual property right is now basically established in China” is coming closer to realization.

Piracy of Journals and Books

Last year's submission details the successful effort of AAP and other publishing industry associations in dealing with the print journal piracy problem.⁶ The improvements obtained in this area appeared to be holding in 2003, and the Chinese government is to be commended for its efforts in keeping this piracy rate low. However, publishers are noticing a significant increase in electronic journals piracy. The Chinese government must work diligently with right holders to ensure that the government's success in reducing print journals piracy is not undermined by these increases in electronic piracy.

Unfortunately, the successes against journal piracy have not carried over into efforts to combat piracy of other literary materials. Traditional reprint piracy continues to remain a major problem in China, particularly of higher education textbooks. Professors, through lack of education or lack of government instruction or enforcement, often openly solicit pirated goods. 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 latest Harry Potter book, "Harry Potter and the Order of the Phoenix," was again heavily pirated both in print and over the Internet.

A problem on the rise in China is illegal commercial photocopying. While photocopying has traditionally taken second place to print piracy in China, decreasing costs of photocopy paper and other necessary materials are resulting in increasing levels of this type of activity. This is especially prevalent among secondary schools and English language teaching programs. Many of these programs draw students by advertising their use of full color, high quality books, and then provide photocopies of books to students upon enrollment.

Counterfeiting problems also abound. IIPA has 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.⁷ 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. Publishers continue to report production of illegal translations, of both textbooks and bestsellers, largely by second-channel distributors. The scope of this problem grows larger in smaller cities and provinces.

Piracy and Counterfeiting of Cartridge-Based Entertainment Software

China remains the primary source of counterfeit and pirate cartridge-based entertainment software products. Counterfeit Nintendo products continue to be produced in mass quantities in China, and exported throughout Asia, Latin America, the Middle East and Europe. Nintendo has undertaken significant anti-piracy efforts in Guangdong Province, though these actions have been taken largely under the trademark law to protect the globally famous "Game Boy" brand. While trademark actions have generally proven easier to prosecute than

⁶ See IIPA's 2003 Special 301 country report on the People's Republic of China, pages 25-26, available at <http://www.iipa.com/rbc/2003/SPEC301PRC.pdf>.

⁷ Id.

copyright cases, available penalties are equally low. The efforts of the Chinese administrative authorities (specifically in Guangdong Province), in cooperation with Nintendo representatives, have resulted in raids against a number of retail shops and at least 19 factories, resulting in the seizure of 1,286,356 counterfeit Nintendo products. The raids against factories, however, have not resulted in a significant reduction in factory-capacity to produce counterfeit cartridge-based video games. There have been many instances where, despite a raid on the factory premises and an ostensible shutdown and seizure of the infringing goods, the very same factory continues its operations, albeit under a different corporate name and at a different location.⁸ Unfortunately, as noted, fines remain woefully low to make any real dent in the marketplace. Raids against these factories have also revealed that they are (directly or indirectly) connected with Hong Kong and Taiwanese factories (for instance, funding was often supplied by a Taiwanese national, or a Hong Kong “affiliate” office often served as a conduit for transmitting orders to the factory on the Chinese mainland).

Other Types of Piracy

Other types of piracy also continue in China, including the unauthorized public performance of U.S. motion picture product, which continues mostly unchecked in hotels, clubs, mini-theaters and even government facilities; television piracy, particularly at the provincial and local level; and cable piracy (over 1,500 registered systems) which routinely pirate U.S. product.

WHILE RAIDING AND SEIZURES CONTINUE AT HIGH LEVELS, LOW ADMINISTRATIVE FINES AND THE LACK OF CRIMINAL ENFORCEMENT AGAINST PIRACY HAVE MEANT THAT THERE IS LITTLE, IF ANY, DETERRENCE IN THE COPYRIGHT ENFORCEMENT SYSTEM.

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) give Vice Premier Wu Yi the “publicly announced” authority to intervene at all levels and to 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, convict and impose deterrent fines and

⁸ For example, in October 2002 and January 2003, Chinese administrative agencies raided the “Electronic Dragon” production facilities at which over 49,000 counterfeit *Game Boy Advance* cartridges and components were confiscated. During post-raid surveillance, the company found that the factory had resumed operations in a different location under a new company name. A subsequent raid on the new location was conducted in July 2003 and more than 78,000 counterfeit *Game Boy Advance* cartridges and semiconductor chips were seized. The principals all fled China and authorities have been able to take no further action against them. Such actions by the pirates and difficulties enforcing against them indicates how well-developed and sophisticated these manufacturers and distributors have become. Such organized criminal behavior demands a coordinated national response from the Chinese government.

prison sentences on pirates. None of these objectives has as yet been either fully articulated let alone accomplished.

In IIPA's 2003 submission, we detailed the lack of deterrence in the system despite significant raiding and massive seizures of pirate product. Little has changed in 2003, though there have been a few notable successes in the administrative tribunals and the civil and even criminal courts in 2003, as detailed both above and below. While these are positive steps, they have not resulted in piracy rates being reduced; indeed, in some industries they have increased.

IIPA also recently learned that the Ministry of Culture plans to introduce a new "hologram" system ostensibly to combat piracy in the local market.⁹ IIPA members do not favor this solution to the problem of piracy. Not only are holograms themselves generally prone to counterfeiting (and thus would "legitimize" otherwise pirate product), but are costly to right holders, burdensome, and cause delays in releasing legitimate product (and again will foster piracy). Most important, they have proven generally ineffective in practice, are thus counterproductive and are no substitute for the kind of aggressive and coordinated enforcement so desperately needed in China. We urge the Ministry to reconsider its decision and to consult fully with right holders with experience in this area.

Administrative Enforcement

As noted above, NAPPWC appears to be the most effective administrative enforcement mechanism in China, with a continued large number of raids, seizures and arrests. NCAC's title verification program continues to work well for only one industry—the motion picture industry—with, from 1996 to August 31, 2003, a total of 10,021 title verification requests submitted by MPA, and 3,477 titles found to have been unauthorized.

However, NCAC's record in levying deterrent fines and actually conducting, for example, actions against corporate end-users of business software has been abysmal, particularly in light of the fact that other critical remedies, such as under the criminal law, are virtually unavailable to right holders.

Even with the myriad arrests by NAPPWC, the lack of transparency in the enforcement system, particularly the lack of industry access to levels of fines and other penalties for infringement, makes it almost impossible to judge whether there have been advances in deterrent enforcement. We do know, however, that the piracy rates remain universally high and thus we have no alternative but to conclude that the administrative enforcement system is not having any serious impact in the marketplace. This is not to say that industry does not welcome or does not fully support these efforts, simply that the Chinese government must focus on **deterrence** as the key to reducing piracy rates. To date it has not done so. The following summarizes the deficiencies in the administrative enforcement system:

- 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.

⁹ China Plans Anti-Piracy Seals to Combat Counterfeiting, Associated Press, February 10, 2004. http://online.wsj.com/article/0,,BT_CO_20040210_000792.00.html

- The system is almost entirely nontransparent; it is, with some recent exceptions, 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.
- There is still “local protectionism” by administrative agencies involving politically or financially powerful people engaged in pirate activities.
- NCAC continues to fail to use its authority to deal with the all-important problem of corporate end-user software piracy.

CHINA ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES
Number of raids/searches conducted	1,409
Number of administrative cases brought by agency	811
Number of defendants found liable (including admissions/pleas of guilt)	803
Ratio of convictions to the number of raids conducted	57%
Ratio of convictions to the number of cases brought	99%
Number of cases resulting in administrative fines	N/A
Total amount of fines levied	N/A
US\$0-\$1,000	N/A
\$1,001-\$5,000	N/A
\$5,001-\$10,000	N/A
\$10,000 and above	N/A
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	N/A

Criminal Enforcement

IIPA and its members (and the USG) have pressed China for years to use its criminal law to prosecute pirates, since it is 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 (Article 225 of the Criminal Code), 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 announced commitment from the State Council/Vice-Premier level 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 Supreme People’s 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 consistently had difficulty in gathering information on the use of the criminal law against acts of piracy. When we hear of convictions, we discover that they are

usually under other laws, like pornography or “illegal business,” not piracy. China publicly announces the seizure and destruction of pirate product on a regular basis, but seems to rarely publicly announce a jail term or deterrent fine for piracy *per se*. This must change. This year, however, one IIPA member was able to unearth some statistics: In 2002 19 criminal cases were brought and concluded (with reported sentences of six months to 6 years) in Beijing involving that industry’s products—apparently none in any other city. In 2003, 30 cases were filed in Beijing and Shanghai, with again, 80% in Beijing. Only 3 of these cases were brought under the criminal “piracy” provisions, Article 218, the high threshold having been met in those 3 out of 49 total cases over 2 years. The rest of the cases were basically censorship cases brought under Article 225 of the Criminal Law. Jail terms were, however, significant in most of these cases, indicative of the fact that a criminal prosecution, as contrasted with an administrative proceeding, is likely to result in some deterrence—if properly and widely publicized and directly identified with piracy.

We have also heard from Chinese representatives that there have been other criminal convictions specifically prosecuted under the criminal piracy provisions, though the ones cited have involved Chinese origin works and all have admitted that these cases are very, very few. We have inquired on many occasions about the existence of criminal convictions purely for piracy offenses and we have received no confirmations.¹⁰

Bringing criminal cases was not only an obligation in the US-China 1995 Memorandum of Understanding and [Enforcement and Market Access] Action Plan, but is a clear TRIPS requirement. China is not now in compliance with either that bilateral agreement or TRIPS. We again urge the USG to press the State Council to fulfill its commitment to recommend to the Supreme People’s Court that its “Interpretations” be significantly amended to make criminal prosecutions more available. As further discussed below, the State Council has ultimate authority to order that these amendments be made.

Except for the statistics cited above, no other industry reports having a criminal case—for piracy—brought or concluded with respect to their products. Indeed, the recording industry, which has brought myriad civil cases against licensed OD factories, continues to voice its frustration that the criminal authorities (the Public Security Bureau) are not taking actions against underground plants where civil actions are not possible.

While the copyright industries welcome actions under Article 225 of the Criminal Law, real deterrence won’t be brought to the criminal system until a significant number of widely publicized cases are brought under Articles 217 and 218. For this to happen, there must be political will and modifications of the Supreme People’s Court’s criminal law “Interpretations,” discussed below.

¹⁰ 2002 may have marked the year of the first pure piracy case ever, involving a factory in Guangdong Province, where two defendants were 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. There were other 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. 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.

CHINA CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES
Number of raids conducted	41
Number of VCDs seized	23,252,990
Number of DVDs seized	8,478,590
Number of CD-Rs seized	12,575
Number of investigations	1,082
Number of VCD lab/factory raids	16
Number of cases commenced	31
Number of Indictments	5
Number of defendants convicted (including guilty pleas)	15
Acquittals and dismissals	-
Number of cases Pending	26
Number of factory cases pending	N/A
Total number of cases resulting in jail time	4
Suspended prison terms	
Maximum 6 months	-
Over 6 months	-
Over 1 year	-
Total suspended prison terms	-
Prison terms served (not suspended)	
Maximum 6 months	2
Over 6 months	-
Over 1 year	5
Total prison terms served (not suspended)	N/A
Number of cases resulting in criminal fines	N/A
Up to \$1,000	
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied (in US\$)	N/A

CIVIL ENFORCEMENT

As noted above, one positive development is the increasing sophistication and effectiveness of the IPR courts throughout China. For this reason, Chinese right holders and, increasingly, U.S. right holders have used the civil system as a means to bring some deterrence to the enforcement system in China, given the demonstrated failures of the criminal and administrative enforcement systems. The recording industry has brought over 150 cases against factories and many others against distributors and retailers since it began to use civil litigation in 2001. Also included were further cases involving illegal distribution of MP3 files on the Internet. Many of these cases have been completed and some of these cases resulted in significant damages. It is reported that these cases have had a deterrent effect, particularly 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 eight civil cases having been brought under the recent Copyright Law amendments during the past 12 months, all of them successful. In Beijing, two cases against factories were settled while six cases against three retail outlets resulted in court findings against the retail operators in each case. The difficulties we reported on last year appear to have been ironed out.¹¹

¹¹ See IIPA's 2003 Special 301 country report on the People's Republic of China, page 31, available at <http://www.iipa.com/rbc/2003/2003SPEC301PRC.pdf>.

As discussed in detail in prior submissions, 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.”

These changes are significant improvements, though U.S. right holders have continued to have some problems in successfully bringing civil cases in China, particularly the business software industry.

We have reported in detail above on the four civil cases reported by BSA involving software piracy. BSA remains concerned, however, that evidence preservation orders are still coming too slowly and are too difficult to obtain, in view of China’s TRIPS obligations in this important area.

In the area of piracy of literary works—in a major salutary development—a Beijing Intermediate Court rendered a judgment in September 2003 (in a case commenced in 2000) which sought damages against the Beijing New Oriental School. This school 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. (Over 10% of the 800,000 students taking the TOEFL test worldwide come from China). New Oriental had been unsuccessfully sued before and the size of the infringement was staggering, with New Oriental adding an average of 10,000 students per month and with a nine-month waiting list. The court finally concluded a case that had been rife with procedural hurdles, and awarded damages of US\$1.2 million to both ETS and GMAT. Again, this bodes well for improving civil enforcement in China.

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. As reported above, in 2003, 231 cease and desist letters were issued and the compliance rate decreased to 37% from 41% in the prior year. We now await a review of the new Internet “Interpretations” and the timely issuance of the new Internet regulations with the hope that this system can improve significantly.

The recording industry, facing massive Internet piracy in China, has continued to issue cease and desist letters to offending ISPs and websites, FTP sites etc. in 2003. 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 has brought a number of civil suits against ISPs and websites, which have been reported, in earlier submissions. Some success has been achieved.

STATUTORY LAW AND REGULATIONS

The new copyright law amendments and regulations remain deficient in implementing China's TRIPS obligations as well as the provision of the WIPO "Internet" treaties.

The amendments to China's 1990 copyright law were adopted on October 27, 2001, and IIPA's 2002 and 2003 submissions provide great detail on both the positive changes, as well as the deficiencies, in these amendments.¹² The amendments sought to bring China into compliance with its WTO obligations and added many provisions that sought to implement the requirements of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The deficiencies detailed in these prior submissions were not fixed by the December 2001 regulations governing computer software, or the regulations to the Copyright Law which became effective on September 15, 2002.

Again worthy of particular emphasis, however, is the failure of these amendments to address the lack of TRIPS-compatible criminal remedies, probably the single most important change that must be made to open up the Chinese market closed by staggering piracy rates of over 90%.

Section 217 and 218 of the Criminal Code criminalizing copyright piracy must be amended to comply with TRIPS; the Supreme People's Court's "Interpretations" of these provisions must likewise be amended.

IIPA has noted in prior submissions that the criminal piracy articles of Chinese law are deficient on their face, and thus violate TRIPS Article 61, which requires the criminalization of all "copyright piracy on a commercial scale." These articles must be amended, *inter alia*, (1) to criminalize end-user piracy; (2) add reference to all the exclusive rights now provided in the law, particularly the new WIPO treaties rights and unauthorized importation; (3) add criminalization of violations of the anti-circumvention provisions and rights management information; (4) criminalize Internet offenses that are without "profit motive" but that have impact on rightholders "on a commercial scale"; (5) eliminate distinctions between crimes of entities and individuals; and (6) increase the level of penalties overall.

¹² See IIPA's 2003 Special 301 country report on the People's Republic of China, pages 33-36, available at <http://www.iipa.com/rbc/2003/2003SPEC301PRC.pdf>. 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).

We have noted that there is an urgent need to revise the current SPC “Interpretations” of the existing criminal law Articles 217 and 218. We understand that this has now been completed at this time. It is critical that the “threshold” not only be significantly reduced or eliminated (particularly with Internet offenses when not done “for profit”), but that the other procedural deficiencies are remedied as well. These deficiencies include calculating income at pirate prices (rather than the legitimate price in China) and calculating income only on the basis of what is found to have actually been distributed/sold, not what pirate product may be sitting in a warehouse. This is one of the highest priorities for U.S. industry. Such a commitment is contained in the U.S.-China IPR WTO 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 must continue to press the State Council to redeem this commitment.

Application of the Copyright Law to Internet disputes: Supreme People’s Court “Interpretations” and the need to ratify the WIPO Copyright and Performances and Phonograms treaties and amend the Copyright Law to fully meet all those obligations.

IIPA has recently been told that new “Interpretations” were recently issued by the PSC. They remain in Chinese and IIPA has not yet had a chance to analyze them. In last year’s submission, we detailed the positive and deficient provisions of the existing “Interpretations” and do hope that these observations were taken into account. Since Internet piracy is growing in China, it is critical that the legal infrastructure for protecting copyright on the Internet -- through amendments to the copyright law, to the copyright and software regulations (which we understand are in process) and to the SPC “Interpretations” – be modernized to take into account the substantive law and enforcement associated with this type of piracy. We commend the Chinese authorities for being aware of these issues and hope that early modifications can be made in a transparent process that takes into account the vast experience our industries have accumulated globally on this critical topic.

IIPA also urges China to ratify the WIPO “Internet” treaties and to make the amendments to the Copyright Law and regulations to fully implement their obligations. The amendments that IIPA believes are necessary were detailed in the 2003 submission.¹³

China must eliminate its onerous market access restrictions and create a competitive marketplace that can meet domestic demand.

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

¹³ See IIPA’s 2003 Special 301 country report on the People’s Republic of China, pages 33-36, available at <http://www.iipa.com/rbc/2003/2003SPEC301PRC.pdf>.

product has been approved for distribution. In addition, there are other investment and ownership restrictions that must be abolished.

Book and journal publishing: In IIPA's 2003 submission, we detailed some of the existing barriers for the U.S. publishing industry. By December 11, 2004, many of these barriers must disappear in accordance with China's WTO commitments. At that time, publishers must be afforded full trading rights (the right to freely import directly into China), and be permitted to engage (with wholly owned companies) in wholesale and retail distribution activities. But there are other essential activities for which China's WTO commitments must be clarified and/or its existing regulations repealed, including the right to publish and print books and journals in China without restrictions (except for a transparent, quick and non-discriminatory censorship regime) and the right to invest freely in all manner of publishing related activities without ownership restrictions.

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 are 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. China must begin immediately to dismantle all these archaic, protectionist and discriminatory restrictions.

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 this limitation. China should begin now to eliminate all barriers to the import and distribution of films, including all investment and ownership restrictions.

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 airtime should be raised to at least 50%, and the prime-time quotas should be eliminated altogether. China should begin now to eliminate all these discriminatory restrictions.

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

because it inhibits the development of the television market. Indeed, all these restrictions and barriers 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. All such restrictions should be abolished along with other foreign investment restrictions embodied in the June 1995 foreign investment guidelines, which restrict investment, on a wholly owned basis, in other important segments of the film, video and television industries.

Taxation: The theatrical and home video industries have been subject to excessively high duties and taxes in China, totaling over 50% and 75%, respectively. These levels have a significant impact on revenues and continue to hinder market access. With its accession to the WTO, however, China committed to reducing import duties by approximately one third and will now apply a specific rate of duty to both theatrical (reduced from 9% to 5%) and home video imports (reduced from 15% to 10%). These should be fully and fairly implemented.

Internet regulation: To monitor the Internet, economic and telecommunication-related ministries have staked out their turf on the web and have drafted competing regulations that are often vague and inconsistent. The State Council has been charged with creating a clear, effective and consistent Internet policy. Until the State Council completes its work, however, the landscape of existing regulations will remain confusing, with the Internet governed by regulations promulgated by a dizzying array of ministries and agencies. A stable, transparent and comprehensive set of regulations is necessary to guide the development of the Internet and e-commerce in China. China has also attempted to regulate and censor content on the Internet through regulation and technological controls. For example, the State Secrecy Bureau announced in January 2000 that all websites in China are to be strictly controlled and censored. In addition, the State Council set up the Internet Propaganda Administration Bureau to “guide and coordinate” website news content in April 2000. Jointly issued by the State Press Publication Administration and the Ministry of Information and Industry, the Provisional Regulation on Management and Control of Internet Publications became effective August 1, 2002, providing an additional mechanism for the government to intensify supervision of newspapers, periodicals, books and audio-visual content available online. The Ministry of Culture published “Interim Regulations on the Administration of Internet Culture,” effective July 1, 2003. These regulations require that providers of Internet-based content (with any broadly defined “cultural” attributes) receive MOC approval prior to distribution in China.

From a technological standpoint, China maintains firewalls between China and foreign Internet sites to keep out foreign media sites, and regularly filters and closes down Chinese sites that are seen as potentially subversive. In September 2002, for example, both the Google and Alta Vista search engines were blocked without explanation or acknowledgement by the government. While the industry respects the rights of China to ensure that its population is not subject to content that may be questionable under Chinese values, the breadth of China's restrictions on the Internet are unprecedented.

Such restrictions will likely limit the growth in the sector and severely restrict the ability of MPA member companies to distribute product via this nascent distribution medium.

Recording industry:

The recording industry is also severely hampered both in the fight against piracy and in helping to develop a thriving music culture in China by the many and varied market access and investment restrictions that affect the entire entertainment industry, specifically:

Censorship: Only legitimate *foreign-produced* music must be approved by Chinese government censors. Domestically produced Chinese sound recordings are NOT censored. China should terminate this discriminatory process. Censorship offices are also woefully understaffed, causing long delays in approving new recordings. Censorship should be industry-administered, as in other countries. If not possible, steps must be taken to expedite the process so that legitimate music can be promptly marketed, preventing pirates from getting there first. For example, staff shortages must be filled. In the near-term, China should be pressed for a commitment to (1) end discrimination in censorship; and (2) complete the approval process within a reasonable period (e.g., a few days). In the long term, censorship should be abolished.

Producing and publishing sound recordings in China: U.S. record companies are skilled at and desirous of developing, creating, producing, distributing and promoting sound recordings by Chinese artists, for the Chinese market and for export from China. However, onerous Chinese restrictions prevent this from occurring. For example, for a sound recording to be brought to market, it must be released through an approved “publishing” company. Currently only state-owned firms are approved to publish sound recordings. China should end this discrimination and approve foreign-owned production companies.

Further, production companies (even wholly owned Chinese ones) may not engage in replicating, distributing or retailing sound recordings. This needlessly cripples the process of producing and marketing legitimate product in an integrated manner. China should permit the integrated production and marketing of sound recordings.

U.S. record companies may market non-Chinese sound recordings only by (1) licensing a Chinese company to produce the recordings in China or (2) importing finished sound recording carriers (CDs) through the China National Publications Import and Export Control (CNPIEC). China should permit U.S. companies to produce their own recordings in China and to import directly finished products.

Distribution of sound recordings: Foreign sound recording companies may own no more than 49% of a joint venture with a Chinese company. However, the recently concluded “Closer Economic Partnership Agreement” (CEPA) between China and Hong Kong permits Hong Kong companies to own up to 70% of joint ventures with Chinese companies engaged in distributing audiovisual products. China should grant MFN status to U.S. record producers per the terms of the CEPA.

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PRIORITY WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ARGENTINA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2004.

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 copyright industries face continuing enforcement hurdles 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 2003. However, raids and seizures did not translate into prosecutions and deterrent sentences. A package of copyright amendments to Argentina's 1933 Copyright Act, aimed at elevating the law's substantive obligations, was circulated in mid-2001 to selected industry representatives, but remains under review within the Ministry of Justice.

Actions which the Argentine government should take in 2004: This list of recommendations is almost a verbatim recitation of IIPA's proposals for 2003.

- Commit to a coordinated 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 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 law to 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.
- Implement the obligations of the two WIPO digital treaties into domestic law;
- Extend terms of protection for phonograms and other works not measured by the life of the author to 95 years from publication;
- 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.

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: 1999 – 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	30.6	53%	26.0	60%	78.2	47%	76.0	46%	50.0	33%
Entertainment Software	NA	NA	NA	NA	NA	95%	141.4	94%	90.3	92%
Business Software Applications ³	NA	NA	10.7	62%	72.5	62%	92.9	58%	156.7	58%
Motion Pictures	30.0	45%	30.0	45%	30.0	45%	32.0	45%	32.0	45%
Books	4.0	NA	NA	NA	8.5	NA	8.5	NA	8.0	NA
TOTALS ⁴	NA		66.7		189.2		350.8		337.0	

Copyright Piracy in Argentina

Piracy levels for all industry sectors remain high in Argentina.⁵ It is critical to note that the estimated annual losses have been declining over the past few years due to the Argentine economy's overall instability, not because of lower piracy levels in-country.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, and is available on the IIPA website at <http://www.iipa.com/pdf/2004spec301methodology.pdf>. For more information on the history of Argentina under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² Estimated 2002 trade losses for the recording industry reflect the impact of significant devaluation during 2002. The level of pirate product in 2003 is based on a third-party survey to improve accuracy of the statistics.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimates of \$70.7 million at 62% were identified as preliminary; BSA finalized its 2002 numbers in mid-2003, and those revised figures are reflected above. While there may be other minor factors, such as an overall drop in sales in 2002, the overwhelming reason for the differential between 2001 losses and 2002 losses was the drop in value of the Argentine currency relative to the U.S. dollar, from an average exchange rate of US\$1-AR\$1 in 2001 to US\$1-AR\$0.35 in 2002. This means that local losses of equal magnitude in the two years, when converted to dollars, would only be one-third as great in 2002 as in 2001. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in Argentina, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in Argentina.

⁴ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to U.S. copyright-based industries in Argentina were \$126.7 million for 2002. IIPA's revised 2002 loss figures are reflected above.

⁵ IIPA also has filed 301 reports on Argentina in previous years; they all are posted at <http://www.iipa.com/countryreports.html>. Argentina is a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program. During the first 11 months of 2003, \$407.6 million worth of Argentine goods (or 14.6% 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 62.7% increase over the same period in 2002.

The entertainment software industry suffers from several forms of piracy in Argentina including: (a) the importation of cartridge-based videogames (primarily from the People's Republic of China and Hong Kong) as well as console-based videogames (primarily from Malaysia) entering via Iquique, Chile or Colonia, Uruguay; (b) reproduction-on-demand whereby entertainment software is burned onto blank CD-Rs, and; (c) 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. Although a few raids have been taken place in downtown Buenos Aires, the interior of the country is plagued with street vendors selling pirate product. States like Tucuman, Mendoza, Santa Fe and Cordoba have been practically lost to pirates.

The book publishing industry reports widespread photocopying of English language materials and computer books and texts in Argentina. Commercial copyshops located near the universities, as well student unions and organizations within the universities, are the primary sources of illegal photocopying. Piracy of business software programs 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.⁶ The filmed entertainment industry reports that retail video piracy still is the biggest and most inextricable problem its companies face in Argentina. Because of the relatively low DVD-player penetration and the slow growth in DVD sales, neither the legitimate DVD market nor the incidence of optical disc piracy is as significant as VHS piracy. The majority of such film piracy is CD-R, although the potential migration to the less common but high quality DVD-R remains a significant worry for the industry.

Copyright Enforcement in Argentina

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.

Criminal enforcement has always been cumbersome, costly, and time-consuming and without deterrent impact on the market for copyrighted products. Consequently, BSA has relied on civil enforcement, given the difficulties with criminal enforcement. Notwithstanding procedural delays before obtaining and conducting a civil search in business piracy cases, the mediation session required by civil procedure facilitated the resolution of quite a few cases by the BSA during 2003.

⁶ The Business Software Alliance (BSA) reports that between 1995 and 2001, the information technology sector in Argentina created 58,000 new jobs. See BSA, "Eighth Annual Global Software Piracy Study" (research compiled by International Planning and Research Corporation, published June 2003), available at <http://global.bsa.org/globalstudy>.

Copyright Law in Argentina

Argentina's 1933 Copyright Act (as amended) has been under review for years. Argentina already has deposited its instruments of access to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty; full implementation into national law is the next necessary step.

A package of copyright amendments, circulated in July 2001 to selected industry representatives, apparently is still under review within the Ministry of Justice. This 2001 package failed to address many of the enforcement deficiencies and required further clarification with respect to other key issues for the copyright industries.⁷ These deficiencies needed to be corrected before introduction to the Congress if Argentina is to have a modern copyright law which promotes e-commerce and investment. We do not have any recent news on whether more copyright law proposals have been developed by Argentine government agencies.

In 2001, a bill was introduced and approved by the Chamber of Deputies which would enhance measures to aid in the anti-piracy fight. It would allow the courts to impose compulsory and progressive damages in copyright infringement cases and also the destruction of infringing material and reproduction equipment. Plaintiffs in a copyright infringement case could also be compensated for damages assessed as (a) the real damage suffered by the plaintiff or (b) a judicial assessment within a minimum of \$1,000 and a maximum of \$1,000,000 (punitive damages) for each infringement, whichever is higher. The status of this bill in the Senate is not known.

Customs Valuation

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. The film and recording industries 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. Notwithstanding this, Law 25.856, passed in January 2003, gave activities (e.g., development, manufacturing, promotion) relating to software the status of an "industry," which is the first step toward obtaining approval of a bill to promote the software industry, which is currently under review in Congress. This bill would grant certain tax benefits to software companies during a transition period of 10 years.

⁷ IIPA's 2002 Special 301 submission identified some of the key problems in this 2001 proposal (see pages 63-64 at <http://www.iipa.com/rbc/2002/2002SPEC301ARGENTINA.pdf>). In fact, separate comments filed by the motion picture, recording and business software industries in Argentina also identified numerous problems with the draft, including: inadequate scope of exclusive rights; overbroad exceptions to protection; inadequate definitions regarding the ownership of copyrighted materials; onerous contractual provisions; inadequate terms of protection; failure to establish a comprehensive definition of audiovisual work and the public performance rights; failure to create deterrent provisions for the circumvention of technological measures of protection; inadequate enforcement remedies on injunctive relief, seizure authority, the scope and level of criminal penalties, *ex officio* authority at the border; and onerous deposit requirements.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

BRAZIL

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Brazil remain on the Special 301 Priority Watch List in 2003. Brazil continues to fail to provide “adequate and effective protection” for U.S. copyrights as required by the GSP trade program; the potential penalty facing Brazil is the loss of its GSP benefits and/or the suspension of its GSP beneficiary country status.

Overview of key problems/achievements in 2003: High levels of copyright piracy and inadequate criminal enforcement in Brazil have harmed both Brazilian and U.S. creators for many years. The initiation of a concerted, national plan to tackle copyright piracy that achieves tangible results is long overdue. In 2003, the Brazilian Congress held hearings and established a commission to investigate piracy but, as yet, this laudable congressional action has had little impact on encouraging the Administration to engage in concerted leadership and nationwide enforcement actions, and piracy continues to flourish.

Piracy across all industries continues in the more “traditional” format (such as hard-goods piracy of pirate videos, audiocassettes, cartridge- and disc-based entertainment software; unauthorized loading of business software in corporate settings; unauthorized photocopies of books/journals). In recent years, the Brazilian market has embraced digital piracy involving optical media. Pirates domestically produce infringing products on digital media, with much of the source material — blank optical media materials (CD-Rs) — being imported or smuggled from abroad. In addition, pirated optical media product, primarily manufactured in Southeast Asia and Paraguay, still enters the Brazilian market because of weak border measures. Significant improvement is needed in border enforcement, an issue critical to all copyright industries because of the influx of piratical product and blank media used in CD-R burning. Organized crime elements, from within and outside Brazil, exercise control over the production and distribution of infringing copyrighted products. Internet piracy is an increasing problem. Piracy persists even as the industries continue to increase their anti-piracy investigations and foster public awareness through educational campaigns.

The most serious deficiency in Brazil involves ineffective, non-deterrent criminal enforcement. While good laws are in place, enforcing the laws has met with abysmal results. 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 six 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. While there has been some welcome cooperation between certain Brazilian authorities and the industries, consistent and systematic anti-piracy results from the Brazilian government are slim. In mid-2003, amendments to the criminal code were issued to increase penalties for copyright infringement and streamline certain procedures. This hopefully will counter the longstanding problem of judges releasing defendants via suspended sentences instead of serving jail time. The Interministerial Committee, created by the executive branch in 2001, has taken very little concrete, organized anti-piracy action.

One area of moderate success in Brazil involves civil copyright infringement cases that have resulted in 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 is 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).

Measures which could be taken by the Brazilian government in 2004: In 2003, the copyright industries had hoped that the administration of President Luiz Inácio Lula da Silva would reinvigorate a national approach to reducing copyright piracy, something which had been missing from the prior Cardoso Administration. In order to support nationwide improvement in copyright enforcement, several years ago IIPA outlined numerous goals/objectives of an effective national anti-piracy plan as well as examples of the kinds of concerted anti-piracy actions needed at the national level to reduce copyright piracy in Brazil.¹ An illustrative (non-exhaustive) list of potential actions might include the following:

Enforcement in General

- Prepare and conduct a national anti-piracy campaign, as a matter of national priority and security.
- Significantly improve and implement deterrent criminal enforcement, including continuous raiding, effectively prosecuting and convicting copyright pirates in all industry sectors.
- Establish federal task forces across the country, creating an anti-piracy coordinator at each State office, which would include formal and specific operational coordination with industry sectors, reporting to the Congressional Committee on Piracy.
- Create a centralized unit of police officers to work on important copyright cases, and provide them with specific guidelines to conduct their cases.
- Direct the Federal Police and Customs to intensify inspections along country borders, and adopt more efficient norms to intercept contraband, blank CD-Rs and pirate pre-recorded CD imports. Require the Customs authorities to keep statistical records of seizures of products.
- Initiate more investigations using the tax evasion element of the Software Law (for example, using the Policia Fazendaria).
- Expedite issuance of search warrants, especially in criminal cases where sometimes it has taken up to 6 months to obtain such warrants.
- Ensure that all intellectual property in use in government information technology (IT) systems is properly licensed.
- Support the various enforcement agencies working with the copyright industries in anti-piracy actions, use organized crime units in IPR actions, and increase resources and training for these agencies.

Prosecution

- Speed up criminal copyright infringement prosecutions and expedite judicial orders to destroy confiscated piratical and counterfeit products.

¹ The IIPA proposed “action plan” in Brazil first appeared in our April 2001 post-GSP hearing brief. That list was repeated in IIPA’s 2003 Special 301 submission (pages 61-62), posted at <http://www.iipa.com/rbc/2003/2003SPEC301BRAZIL.pdf>.

- Assign dedicated prosecutors in each State to lead anti-piracy campaigns that include major investigations of organized crime groups as well as keeping major commercial areas free of pirate product street vendors.
- Secure convictions against businesses that are replicating and distributing optical discs illegally.

Criminal Convictions / Civil Judgments

- Apply the new criminal code amendments in copyright infringement cases.
- Assign piracy cases to judges trained and experienced in IP cases with a view to establishing specialized IP courts.
- Reduce bonds and increase timely decisions in civil copyright infringement cases.
- Create a specialized court which adjudicates copyright infringement cases.

BRAZIL **ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY** *(in millions of U.S. dollars)* **and LEVELS OF PIRACY: 1999 – 2003 ²**

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	30%	120.0	35%	120.0	33%	120.0	33%	120.0	35%
Records & Music	338.7	52%	320.4	53%	302.0	55% (MC99% CD47%)	300.0	53% (MC98% CD35%)	300.0	MC95% CD35%
Business Software Applications ³	NA	NA	260.8	55%	272.3	56%	264.1	58%	319.3	58%
Entertainment Software ⁴	125.7	56%	NA	NA	NA	99%	248.2	94%	116.2	90%
Books	14.0	NA	14.0	NA	14.0	NA	18.0	NA	18.0	NA
TOTALS	NA		715.2		708.3		950.3		873.5	

² In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Brazil in 2002 were \$771.4 million. These figures were later revised to include final BSA 2002 statistics and those are reflected above. (Note that the estimated losses for 2002 likely underestimate total losses due to the severe fiscal decline of the Brazilian economy that year.) The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B to IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in Brazil, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in Brazil.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of IIPA's Special 301 report (see link above).

BILATERAL ENGAGEMENT ON COPYRIGHT ISSUES

Over the past decade, the U.S. government has devoted a significant amount of time and resources to support improved copyright protection and enforcement in Brazil.⁵ In addition to ongoing bilateral contacts, the U.S. government has used the trade tools of both the Special 301 program and the Generalized Systems of Preference (GSP). Over the past year, Brazil has not responded sufficiently to the specific items identified by the U.S. government in USTR's 2003 Special 301 review of Brazil.⁶

Brazil has been under a GSP intellectual property rights review since January 2001. Both IIPA and MPAA provided testimony at Brazil's October 2003 GSP IPR hearing.⁷ Brazil has been on notice for years that it must take appropriate action to meet its "part of the bargain" in receiving these unilateral trade benefits. Unless Brazil complies with its GSP IPR obligations, the potential penalty it faces is the loss of its GSP benefits and/or the suspension of its GSP beneficiary country status.⁸

In the context of the regional Free Trade Agreement of the Americas (FTAA), the U.S. and Brazil are now co-chairs. IIPA believes that the IPR chapter in the FTAA must be a forward-looking, technologically neutral document that sets out modern copyright obligations. In fact, Brazil has *already* implemented most of the substantive provisions — both copyright-specific and enforcement-related — which are contained in other U.S. free trade agreements, into its domestic law. The challenge for Brazil remains its commitment to enforce its already existing laws.

⁵ We incorporate-by-reference into this 2004 Brazil Report our 2003 Special 301 report on Brazil, which is posted at <http://www.iipa.com/rbc/2003/2003SPEC301BRAZIL.pdf>. For more details on Brazil's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁶ Press Release 2003-28, Office of the United States Trade Representative, "Special 301" Report Finds Some Progress on Intellectual Property Protection, but Significant Improvements Needed." Posted at <http://www.ustr.gov/releases/2003/05/03-28.pdf>. USTR's specific comments on Brazil are posted at <http://www.ustr.gov/reports/2003/special301-pwl.htm#brazil> (excerpt follows): "... Despite having adopted modern copyright legislation that appears largely to be consistent with TRIPS, Brazil simply has not undertaken adequate enforcement actions against increasing rates of piracy. In particular, very few prosecutions and deterrent convictions result from raids. There have been recent efforts to move toward enforcing copyright protection in the tri-border area. We look forward to stepped up enforcement actions by the Brazilian Government in the near term. In addition, we encourage the incoming Brazilian administration to: initiate legislation that strengthens the Brazilian enforcement framework against copyright and trademark infringement; commit resources to a broad enforcement action plan that effectively coordinates the work performed by several federal and state authorities, including the police, customs authorities, tax authorities and the judiciary; and investigate and raid illegal domestic manufacturing sources, distribution channels and key distributors. ... We will continue to monitor Brazil's progress in these areas, including through the ongoing GSP review that was initiated by USTR in 2001."

⁷ IIPA Pre-Hearing Brief on Brazil IPR Practices to the GSP Subcommittee, Sept. 26, 2003, available at http://www.iipa.com/gsp/2003_Sep26_GSP_Brazil.pdf.

⁸ During the first 11 months of 2003, \$2.3 billion worth of Brazilian goods (or 14% 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 17.5% increase over the same period in 2002.

COPYRIGHT PIRACY IN BRAZIL

The copyright industries report that there has been no noticeable improvement in the piracy situation in 2003. Most of the industries continue to place estimated piracy levels at about 50% (or above) of the market, 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. In addition to more traditional forms of piracy which the industries have been fighting for decades, piracy involving optical media and the Internet present more enforcement challenges.

The recording industry reports that legitimate sales continue to plummet due to piracy.

Recording piracy in Brazil has grown exponentially over the past five years, from 5% of the CD market in 1997 to 52% in 2003. Over the last three years, recording piracy in Brazil has directly contributed to the closing of over 2,000 legal points of sale and in the loss of about 55,000 jobs, according to IFPI, representing the international recording industry.⁹ Estimated trade losses due to sound recording piracy, in both compact disc and audiotape format, in Brazil amounted to \$338.7 million, with an overall piracy level of 52%. In 2003, the 52% piracy level translated into a volume of 94 million pirate units. All the major labels have released very inexpensive CDs in an attempt to fight piracy (in fact, CD music prices in Brazil are among the lowest in the world), but these efforts have not been successful. Record sales revenue in Brazil dropped some 18%, and unit sales dropped 25% during 2003. Meanwhile, recording companies continue to slash artist rosters and personnel to deal with a shrinking market.

RIAA continues to emphasize the point that pirate audio products are increasingly manufactured locally on CD-Rs. Local illegal replication through the use of CD burners and CD-R problem is so sophisticated that investigations and actions are very difficult to accomplish without the full intervention and commitment by federal authorities. The regional CD and CD-R piracy problem is linked to Paraguay, and unrestricted imports via airports and seaports in Brazil and its links to Southeast Asia—primarily of smuggled or misdeclared blank CD-R's. Pirate and bootleg music cassettes and CDs still enter Brazil mainly from Paraguay via Foz de Iguaçu, Corumba, Uruguaiana, Salto de Guairá and Ponta Pora, and also through the ports of Santos, Paranagua, Recife and Salvador, as well as at the airports at Manaus, Rio de Janeiro, São Paulo (Congonhas, Guarulhos and Viracopos) and Foz de Iguaçu. Paraguay acts as a bridge to deliver blank CD-Rs intended for piracy and some pirate CD product from Taiwan and China. Piracy has changed from an international industrial profile to a domestic semiprofessional effort — the distribution of product, however, remains highly organized. The audiocassette market in Brazil remains entirely dominated by piracy, as it has been for the past several years; almost 75% of this pirate product in Brazil affects Brazilian repertoire

Audiovisual piracy in Brazil continues, with VCD and DVD piracy on the rise.

MPPA continues to report that audiovisual piracy rates remain high, pirate product continues to be ubiquitous, and piracy continues to worsen while anti-piracy enforcement continues to be generally ineffective. Estimated 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 30% in 2003.

⁹ IFPI (International Federation of the Phonographic Industry), Commercial Piracy Report 2003, Brazil, posted at <http://www.ifpi.org/site-content/antipiracy/piracy2003-priority-territories.html>.

MPAA reports several piracy trends in Brazil. First, Internet hard goods sales of pirate optical discs are increasing more rapidly than any other form of digital piracy in Brazil. MPA has tracked a steady increase in the incidence of Internet sites for hard goods sales, including both DVD-R and CD-R recordings of its member company product. Second, retail video store piracy remains a problem because of the continuing importance of video store revenue for local home entertainment operations. About a third of the VHS video market is pirate; most pirate videos are titles in current home video release. The majority of these are back-to-back copies made in the stores, with a growing percentage originating from small reproduction centers that distribute to stores. Particularly worrisome is the ability of these reproduction centers to counterfeit anti-piracy security mechanisms such as exclusive production colors of VHS cassette boxes. Third, optical disc piracy is increasing in Brazil, with a piracy rate approaching 15% of the market and accounting for approximately 25% of total seizures of pirate product. Moreover, optical disc piracy is showing a definite growth trend. Most pirate optical discs are CD-Rs, with only limited numbers of DVD-Rs. Inevitably, however, the growing DVD user-base will open the door for strong growth of pirate DVD or DVD-R. With the impressive growth of optical disc hardware, especially in the middle class population, this illegal competition will inevitably have a negative impact. Sales of low-quality CD-Rs are growing quickly in the street markets in urban centers. CD-Rs and DVD-Rs are also available in Ciudad del Este, Paraguay, on the Brazilian border, for illegal introduction into Brazil. MPAA has seen some improvements in piracy and anti-piracy on an *ad hoc* basis in limited areas of the country. These improvements, however, are based more on the good will of a few individual enforcement authorities than on any improvement in or commitment by their governmental institutions.

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 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.

With respect to end users, BSA has concentrated most of its efforts on bringing civil enforcement actions against companies, which has had some impact on the level of piracy. However, there still exists a considerable business segment in Brazil that is far from having legalized. 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. Because of lengthy delays, civil infringement cases related to the business software take many years to be adjudicated (currently more than 200 civil cases are awaiting judgment). In 2002, In 2003, 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.

The entertainment software industry suffers from both optical media piracy imports as well as locally produced pirate product. The predominant form of entertainment software piracy in Brazil 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, the entertainment software

industry is not aware of any underground factories producing pirated optical media in the country. Factory-produced pirate console discs are usually produced in Asia (e.g., Malaysia) and exported to Brazil through Paraguay, or increasingly through other transshipping countries. Similarly, pirate entertainment software in cartridge formats continue to be shipped from Asia (primarily China) through Paraguay, sometimes assembled there before being transported across the border into Brazil. Estimated trade losses due to entertainment software piracy in 2003 were \$125.7 million, with an overall estimated piracy level of 56%.

There are several venues through which pirated entertainment software 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.” Most of these operations are highly organized in nature. It should be noted that although 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. There is also a large amount of infringing videogame product appearing on Portuguese language auction sites. The Entertainment Software Association (ESA) works with the local association ABES on anti-piracy actions. In many of the Internet cases handled through ABES, the compliance rate for requests for takedown of infringing product has been quite satisfactory. In terms of retail piracy, large quantities of piratical and counterfeit factory-produced discs appear in the “promocenters,” which are small retail booths renting space in larger markets and galleries. In addition to 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.

Unauthorized photocopying continues to undermine the legitimate book publishing markets. 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. Estimated trade losses due to book piracy in Brazil remained at \$14 million in 2003. 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 the annual number of unauthorized photocopies at 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). The ABDR has not been successful, nor are university publishers willing to give up reproduction rights. This RRO (reproduction rights organization) and another called APPDR are planning to merge. The few contracts that exist will be suspended pending these negotiations and the arrangements of new payment schedules. The potential future problem may involve unauthorized translations as more U.S. publishers begin to enter that specific market in Brazil.

Overview of 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. (See industry-by-industry discussion, above).

Reports indicate that there are nine CD plants, with 11 lines, in Brazil; most of these plants are believed to be operating legitimately and are not a significant source of pirated OD product. 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. 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 discs (CD-Rs) which are being imported as contraband into Brazil. The entertainment software industry has seen both Asia-source counterfeits as well as locally produced (i.e., through commercial burn-to-order operations) discs find their way to Brazilian street markets. The legitimate DVD market grew rapidly in 2003 and pirate product is beginning to fill some of the new demand.

Internet piracy in Brazil is increasing. All the industries report that the Internet is increasingly being used in Brazil as a means to distribute pirated product. The audiovisual, business software, recording and entertainment software industries all report positive responses to their campaigns to takedown websites and webpages in Brazil which offer piratical copyright content. The business software industry reports positive responses to its campaign to takedown offers in auction sites in Brazil, achieved with cooperation of the auction sites

The audiovisual industry has seen an increase in the use of the Internet as a distribution system for optical disc piracy, usually offered on web sites for delivery COD. In 2003, the MPA Brazil office coordinated with federal police in 14 raids on reproduction centers using the Internet for commercial distribution of CD-R or DVD-R; seven persons were arrested and are being processed for criminal copyright infringement. MPA sent over 2,400 notices to ISPs in Brazil regarding the unauthorized distribution of copyrighted material.

ESA's domestic enforcement program also had some success in its online enforcement efforts, resulting in the take down of approximately 381 pirate websites and over 4,000 auction listings for pirate products from April through June 2003. In a significant development, the entertainment software industry, along with the recording, motion picture and business software industries, also obtained agreement from "Arremate.com" (an auction site) to receive notices of infringement from right holders regarding auctions of pirate products as well as to immediately take down auction listings for pirate products. The auction site also agreed to modify its seller registration policies to allow disclosure of the registration information of online sellers of pirate products to the local associations.

The recording industry reports that through a local internet anti-piracy campaign 755 websites were taken down and 20 more are under investigation. In addition, the campaign produced the first indictment for internet piracy in the city of Cuiutiba against a website named mp3forever.com in August 2003.

Organized crime remains a significant concern. Prosecutors of organized crime-related cases now include piracy on their agenda (along with narcotics, money laundering, etc.). For example, this linkage was made at their national meeting February 18, 2003 in Porto Alegre. During 2003, the business software industry continued to promote awareness and education campaigns 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.

BRAZIL LACKS A NATIONAL PLAN TO FIGHT PIRACY

The Inter-Ministerial Committee (IMC) has failed to implement any coordinated national anti-piracy plan. It would appear, at first glance, that the most tangible step taken by Brazil toward addressing a national anti-piracy plan in recent years was its March 13, 2001 decree implementing the Inter-Ministerial Committee to Fight Piracy (IMC).¹⁰ Appearances can be deceiving, however. IIPA and its members noted at the March 2001 GSP hearing 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.

Under the Lula Administration, the IMC has maintained its organizational structure and remains completely ineffective. An indication of IMC's lack of action is demonstrated by the Congressional decision not even to invite the IMC Director or any of the IMC's members to testify during the current Congressional investigation into piracy and anti-piracy enforcement. This IMC, still headed by the Ministry of Justice, spent at least its first full year of the Lula administration discussing issues but without taking any action (and with almost no participation by the private sector). Its only actions have been to release a brochure explaining the dangers of piracy and to co-sponsor a conference in October 2003 to discuss piracy. Its approach to piracy has been primarily rhetorical in nature, and it has taken little concrete enforcement or enforcement-coordination action. The IMC's paralysis is a reflection of the anti-piracy paralysis in the Ministry of Justice which, under the Lula administration, has completely stopped the few advances made late in the Cardoso administration (such as coordinated national raids, training courses and an MOJ/Industry anti-piracy information database).

The Brazilian Congress steps up to investigate piracy. The Brazilian Congress has taken steps to examine and confront the piracy problem. In late May 2003, the Brazilian Chamber of Deputies convened a parliamentary commission to analyze the adverse economic impact of copyright piracy, smuggling and tax evasion. Starting in mid-June 2003, the Commission on Parliamentary Inquiry (CPI) held hearings; many IIPA member associations and their local representatives testified at those hearings. The industries continued to request concrete results in effective criminal anti-piracy actions to lead to a reduction in the high levels of piracy which afflict Brazil.

The CPI, originally set to end its investigation at the end of September 2003, requested an extension of its efforts. The CPI's work will now last until June 2004. The CPI will continue its investigation before releasing its report to the Speaker of the House. The report is expected to be critical of the Administration's lack of concrete action against piracy and will hopefully make specific recommendations to the Ministry of Justice regarding action by the Secretaria de Seguraca Publica in establishing federal task forces, both geographic and territorial, establishing an anti-piracy coordinator at each State office, establishing formal and specific

¹⁰ 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.

operational coordination with industry and reporting actions/results to the follow-up Congressional Committee on Piracy.

In parallel with the CPI proceedings, some of the CPI's members created a permanent congressional presence (political and physical) in the form of a non-partisan Anti-Piracy and Anti-Tax Evasion Parliamentary Movement (*Frente Parlamentar de Combate à pirataria e à Sonegação*). This Congressional Committee on Piracy movement was launched in the first week of September 2003. It comprises members of Congress (110 members have indicated interest in participating although local reports estimate that the core group will be 8 to 10 members), with a formal leadership group. This committee will make permanent the current work of the CPI. Although most such congressional committees are "virtual," this committee is expected to have a permanent office and staff. Significantly, the initial indication is that this congressional committee will be run operationally by the private sector via a Secretary chosen and paid by industry. As such, there appears to be some optimism that this committee will continue to press the Administration for enforcement, will follow up its recommendations and will continue to investigate corruption and important cases. We understand this committee will most likely begin its activities after the CPI concludes, which likely means starting up in the June 2004 time frame.

The bottom line is that the present Administration has not gone beyond limited rhetorical acknowledgement of the piracy problem affecting Brazil, notwithstanding the Congressional investigation and the fact that piracy's principal victims are Brazilian creators. While the Brazilian government can present some positive movement against piracy, such improvement comes from institutions and individuals acting outside the Administration's efforts. Neither the CPI, nor the State-level task forces and organized crime investigations, nor the municipal efforts to attack piracy, are due in any manner to the Administration's efforts. In fact, the lack of participation by the Lula Administration presents a real danger that the efforts of members of the Brazilian Congress and the efforts of a few law enforcement individuals will continue to receive nothing more than rhetorical support and will never reach the level of effective action that only federal coordination and support can bring.

Although there is no federal coordination, some organized enforcement actions at certain state and local levels have been encouraging. Although a few Brazilian police units have conducted a substantial number of raids, these raids have resulted in very few criminal prosecutions. Police raiding activities are inconsistent, with the level of attention varying throughout the country. For example, the copyright industries report good cooperation with certain Brazilian states. Specifically, the state government of São Paulo has created a specialized police unit for piracy cases, the DEIC, which is part of the Organized Crime Office. The municipality of Porto Alegre in Rio Grande do Sul has established a municipal effort to fight piracy.

The State of Rio de Janeiro announced the creation of a special anti-piracy task force in mid-2002, and activated its Special Anti Piracy "Delegacia" (Precinct) some three months ago. Some industries report that this task force is beginning to conduct some limited operations, and is beginning to show limited results in a region that has historically been subject to corruption and ineffective anti-piracy enforcement. Nevertheless, this task force (which notably is state-funded and not a federal effort) is a small operation with human and financial resources far below the need shown by the private sector, both copyright and trademark. Ironically, the first such state anti-piracy office — that in São Paulo — is currently enmeshed in investigations of corruption that reach to higher levels and include the arrest of police officers and commanders. Other state-level anti-piracy efforts have arisen on an *ad hoc* basis, including similar police task

forces in Goiás and Pernambuco; some prosecutors have also expressed interest in anti-piracy actions as a form of organized crime. Note, however, that these efforts are not initiated by the current Administration, are not federal efforts, are not part of an overall government strategy and are certainly not permanent.

CRIMINAL CODE IN BRAZIL

The Brazilian criminal code was amended in 2003 to clarify and strengthen certain procedures and penalties which had hobbled effective enforcement throughout the 1990s. The Brazilian penal code was reformed in 1993; however, those 1993 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. In addition, the levels of fines in the 1993 amendments were subsequently overwhelmed by inflation, and should have been tied to the indexing system in the general provisions of the Brazilian penal code.

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 commenced issuing suspensions, the copyright industries exhibited serious concern that these regulations were not supporting the creation of a system which has expeditious and deterrent penalties. In fact, as detailed in the enforcement chart below, most copyright cases have been cycled through this system of suspensions which in turn resulted in no deterrence.

On July 1, 2003, the Brazilian criminal code was amended to increase criminal sanctions for copyright infringement and amend certain procedures. Effective August 1, 2003, this new Law 10695 amended Article 184 of the Criminal Code by raising the minimum penalty from one year to two years in prison for persons convicted of illegally reproducing, distributing, renting, selling, acquiring, smuggling into the country, or storing protected copyright works with the intent to profit from reproductions. A fine will also apply in addition to the prison sentence.¹¹ The maximum penalty will apply if the violation involves supplying unauthorized works to the public via cable, optic fiber, satellite, airwaves or any other method of transmission for a profit. Those persons infringing copyright without intent to profit are subject to detention of three months to one year or a fine. These amendments are significant because penalties of one year or less of jail time, at the state level, could be commuted to a fine, or a judge could suspend a case indefinitely (Law 9099-95). The amended law also codifies procedures to seize and destroy contraband and provides judges authority to dispose of seized equipment in a way that ensures it will not be used for commercial purposes.

Although almost six months have passed since these amendments entered into effect, it still is too early to tell how Brazilian prosecutors and courts will implement them into their

¹¹ The law changes the "unit" of fines and bonds from "daily salary" units to "monthly minimum wage" units. In other words, the minimum fine or bond is now 240 Reais (US\$82) instead of 1/30th of that amount. The judge sets the fine/bond, not the law. The maximum penalty continues to be four years in jail. In a recent MPA case, the judge set the bond at 4,800 Reais (US\$1,644), the highest amount MPA has seen.

criminal practice. Suspensions in copyright cases have been the norm, thus contributing to the lack of effective deterrence against copyright piracy in Brazil. The industries are working with prosecutors to enforce the amendments. The recording industry reports that thus far they have not experienced any major obstacles regarding the deposit of seized merchandise; official experts continue working with samples of the seized goods. The amendment affecting experts' determinations is also positive in that it allows a single private party with technical knowledge to make a determination; such a determination, therefore, could be made by an industry expert. MPAA reports that the amendment law is helpful in three ways: (a) it requires the judge to assign custody of the evidence to the injured party — in the past, judges have turned evidence over to suspects who have in turn altered the evidence in ways prejudicial to MPAA's case; (b) police are more inclined to view piracy as a serious crime worth their time; and (c) suspects apprehended by police are now held until released by a judge, costing the suspect at least time, a bond and perhaps attorney fees.

However, the business software industry has expressed concern over the 2003 criminal code amendments in that they fail to increase sanctions for the infringement of computer programs because the one-year sanction for computer software infringement still appears in the separate 1998 Software Law, unchanged by the amendments to the criminal code. The software industry can only use the criminal code amendments to the extent those sections do not conflict with existing law. This means that the procedural provisions regarding the expert reports and the custodial aspects of evidence in the criminal code can be used by the software industry. However, because the minimum penalty of the separate software law (one year) has maintained unchanged, criminal infringement cases brought by the software industry will still be subject to automatic suspension under Law 9099-95.

COPYRIGHT ENFORCEMENT IN BRAZIL

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 (depending on the jurisdiction), but these result in few prosecutions. The business software industry reports moderate success in its ability to obtain deterrent civil judgments.

Criminal Copyright Enforcement in Brazil is Not Effective, and Not Deterrent.

Police raids are numerous, yet inconsistent among the various Brazilian states.

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 in cases of copyright infringement.

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. Federal police officials have jurisdiction over the types of crimes that are generally viewed as producing large-scale corruption (such as tax evasion, drug trafficking and money-laundering). Most industry-led enforcement efforts end up being handled by state and local police officials.

The ESA reports several police actions against videogame piracy were taken last year. In April through June 2003, the local police ran several raids against retail and promocenter outlets, as well as street vendors, in São Paulo and Rio de Janeiro, resulting in the seizure of approximately 300,000 pirated game products (including PC and console games). At a raid on a retail market in São Paulo, a huge uproar ensued, with store owners attempting to close their stores before the police gained entry. However, efficient police action resulted in apprehending these store owners, who were then escorted to the police station for questioning. The police, based on information provided by ESA's domestic program, also took action against two CD software labs in the Santa Catarina region, where 2,200 master copies well as reproduction equipment were seized. There have also been investigations conducted against individuals who run commercial CD-burning operations, such as a raid on an apartment in São Paulo that resulted in the seizure of more than 2,400 infringing discs along with two CD burners. ESA's domestic enforcement program has also participated in law enforcement training events in São Paulo as well as the City of Campinas. So far in 2004, the ESA sees a positive enforcement trend, with more police actions focused on laboratory operations involved in the production of pirate optical media, including game software. Three raids against small- to medium-sized operations, mostly involved in CD-R burning operations, were accomplished in January 2004 in São Paulo.

Brazilian prosecutors pursued very few criminal cases in 2003, despite numerous complaints filed and raids run. 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 and a general lack of resources. Over the last six years, the ratio of convictions to the number of raids run each year is less than 1%. 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.

Non-deterrent penalties have been the unacceptable norm. In those very few criminal copyright cases which do reach judgment, the sentences are primarily small fines, probation and community service. Between 1995 and 2003, most of the cases resulted in suspensions or dismissals under Law 9099-95, a law which permits judges to sentence first-time offenders with up to two years' probation and monetary damages. Recent amendments to the Brazilian criminal code and the criminal procedural code are aimed at improving prosecutions and sentencing. However, IIPA and its members do not yet have sufficient information to evaluate how the new criminal code is being implemented by prosecutors and judges, given that the amended law has only been in effect for less than six months. MPA reports that the number of sentences in 2003 remained nearly the same as in 2002, and although MPA expects an increased number of indictments in 2004 and 2005, they do not expect to see results of the new law for some time.

Delays by police, prosecutors and judges in criminal cases. It takes a long time for a criminal case to wind its way through the Brazilian courts. 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).

BRAZIL
CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS
1998 to 2003

	RECORDING INDUSTRY	MOTION PICTURE INDUSTRY	BUSINESS SOFTWARE INDUSTRY	TOTALS
ACTIONS	1998 (1999) [2000] {2001} -2002- 2003	1998 (1999) [2000] {2001} -2002- 2003	1998 (1999) [2000] {2001} -2002- 2003	1998 (1999) [2000] {2001} -2002- 2003
Number of complaints filed with police	530 (154) [153] {188} -206- 190	1,320 (832) [1,957] {1,750} -- 1,825 -- 2,995	34 (118) [134] {273} -253- 351	1,884 (1,104) [2,244] {2,211} -2,284- 3,536
Number of raids conducted	680 (777) [1,011] {621} -870- 1,018	2,381 (1,671) [1,535] {1,354} -- 1,640 -- 2,995	34 (118) [134] {273} -253- 175	3,095 (2,566) [2,680] {2,248} -2,763- 4,188
Number of pirate copies seized	2.85 million (1.40 million) [3.22 million] {2.73 million} -3.78 million- 5,686,253	243,581 (212,063) [220,878] {225,785} -253,805 VHS, 56,037 OD- 254,230 VHS and 134,417 CD-R	NA (NA) [212,898] {351,944} -355,156- 574,341	+3.09 million (1.61 million) [3.65 million] {3.3 million} -4.4 million- 6.64 million
Number of cases suspended or dismissed	NA (18) [28] {39} -40- 29	148 (235) [146] {87} -144- 23	0 (0) [0] {0} -0- 0	+148 (253) [174] {126} -184- 52
Number of defendants convicted (including guilty pleas)	5 (3) [11] {7} -11- 8	1 (0) [2] {13} -13- 14	0 (1) [0] {0} -0- 0	6 (4) [13] {20} -24- 22

BRAZIL
CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS
1998 to 2003
(continued)

ACTIONS	RECORDING INDUSTRY	MOTION PICTURE INDUSTRY	BUSINESS SOFTWARE INDUSTRY	TOTALS
	1998 (1999) [2000] {2001} -2002- 2003	1998 (1999) [2000] {2001} -2002- 2003	1998 (1999) [2000] {2001} -2002- 2003	1998 (1999) [2000] {2001} -2002- 2003
Criminal sentence issued	Minimal fines (Minimal fines) [Minimal fines] {Minimal fines} -Ranging from: 1-year community service; 2 years community service and fines; 2 years in jail plus small fine; 6 years in jail plus 20 days' fine- Minimal fines	Community service (None) [Community service] {up to 2 years, all given probation} - community service, probation - Minimum 1-year, maximum 18-months, all suspended	None (2 years' probation plus fine <\$600) [None] {None} -None- None	Minimal (Minimal) [Minimal] {Minimal} -Minimal- Minimal
Ratio of convictions to the number of raids conducted	0.74% (0.39%) [1.09%] {1.13%} -1.26%- 0.79%	0.04% (0%) [0.13%] {0.96} -0.79%- 0.47%	0% (0.85%) [0%] {0%} -0%- 0%	0.19% (0.16%) [0.49%] {0.89%} -0.87%- 0.53%

Note: Statistics for this enforcement chart are provided by IFPI Latin America (IFPI), the Motion Picture Association (MPA), and the Business Software Alliance (BSA). The recording industry has reviewed and revised its statistics from 1999 to 2002, and the revisions are reflected above. Also, 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.

Brazilian Border Measures Remain Ineffective.

The copyright industries have long recommended that controls at the major transshipment points be strengthened. Products from Paraguay and those shipped to Brazil's free ports of Santos and Paranagua should be inspected and thoroughly documented. Although much of the music and audiovisual piracy has turned to domestic production, infringing copies of entertainment software (both in silver disc and cartridge format), and misdeclared and infringing blank CD-Rs, continue to enter as infringing imports. 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.

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. To stem the flow of this product, IFPI and Phillips 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 under-valuation and monitoring entry of known pirate CD-R labels. Unfortunately, nothing has been done yet.

Significant Damage Awards Have Been Issued in Civil Copyright Cases, But Lengthy Delays and High Bond Requirements Pose Problems.

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. The level of damages awarded in these software cases is unprecedented worldwide with respect to software copyright infringement suits.

Such success is not without some glitches. First, the civil court system in Brazil is notoriously overloaded, inefficient, and slow. 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 to four years before a judgment is issued by the relevant superior court. Due in large part 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. Second, Brazilian courts also continue to require extremely high expert fees and bond requirements. In some BSA cases during 2003, for instance, bonds of US\$50,000 to US\$100,000 were required, and BSA had no option but to terminate the cases without seizure of the defendant. On 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.

COPYRIGHT LAW IN BRAZIL

1998 Copyright Law and 1998 Software Law: Under its 1994 agreement with the U.S., Brazil promised to enact legislation on computer software and to pass amendments to its copyright law by making "best efforts" to accomplish this by January 1, 1995. Finally, both bills were enacted in 1998. The Software Law (Law No. 9.609) 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. As a statutory matter, Brazil has already implemented its substantive copyright obligations compliant with, and even beyond, those required by the TRIPS Agreement. These include protection for temporary copies. Brazil already affords a term of life plus 70 years for works and 70 years following first publication for sound recordings. Brazil also has implemented at least some of the provisions of the two WIPO Internet treaties to include provisions against circumvention of technological protection measures. Brazil has even provided preset statutory damages for copyright infringement, a key enforcement tool which has resulted in the imposition of deterrent-level civil damages. Although these 1998 laws provide good levels of substantive protection, they are not enforced in practice (see discussion, above). In addition, the Brazilian

government unfortunately has refused to date to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, despite the fact that its copyright law is quite comprehensive and the Brazilian creative community relies on copyright protection to reach the global market.

Tax evasion: 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, it seems clear that the Brazilian IRS (Receita Federal) and the respective state tax authorities are dedicating no resources to pursue these tax evasion cases. 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.

ADDITIONAL ISSUES

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. No specific action has yet been taken to create these courts. Consideration of this remedy to help ameliorate the sorry state of anti-piracy enforcement would be welcomed.

Government software management: The Brazilian government should be encourage 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. The government should work closely with the private sector in this regard.

Non-tariff barriers — 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) 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

BULGARIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Bulgaria be added to the Special 301 list in 2004, and placed on the Priority Watch List.

Overview of key problems: Copyright piracy, especially optical media piracy, returned to Bulgaria several years ago after a brief absence in the late 1990s. Despite a string of warnings from Bulgaria's trading partners and the private sector, the Government of Bulgaria and the various enforcement agencies have dramatically failed in clamping down on the endemic piracy problem that continues to affect the commercial interests and investment of both Bulgarian and foreign copyright industries. Even with repeated training of enforcement officials and relentless involvement of copyright sector representatives in legal actions against IPR infringement, the track record of prosecutors and courts in bringing an end to the massive copyright crime in Bulgaria is highly disappointing at best.

Large quantities of pirated CDs, especially of music, computer and entertainment software, continue to be easily available in all major cities. Problems with both the growing local production and the importation of pirated optical disc (OD) media abound. Unwarranted and misplaced deregulatory zeal by the Bulgarian government in 2002 led to the withdrawal of a critical element of the existing CD regulatory regime, despite express prior guarantees given both to the United States and the European Union. Bulgaria's CD plant licensing system is currently up for renewal, and efforts are underway to implement a new optical media licensing system. After almost two years of work, the Council of Ministers submitted draft legislation addressing optical media regulations to the Bulgarian Parliament in January 2004. In 2002, the copyright industries submitted comprehensive model legislation to the relevant Bulgarian ministries. However, the legislative package adopted by the Council of Ministers is completely inadequate to strengthen Bulgaria's flawed OD regulatory system. In fact, government officials have consistently rebuffed the expertise offered and proposed amendments advocated by several copyright industry sectors to strengthen the legislative proposal over the past 18 months.

On the enforcement front, the copyright sectors report mixed results. MPAA notes that BullAct, the local anti-piracy organization for the audiovisual industry, has a very active anti-piracy program and enjoys excellent cooperation from law enforcement authorities. In other instances, the national police, however, fail to cooperate at critical moments. Pre-raid leaks are the norm, not the exception. A significant hurdle remains poor prosecutions; cases simply do not progress. The situation further deteriorated when, through a change in the Criminal Procedure Law, damaged parties were not any more allowed to join criminal prosecution cases. In the few cases that do reach final judgment the sentences are not deterrent, are usually suspended, and involve low fines. The Bulgarian courts also continue to demand excessive and cumbersome proof of rights ownership and chain of title, even in blatant infringement cases. They have difficulties in expeditiously issuing injunctive orders and fail to impose sufficient damages in civil copyright infringement cases.

Actions which the Bulgarian government should take in 2004

Law Reform

- Incorporate all amendments submitted by the copyright industry into the draft optical disc regulation in order to create an effective regulatory regime equipped to prevent resurgence of large-scale illegal optical disc production;
- Increase criminal sanctions in the penal code for copyright infringement up to deterrent levels;
- Amend the criminal procedural code to (1) introduce presumption of rights ownership for criminal infringement cases; (2) allow rightsholders or their representative organizations to assist in preparing expert opinion reports concerning infringement of their intellectual property rights; (3) improve existing procedures to reflect the specifics of the digital environment with regard to the investigation and prosecution of computer, software and Internet-related crimes; (4) provide for criminal liability of the managers of entities where IP crimes are committed; (5) re-establish the option for the rightholder to file a civil claim at any stage of the criminal trial; and (6) refine the definition of “injured party” in the criminal trial to cover rightsholders who have incurred a loss of profit;
- Instruct the judiciary and the courts to accept affidavits from rightsholders as sufficient proof for their identification. At present, rightsholders 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);
- Introduce a country-wide regulatory instrument prohibiting street sales of cultural and copyrighted products, outlawing any sale or offering for sale of optical discs and other carriers of copyrighted materials in street stalls;

Enforcement

- Take actions to enforce the current regime regarding title verification and CD plant licensing (and, to the extent the OD regulatory system is revised in 2004, training efforts will be needed to educate enforcement authorities about the new law);
- 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 *ex officio* 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;
- Improve border enforcement to halt the importation and exportation 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.

BULGARIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	4.0	25%	3.0	20%	3.0	20%	3.0	25%	4.0	25%
Records & Music	7.0	80%	7.2	83%	3.0	65%	NA	NA	NA	NA
Business Software Applications ²	NA	NA	6.2	68%	8.3	75%	8.1	78%	9.1	80%
Entertainment Software	NA	NA	21.9	91%	NA	84%	NA	NA	NA	NA
Books	0.3	NA	0.3	NA	0.3	NA	NA	NA	NA	NA
TOTALS³	NA		38.6		14.6		8.1		NA	

Bulgaria last appeared on a USTR Special 301 list in 1998, after the conclusion of a Section 301 trade investigation. For the last two years, IIPA has requested that Bulgaria be reinstated on the Special 301 list primarily due to the growing optical disc piracy and a continuing lack of improvement of IPR enforcement. The arrival of a new government in 2001, promises of Bulgarian reform and improvements of the optical disc regime and enforcement have deflected placement on the Special 301 lists, yet those root problems have not been resolved at all.⁴

Bulgaria presently has several agreements with the U.S. which contain IPR obligations. First, 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

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in the IIPA’s 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA’s statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA’s February 2003 Special 301 filing, BSA’s 2002 estimated losses of \$7.0 million and levels of 72% were identified as preliminary. BSA’s revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Bulgaria (including U.S. publishers) and (b) losses to local distributors and retailers in Bulgaria.

³ In IIPA’s 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Bulgaria were \$39.4 million. IIPA’s revised loss figures are reflected above.

⁴ For more details on Bulgaria’s history in the Special 301 process, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission. IIPA’s previous Special 301 submissions can be accessed at <http://www.iipa.com/countryreports.html>.

to adopt, including procedures and remedies against copyright infringement, and a commitment to join the Geneva Phonograms Convention by the end of 1992. In September 2003, the U.S. government welcomed the European Commission's decision which endorses a political understanding which preserves the U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Bulgaria. This BIT is important as it provides a broad provision on national treatment. Second, the U.S. and Bulgaria exchanged letters in April 1995, 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. Third, the 1995 Title Verification Agreement contained specific enforcement-related obligations, requiring the Bulgarian government to implement optical disc plant licensing and title verification systems. In addition, Bulgaria is a beneficiary country under the Generalized System of Preferences (GSP) trade program.⁵

COPYRIGHT PIRACY IN BULGARIA

Piracy is widespread, with optical disc and Internet piracy on the rise.

The piracy of U.S. sound recordings and music remains unacceptably high in Bulgaria, with around 80% of all foreign sound recordings sold being illegal copies. There is a large and fast growing pirate CD-R market. This phenomenon has been exacerbated by the fact that there are now three CD-R plants and two DVD-R plants in Bulgaria; therefore the likelihood of blank CD-R production moving straight into the pirate chain of unauthorized burning and distribution is high. Streets and markets in Sofia and other major cities are full of pirated CD-R music, DVD-R music and film. Pre-recorded CDs from Russia, including MP3 collections, are in abundance. Some of the pirated music in CD-R form is imported from Russia and possibly Ukraine, though a greater proportion is likely to come from unauthorized recording onto Bulgarian produced blank media, and does constitute a significant part of the music piracy problem in Bulgaria. Estimated trade losses, not including the devastating effects of sharply growing Internet-piracy in and from Bulgaria, to U.S. companies due to recording piracy in Bulgaria is placed at \$7.0 million in 2003.

The entertainment software industry reports that piracy at Internet cafés has become a major problem. Criminal syndicates appear to be in control of a number of Internet cafés where either pirated or unlicensed entertainment software is in use at these establishments. CD-R burning is also allowed on the premises, with the customer ordering from a catalogue of pirate video games and then making a copy using the café's equipment — all at \$1.00 per copy. These syndicates have also taken to organizing themselves into informal "associations," indicating the highly organized nature of the piracy in this sector. Pirate entertainment software products remain readily available at retail stores and in market stalls and kiosks. While CD-R burning occurs with greater frequency at the Internet cafés, silver (or factory-produced) discs remain the primary form of pirate product in the country, most of which is shipped from Russia, Serbia and Montenegro and the Former Yugoslav Republic of Macedonia. Piracy of cartridge-based entertainment software products is also of concern with pirate and counterfeit product still shipping from China through the United Arab Emirates.

⁵ During the first 11 months of 2003, \$37.4 million worth of Bulgarian goods (or 9.3% 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 44.2% increase over the same period in 2002. The U.S. government is currently reviewing Bulgaria's eligibility under the GSP program; a review of a reverse preferential treatment issue was initiated in 2003.

The Motion Picture Association of America (MPAA) reports that the most significant problem its industry faces in Bulgaria continues to be the threat posed by pirate digital media. Pirate optical discs and the Internet have completely overtaken traditional videocassette piracy. The popularity of home burning has led to an increase in the number of DVD-Rs and CD-Rs on the market, with pirates increasingly choosing to make their own discs rather than run the risk of having their shipments detained by customs. The local anti-piracy organization, BullACT, has seized almost 27,000 CD-Rs containing unauthorized films in 2003. Pirate DVDs from Russia are also beginning to appear on the market with Bulgarian and Russian subtitles. DVDs from the Far East are also available, but they typically contain only Chinese, Spanish and French subtitles. These DVDs are believed to be used for export to Kosovo and Macedonia. Several successful seizures along the border have led to the dismantling of a network that used Bulgaria as a transshipment point for pirate DVDs. Pirate DVDs currently make up 50% of the total pirate optical disc market. In addition, Internet cafes are serving as the conduit for the increase in burned discs. Consumers use high-speed access to download films and burn them onto CD-Rs and DVD-Rs. The cafes also serve as centers to rip and copy DVDs and to trade film files. It is estimated that Bulgaria currently has over 5,000 cafes that require constant monitoring to ensure that they are conducting legal activities. The distribution of films through informal networks and chatrooms has made the Internet one of the most popular methods for distribution of pirate product. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Bulgaria are estimated to be approximately \$4 million in 2003.

Software piracy remains pervasive throughout Bulgaria, and criminal enforcement is wholly inadequate, according to the Business Software Alliance (BSA). 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 been found in Western European markets, such as Germany, Belgium and the U.K. The domestic software market is flooded with illegal CD-ROMs, both silver and gold, containing a full range of different business software applications published. There is widespread use of unlicensed software in both the corporate and private sectors (end-user piracy). In addition, the practice of distributing illegal software copies on the hard disks of sold computers (HDL/hard disk loading piracy), while still a common practice among Bulgarian resellers, is being increasingly replaced by selling so-called "naked PCs" with an additional service for installation of pirate software at the customer's premises. BSA also reports an increase in use of the Internet for distribution of illegal software.

American books, especially popular fiction and textbooks, continue to be pirated in Bulgaria. Estimated trade losses due to book piracy remain at \$300,000 for 2003.

Optical Disc Piracy in Bulgaria Returns

Optical media piracy has been growing in Bulgaria over the last few years. The domestic market is flooded with pirate optical discs (as discussed above). Domestic overproduction is a more serious problem than illegal imports. Finished pirated discs are mass-imported into Bulgaria. For the last two years, local copyright industry representatives, especially the recording, film and business software industries, have been working with numerous Bulgarian agencies to advocate improvements to the OD regulatory scheme in Bulgaria (see discussion below on legislative reform).

Local plant capacity: The number of plants and production lines in Bulgaria has continued to rise. There are now seven plants operating in Bulgaria: CHSL, Media Plant, TOT 2000, Euro Silver Group (Sofia), Media Sys, Optical Storage (Stara Zagora), and Silver First (Plovdiv). Two further plants are believed to be non-operational and unlicensed (the former Unison in Botevgrad and the former DZU plant in Stara Zagora). This means that the seven operational plants — between them having nine (9) lines — plus four non-operational lines, giving a likely operational capacity of some 57 million discs per year, and a potential of 73 million units (if the non-operational lines are included). The legitimate demand for optical discs in Bulgaria (all formats) is far below 10 million copies per annum. This shows that Bulgaria's over-capacity continues to grow exponentially.

OPTICAL DISC PLANTS IN BULGARIA	DESCRIPTION
OPERATIONAL PLANTS (7)	
CHSL	Sofia-based. Has one licensed production line, with an annual capacity of about 3.7 million discs.
MEDIA PLANT	This plant in Sofia has one licensed production line with a capacity of 5.2 million disks annually. Successor from TOT 2002 of the Hemus Group line, and located in Hemus' old location, in premises owned by the Kyralfa mastering plant, whose location remains unknown.
TOT 2002	Successor to Hemus' equipment and location, though sold these to Media Plant and relocated with new equipment to new premises in Sofia.
EURO SILVER GROUP	Sofia-located production line, with both CD-R and DVD-R production capability. The plant has not permitted any visit to the facility to verify machinery and production capacity. A figure of approx. 5 million is estimated.
MEDIA SYS	This is a DVD plant operating in Stara Zagora. Its DVD production line has a maximum annual capacity of about 5.4 million units. There is one mastering facility, which is also licensed and operational.
OPTICAL STORAGE	This is a CD-R and DVD-R production line operating in Stara Zagora, which is understood within the last six months to have acquired three further CD-R/DVD-R lines. Production capacity will have to be confirmed in light of this, though a figure of about 25 million blank media might be expected annually.
SILVER FIRST	This is a CD-R production line operating in Plovdiv, with a production capacity of about 7.7 million CDs or blank CD-Rs annually.
KNOWN NON-OPERATIONAL PLANTS (2)	
VIDEOTON	This is a Hungarian-owned company which purchased the former Bulgarian state-owned DZU plant in Stara Zagora. It had an estimated capacity of 7.4 million discs per year. Reportedly, one of the two production lines is inoperable and the other is not licensed and does not operate. There also is one mastering facility which is not licensed and not operational.
UNISON DCM	This plant in Botevgrad has two lines and an estimated capacity of 7.4 million discs per year; it is not licensed and is not operational.
TOTAL	Estimated 57 million discs per year for the existing 7 plants (A potential of 73 million units per year, if the non-operational lines are included)
Source: IFPI, January 2004	

Imports and transshipment of piratical products / CD-R piracy: Bulgaria is still widely used to transship pirate CDs from Ukraine and Russia to the Balkans, Greece and Turkey. Bulgarian government officials have emphasized that the bulk of piracy in Bulgaria is due to piratical imports. The industries disagree, and believe that that attitude is a diversion to draw attention away from the growing domestic production problem, predominately on CD-Rs. It is estimated that around 70% of all optical disc piracy in Bulgaria involves illegally burned CD-Rs.

Plant inspections in October 2003 revealed that whole batches of blank CDs, produced at one Bulgarian plant, disappeared before arriving at the location where the traditional CD-R type information was supposed to be printed on the discs. The authorities were informed but there has been no sign of any follow-up. This discovery confirms the growing suspicion of large-scale burning activity on CD-Rs in underground workshops, with full knowledge and co-operation of certain plants. These burned CD-Rs are subsequently printed with content-related label information and artwork in order to look like originals. This phenomenon also reinforces the need to introduce a SID Code obligation for all blank media, including all equipment and molds/mirror blocks, regardless of whether these are or are not actually used in the production process.

Organized crime: The industries report that the link between organized crime elements being involved in OD piracy is blatant and undeniable. There have been highly publicized “turf wars” among various organized syndicates. The Russian syndicates appear to be increasingly involved in some of Sofia hotspots and at the seaside resorts.⁶ The fact that organized crime elements are involved in piracy makes it very dangerous for the private sector to take anti-piracy actions. Time and again, the private sector has urged the relevant authorities to definitively clamp down on the organized groups controlling the illegal trade at some of the most blatant pirate hotspots, such as the infamous Slaveikov Square in Sofia. Many Internet cafés seems to be heavily controlled by organized crime, using unlicensed and illegal business and entertainment software.

It should be noted that the anti-organized crime agency openly acknowledges the involvement of organized criminal groups in the pirate distribution business.⁷ However, their proposed action plan to tackle the problem does not include any initiative aimed at dismantling these groups and dealing with the root of the problem. Instead, it focuses on the prohibition of street, outdoor and market sales of optical discs and increased customs controls. Although these are recommendable actions, endorsed by the copyright sector, they fail to address the core of the problem: organized and highly dangerous criminal groups involved in all forms of copyright theft. In this context it is necessary to highlight that the City Government of Sofia introduced strict regulation of street sales of copyright product more than a year ago. This regulation has, however, never been enforced in any meaningful way.

COPYRIGHT ENFORCEMENT IN BULGARIA

Interagency coordination efforts: In November 2002, a new Inter-Ministerial Council for the Protection of Copyright and Neighboring Rights was formed by an ordinance issued by the Minister of Culture. The first Inter-Ministerial Council was formed in 1997, but was abolished in July 2002 when the Council of Ministers repealed the 1997 decree (Decree No. 120/1997) which created it. The council was first organized to better coordinate and direct Bulgaria’s anti-piracy enforcement

⁶ “The Russian mafia conquered Slaveikov Square,” *Noshten Trud*, August 25-26, 2003.

⁷ “There is a danger that Bulgaria may be put on the black list,” *Noshten Trud*, January 26-27, 2004.

efforts. It is currently headed by the Deputy Prime Minister, 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. Other members include representatives from the Ministry of Culture, the Ministry of Economy, the Ministry of Interior and the Customs Service. The industries report that this Council has made no efforts to work with them.

It is quite disturbing that the Bulgarian law enforcement agencies and judiciary still fail to make any significant progress in their enforcement actions, despite the training and assistance provided by both the U.S. government and the E.U. in the last 8-10 years. From their lack of action, let alone *ex officio* action, the continued bottlenecks at the prosecutorial level and the dismal record of court convictions, it is clear that, apart from some rare exceptions, the general attitude of the entire Bulgarian enforcement system with respect to copyright crime leaves very much to be desired. This attitude, which has prevented any effective clamp-down on widespread and blatant piracy, is exacerbated by a continued lack of political will at the government level. The continuing frustration of the legislative process with respect to the new optical disc regulation is just one of many examples of a government policy that is more focused on symbolic action than on introducing and implementing meaningful, strong and effective enforcement legislation and programs.

Poor enforcement of existing OD plants: OD plant licenses are issued by the Minister of Economy upon a proposal made by a special Licensing Commission composed of an 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). Regrettably, communication between the Licensing Commission and interested private industry is poor, with licenses being issued and industry not being informed automatically of new lines or plants. For example, on September 23, 2003; a license for CD-R production was given to EURO SILVER GROUP. Production started in October 2003, though the recording industry (BAMP/IFPI) found out about this only in mid-November after contacting the commission. The plant surveillance system — in its latter years showing several exploitable weaknesses — which was supposed to be undertaken by economic police within the Ministry of Interior and its units has all but disappeared, leaving plants unregulated.

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) and equipment monitoring, involvement of the private sector in the controlling activities, 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. An additional concern is that a licensed manufacturer is able to hold as many molds — including non-coded molds — 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 molds for examination, and of regular, proactive checks, a plant can undertake illegal production.

Another example of the weaknesses inherent in the current system follows. In October 2003, a check was carried out by NSCOC, the Ministry of Economy and the General Tax Directorate in the CD-R plant Silver First, Plovdiv. It was ascertained that the plant had acquired a

second mold for CD-R replication, and in fact that the Licensing Committee had been informed about this. During the inspection, the plant owners failed to provide production records for CD-Rs, nor any information about the sales of the production. The owners maintained that such information is prepared only in their registered Sofia office. Further, the owners stated that the produced CD-Rs are transported to Sofia and kept in a warehouse, the location of which they were “unaware.” The recording industry is not appraised of whether this matter has been satisfactorily investigated fully. Nonetheless the following conclusions can be reached:

- The plant was able to acquire a further mold, and receive the consent of the Licensing committee.
- Any plant can acquire as many molds as it wishes. Only the proven fact of production of CDs/DVDs without use of a code will be considered an offense.
- The enforcement structures were not empowered to deal satisfactorily with the plant management’s lack of cooperation and obstruction concerning production records, etc.
- The enforcement structures being unable to monitor the extent Bulgarian produced blank media — at any of the plants in the country — is fuelling the huge domestic and regional CD-R/DVD-R problem.

Seizures of pirate OD media in 2003: The recording industry reports seizures by various Bulgarian law enforcement agencies of 201,516 pirate optical discs and cassettes in 2003. The motion picture industry reports the seizures of almost 27,000 pirate CD-Rs containing unauthorized films and over 8,400 pirate DVDs.

Moderately good cooperation with some police actions, but there are exceptions (pre-raid leaks, corruption): Recent positive developments have been the improved efficiency of the Customs Agency and the cooperation between the General Tax Directorate and the National Service Police Directorate. The motion picture industry reports that BullACT (the local anti-piracy organization) continues to maintain a high level of anti-piracy activities and works well with Bulgarian law enforcement authorities. Several entertainment software companies enjoy positive relationships with law enforcement who are assisting on the significant problems with piracy in Internet cafés. BSA also reports good cooperation with the General Tax Directorate and the police authorities, especially with the IPR section of the National Services to Combat Organized Crime.

However, some police districts within the Sofia region (especially those under the direction of the Sofia Directoria of the Ministry of Interior) remain reluctant to pursue aggressively anti-piracy actions; those actions which they do take are often ineffective. Some police systematically refuse to focus their enforcement efforts on larger targets and only agree to raid small companies and, in the case of software, computer game clubs or Internet cafés. There are a few signs that some police are very slowly beginning to show some signs of shifting the focus of their enforcement efforts from small companies to larger targets. However, pre-raid leaks are very common. 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 (see below) that have to be prepared by the Ministry of Culture that cause a huge backlog in prosecution cases.

BullACT engages in a high level of activities and enjoys excellent cooperation from the law enforcement authorities. In 2003, BullACT, in cooperation with local law enforcement, conducted 644 investigations and 470 raids. These raids have had a positive impact on the audiovisual piracy

situation, and the film industry no longer suffers from the blatant piracy that used to exist. Audiovisual piracy is still a problem, but it is far less visible than that suffered by other rightsholders.

The recording industry reports that, in 2003, the competent authorities in Bulgaria carried out 869 checks at over 2,000 points, including wholesale and retail points, storage places, production premises (recording facilities), as well as vehicles (during checks at customs), during which they seized a total of 201,516 pirate CDs, CD-Rs and MCs. 108 of those raids have been carried out together with BAMP. 117,084 optical discs and tapes with music, films, entertainment and business software were seized in these joint actions.

The business software industry's enforcement activities have been focused on 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. 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. In many software cases, the Ministry of Culture's experts fail to attend the court hearings for which they are summoned, leading to the need for re-scheduling and causing additional delays in the proceedings. BSA also reports that as a consequence of a joint initiative by the IP industry, the Bulgarian Parliament approved 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. The business software industry stresses that an explicit mandate granting authority to impose sanctions for illegal software use is needed to make this an effective means to fight software piracy.

Entertainment software companies report good cooperation with law enforcement. There is little to no enforcement action, however, taken against high-level suppliers and organized crime syndicate operations. Without the aid of enforcement authorities, investigations into syndicate operations involved in piracy will continue to be extremely difficult for the industry, given the obvious dangers inherent in pursuing actions against criminal enterprises.

Prosecutions and judicial sentencing remain ineffective and non-deterrent: This is a continuing bottleneck in pursuing criminal copyright infringement cases. Court cases can still take up to three years to complete, but overall the length of time has been decreasing. In the limited number of convictions for copyright crime, judges have been reluctant to impose deterrent penalties. According to official information from the Ministry of the Interior, only 17 persons were sentenced for copyright crimes under Article 172a of the Criminal Code in 2003. Due to the endemic lack of transparency of the court system, it is unknown, even to the Ministry of the Interior and the police, what the nature of sentences was. For example, there is no information showing that any person actually serving a prison term for music piracy. It is important that judges in Bulgaria finally recognize the seriousness of these offenses and begin to take swifter action and impose jail time in serious cases involving repeat offenders. 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. In the last four years 150 raids resulted

in criminal trials, and only one of them has been successfully completed with a verdict. Four cases were closed when the prosecution and defense reached a settlement agreement and all others are either pending, abandoned by the prosecutors or terminated by the court. The first end-user case which was completed with a verdict took 3 ½ years to complete, and the 2 defendants were each sentenced to pay a fine of only BGL 1000 (US\$640) – clearly not a deterrent sanction.

The recording industry reports that in 2003, of the 654 raids conducted, the police instituted 209 preliminary police inquiry cases to investigate alleged criminal offenses under Article 172a of the Criminal Code. Eventually, only 13 inquiry cases under Article 172a of the Criminal Code were instituted. The NSCOC sent 44 cases to different prosecutors' offices and 35 proceedings were instituted. Only 17 persons were reported to be convicted for criminal offenses under Article 172a of the Criminal Code 2003 (see above).

Unwarranted delays in criminal actions: Criminal enforcement actions which could deter piracy are not being used effectively. BSA, MPA, and the RIAA report unwarranted delays in criminal enforcement actions, in large part because of the time it takes to move a case from the police, through the magistrate investigator, and on to the prosecutor's office to the court. During this time, seized pirate product may deteriorate (creating evidentiary problems if seized materials are no longer in their original condition) and caseloads can become unmanageable. Although the Penal Proceedings Code provides for relatively short terms within which the investigation should be completed (the longest period could be nine months),⁸ 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. 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 the heavy workload on the part of investigative services.

Still problems and delays caused by the need for expert reports in criminal proceedings: After the initial "check" stage of 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 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 an adequate deterring effect.

⁸ Under Bulgarian criminal law, an investigation is supposed to be completed in two months, although the regional prosecutor may prolong the term for an additional four months (and a general prosecutor in very rare instances for three additional months).

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN BULGARIA: 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted			
By Police	473	26	654
By Customs	3	26	10
Number of cases commenced	23		144
Number of defendants convicted (including guilty pleas)	25	26	n/a
Acquittals and Dismissals			n/a
Number of Cases Pending	3		n/a
Total number of cases resulting in jail time	2	26	n/a (nil)
Suspended Prison Terms			n/a
Maximum 6 months	15		n/a
Over 6 months	6		n/a
Over 1 year			n/a
Total Suspended Prison Terms	21		n/a
Prison Terms Served (not suspended)			n/a
Maximum 6 months			n/a
Over 6 months			n/a
Over 1 year			n/a
Total Prison Terms Served (not suspended)	0	26	n/a
Number of cases resulting in criminal fines		26	n/a
Up to \$1,000	25		n/a
\$1,000 to \$5,000			n/a
Over \$5,000			n/a
Total amount of fines levied	US\$12,500	n/a	n/a

Civil cases do not proceed expeditiously. 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 proceed with the hearings.

Border measures need strengthening. The Bulgarian market is still facing ongoing imports from Russia, Ukraine and Serbia and Montenegro. Border controls must 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. A certificate must be issued in each particular case, so that customs can clear the shipment.

The recording industry reports positive relations with the Bulgarian Customs Agency. In June 2003, Bulgarian customs and the Ministry of Finance destroyed 230,000 pirate optical discs (including music CDs, movie DVDs, and CD-Rs of business and entertainment software). The recording industry (BAMP/IFPI) concluded a Memorandum of Cooperation and Information Exchange with the Customs Agency in July 2003. To the best of BSA's knowledge, there has not been a single suspension pirate software products at the borders in 2003.

Although the 2000 amendments to the copyright law introduced TRIPS border control measures to the Bulgarian legal system, problems remain in its 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 national borders. The

procedure is expensive and time-consuming. Consideration of the rightsholder's application for monitoring the movement of a particular product costs, an initial BGN 500 (US\$320) plus an additional monthly fee of BGN 150 (US\$95) for each and every title listed in the application. The applications are not considered on time and counterfeit and pirate goods are shipped over the border before the customs have decided whether to approve the application or not. Significant guarantees and evidence are also requested before taking action. The decree contains grave discrepancies compared with the TRIPS and the Copyright Law provisions, which in practice makes border control unenforceable.⁹ For instance, TRIPS requires detention of the goods for 10 days after which time the goods should be released, if the rights holder fails to produce evidence that proceedings on the merits have been initiated (i.e. evidence of a civil case or a civil injunction); the Bulgarian Decree requires both a filing and an application for an injunction. A court decision on a civil injunction application, a rarity in Bulgaria, would usually take much longer than 10 days, thus rendering the provision unworkable in practice. In addition, a recent 2003 amendment to the Decree explicitly excluded parallel imports from the scope of the border control measures. There is general willingness on behalf of the customs agency to work on the border control measures but the imperfections in the legal framework and lack of administrative capacity prevent them from doing so.

COPYRIGHT LAW AND RELATED ISSUES

Law on Copyright and Neighboring Rights (1993, amended through 2002)

Bulgaria's Law on Copyright and Neighboring Rights entered into force on August 1, 1993. 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, 1998¹⁰, 2000¹¹ and 2002. Bulgaria deposited its instruments of accession to both the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty in March 2001.

Amendments to the Bulgarian Copyright Act were passed on July 25, 2002, so that Bulgaria would be in compliance with the EU's directives on copyright, e-commerce, and conditional access. These entered into effect on January 1, 2003. IIPA was informed by our industry colleagues that

⁹ IIPA does not have the text of this decree on border control measures.

¹⁰ IIPA's 2003 Special 301 submission contained a more detailed history of Bulgaria's copyright law amendments; see pp. 359-361 at <http://www.iipa.com/rbc/2003/2003SPEC301BULGARIA.pdf>. The 1998 amendments to the copyright law increased administrative fines imposed by the Ministry of Culture tenfold. However, they also contained two serious problems: (1) they required the placement of holograms on blank audio and video tapes, CDs and CD-ROMs; and (2) they changed the procedures for confiscating infringing copies. These twin problems were resolved by the 2000 amendments.

¹¹ The 2000 copyright law amendments were aimed to further Bulgaria's efforts to comply with European Union Directives, TRIPS and partially with the WIPO Internet treaties. Industry reports indicate that these amendments provided for a longer term of copyright protection, a new communication right, provisional measures, and border control measures. They also provided 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 prohibited circumvention devices and the possession of pirate product. Rightsholders 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.

these amendments contained a good number of positive improvements, including a requirement for obligatory licensing of CD manufacturers to be outlined by the Council of Ministers¹² (see discussion of OD legislation, below).

Despite some progress in the 2002 amendments, the legislation did include several troubling provisions and left gaps in what the copyright industries view as proper implementation of the WIPO treaties. For example:

- The right of “communication to the public” for producers of sound recordings is only a right of remuneration. Producers should 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. 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.
- The scope of the “making available right” extends to “an unlimited number of people” instead of a more clearly defined and limited “public.”
- The law only contains two of the three-step TRIPS Article 13 test for limitations.
- The private copying exception under Article 25 which applies *mutatis mutandis* to producers is problematic because it does not contain the restriction that the reproduction is for ends that are neither directly or indirectly commercial. This provision also is misleading by stating that private copying can be done “without compensation” and at the same time a levy mechanism is established in Article 26 for blank media and recording equipment.
- Fines provided under administrative and criminal sanctions are too low and not deterrent. In addition, the new provisions on technological protection measures¹³ and rights management information¹⁴ appear to lead only to administrative and criminal sanctions, there is no civil

¹² The 2002 amendments accomplished the following positive improvements: A new chapter on database protection was added; the definition of the distribution right was revised; revisions/refinements were made to existing exceptions to protection; criminal sanctions and administrative sanctions (fines) for violations involving technological measures of protection were added; the term of protection of sound recordings was redefined (it still 50 years, but is calculated in conformity with provisions of the EU directive); amendments regarding the collection and distribution of the reprographic levy and the blank tape levy were made. Additional amendments were made to the provisions involving transfers of rights and the administration of collecting societies. Also introduced was national exhaustion of the distribution right, which prohibits “parallel imports.”

¹³ Industry colleagues report that the provisions on technological protection measures under Article 97(6) are unsatisfactory as they do only establish criminal liability and only fines are imposed on the infringer. Also the provisions do not cover the scope of protection as required under the EU Copyright Directive. The proposed amendments to the provision do not solve this problem. **Neither the current law nor the draft provisions** include a definition of “effective technological measures” as established under Article 6(3) of the Copyright Directive. With respect to the act of circumvention of technological measures itself the draft provisions introduced in Article 148 (6) a knowledge requirement which is not in the current provision in Article 97(6) at all and which is not in line with Article 6(1) of the EU Copyright Directive, which requires knowledge or reasonable grounds to know that the person is pursuing that objective (i.e., the circumvention). Article 148(6), however, refers to knowing or having reasonable grounds that these [circumvention] devices are primarily designed for such purpose. **The draft amendments** introduce a provision with respect to trafficking in circumventing devices and services which is not included in the current law. However, it lacks the element of Article 6(2)(a) and (b) that describe the elements of circumventing devices and services. Regarding the acts prohibited in Article 6(2) of the directive, **the proposed amendments**, only the element of “advertising” for sale or rental is missing; it does however, include the element of “offer” for sale and rental alongside sale and rental itself.

¹⁴ With respect to rights management information, the new Article 148 (9) is in line with the definition as established in Article 7 of the EU Copyright Directive. The scope of the protection is restricted by a knowledge requirement which is not in line with Article 7 of the EU Copyright Directive. In the directive, knowing or having reasonable grounds to know refers

liability, and all are subject to a “primarily designed test” (thus limiting its usefulness).

- The term of protection for sound recordings remains at only the TRIPS *minima* level and should be extended. In fact, the term of protection for works or objects of neighboring rights protection whose term is not measured by the life of the author should be 95 years from publication.
- 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.
- There is 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;
- There is an exception from the importation and exportation right for amounts of less than commercial quantities;
- The ephemeral recording exemption for TV and radio organisations does not clearly require that the reproduction should be done by means of their own facilities. It also lacks any regulation with respect to the recordings made and does not require the broadcasting organization to destroy the recordings within a certain time limit.

2003 Proposed Optical Disc Law

In mid-2002, copyright sector 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. First, the CD plant licensing regime (Title Verification Decree No. 87/96) was threatened to be abolished, but such a result was avoided. The industries also pressed hard to avoid turning the TVD into a registration system.¹⁵ Obtaining this result was a major victory. However, deregulatory zeal resulted in a decision by the Council of Ministers on November 14, 2002 to abolish the system which tracked the importation of optical disc grade polycarbonate and stampers (Decree 233/2000). The copyright industries, along with the U.S. government and European Union, objected to this deregulation because 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.¹⁶ The global copyright community

to the enabling, etc., of an infringement of copyright or related right. The provision in Article 97(7) and the draft provision in Article 148(8) require that the person must know or have reasonable grounds to know that the rights management information has been removed or modified without authority.

¹⁵ The Bulgarian government passed Decree 87/96, the Title Verification Decree (TVD) in April 1996. It 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.

¹⁶ 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.

has agreed that the key elements of an effective optical disc law include at least 11 elements (which were fully outlined in IIPA 2003 Special 301 report).¹⁷

The 2002 amendments to the Bulgarian 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. The Council of Ministers is charged with developing such terms and conditions. In redrafting the legal basis for OD manufacturing control, the copyright industries have urged that Bulgaria should take care to safeguard the previous achievements and take the opportunity to improve the system to address those weaknesses that have become apparent over time. In November 2002, the drafting of a new decree began, with the Ministry of Culture in the lead. On February 7, 2003, a draft was circulated to other ministries. However, this procedure was aborted in order to await the adoption of the General Law on Regulating Economic Activity.

In the summer of 2003, the Minister of European Integration launched a new initiative to introduce an optical disc regulation before the end of the year. A government working group was urgently established and started working on a draft without in any way properly consulting with the copyright industries and disregarding the bulk of recommendations made during the previous drafting process in 2002. In December 2003, a “Draft Law on the Administrative Regulation of the Manufacture and Trade with Optical Discs, Matrices and Other Carriers Embodying Subject of Copyright and Neighboring Rights” was approved by the Council of Ministers, and was forwarded to the Bulgarian Parliament in January 2004.¹⁸ During the last four months of 2003, copyright sector representatives informed all participants of the working group of the obvious shortcomings in their draft and once again proposed concrete amendments. However, none of the industries’ key recommendations were reflected in the version which was adopted by the Council of Ministers. With respect to this latest draft legislation, IFPI/BSA have identified at least four specific areas where reform is essential.

- Most importantly, a SID code obligation is needed for all optical discs produced in Bulgaria, and this must include blank discs (CD-R, DVD-R, etc.). First, the requirement to have SID codes on blank CD-R relates to ensuring that there is an obligation for SID codes to be etched on all of the relevant replication machinery, molds, etc. This way, a plant owner can

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. 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).

¹⁷ IIPA believes that the following 11 elements are critical to an effective optical disc regulatory system: (1) licensing of facilities; (2) licensing of export/import of materials; (3) requirement to apply manufacturer’s code; (4) license record-keeping requirements; (5) registration requirement for commercial optical disc duplication; (6) plenary inspection authority; (7) search and seizure authority; (8) government record-keeping requirements; (9) criminal penalties for violations; (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/regulation; (11) possibility of closure of the OD plant.

¹⁸ The discussion herein is based on reports of local copyright experts and industry representatives in Bulgaria; an English translation of the draft legislation is not available.

not possess a clean mold and tell the authorities that it is only used for blank CD-Rs. In addition, it is useful to have blank CD-Rs identified so that if that disc is used to manufacture pirate product, the chain of distribution may be uncovered. (The industries had earlier received some reassurances that this would be included in the draft legislation, but unfortunately it was omitted from the version adopted by the Council of Ministers.)

- It must be clear that private sector experts shall at all times and unconditionally be permitted to participate in plant inspections;
- Additional, enhanced rights and competencies are needed to permit inspectors to search premises, investigate documents and equipment and seize, for further investigation, all relevant materials;
- A full-fledged import-export registration system is needed for optical disc grade polycarbonates and other essential raw materials as well as equipment for optical disc production, including matrices (the industries are asking only for a registration scheme, not a licensing regime). 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 resale or movement of imported polycarbonate within Bulgaria must be tracked carefully in order to counteract illegal production.

This proposed OD legislation contains very serious gaps and inconsistencies, even compared to the currently existing licensing regime. If adopted by the Parliament as is, it will likely result in fostering — not hindering — conditions for the re-emergence of local production of piratical optical discs containing copyrighted materials. Discussions among Bulgarian ministries continue on this legislation, and the copyright industries will continue to press for the strongest solutions to ensure a comprehensive and effective OD regulatory system.

Title Verification Decree (1996, as Amended)

There are two components of the TVD. First, there is the Title Verification System; the current system contains three levels of verification with the Copyright Department of the Ministry of Culture.

- 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).
- 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.
- 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.

The second component of the TVD is the Plant Licensing System, which 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.

Criminal Code

The levels of fines 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 US\$641 (1000 BGL) to a maximum of US\$1,922 (3000 BGL), and for a second offense from a US\$1,922 (3000 BGL) minimum to a US\$3,200 (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 US\$1,280 (2000 BGL) for a first infringement, and to US\$3,200 (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

2004 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Colombia be elevated to the Priority Watch List in 2004.

Overview of key problems: Piracy continues to dominate the Colombian market, greatly affecting legitimate sales, most notably in the music sector. In a very troubling development, pirates are increasingly turning to new media—primarily CD-R and DVD-R, as the medium for piracy, and the government has demonstrated little, if any, determination to address this large and growing problem. If Colombia aspires to be a Free Trade Agreement partner with the U.S., it is essential that it begin immediately to address the deteriorating situation. It is our hope that this filing, and the elevation of Colombia to the Priority Watch List will operate as a call to arms to the Government of Colombia to finally and meaningfully address their failure to provide adequate and effective protection to copyright owners—both their own nationals, and for the purposes of this submission, US creators. Should Colombia fail to act, it will create tremendous uncertainty surrounding their preparedness to take on the obligations of a FTA, and will cast doubt on their reliability as a FTA partner. We hope that this will not be the case.

Colombia must take actions to ensure that its criminal, administrative, civil and border procedures will meet its existing bilateral copyright enforcement obligations (both in substance and in practice). Unfortunately, Colombia's enforcement efforts to combat widespread piracy have been inadequate, ineffective and not deterrent. The growth of illegitimate CD-R replication continues to undermine what is left of the legitimate music market. Despite some raids by the police in Bogota and Medellin, local flea markets like San Andresitos are infested with pirate product. Colombian authorities have done little to investigate pirate duplication and distribution facilities, which continue to feed a vast network of street vendors. Illegal use of business software in small and medium-sized businesses is widespread, with rates higher in areas outside the major cities. While criminal raids continue at a modest level, one breakdown is that few effective prosecutions for copyright infringement are pursued. Lengthy delays in prosecution continue to mean that there is no effective deterrence against piracy. With respect to administrative enforcement of cable piracy and signal theft, CNTV's efforts continue to require improvement. Furthermore, 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. To make matters worse, customs authorities have not taken any action against the inflow of blank CD-Rs that are clearly imported for piracy purposes. Above all, the Colombian government has not taken any real interest in fighting piracy as a priority and developed a policy that would involve all the different agencies that need to take an active part in an effective campaign.

Actions which the Colombian government should take in 2004

- Have 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;
- Expedite prosecutions of criminal copyright cases and issuing deterrent sentences, as permitted under the criminal code;
- Engage municipal authorities to clean up flea markets offering pirate product;
- Grant civil *ex parte* search orders more swiftly;
- Encourage more actions by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy;
- Implement border measures to prevent entry into the country of blank CD-Rs (which are often used for piracy) and halt the flow of pirated products entering Ecuador and Venezuela;
- Improve 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);
- Support the current bill to increase criminal penalties for piracy; and
- Develop and promote legislation which will address the higher standards of copyright protection and enforcement which will be expected as Colombia commences FTA negotiations with the U.S.

COLOMBIA ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	75%	40.0	90%	40.0	90%	40.0	90%	40.0	55%
Records & Music	49.4	70%	56.3	65%	73.0	65%	60.0	60%	60.0	60%
Business Software Applications ²	NA	NA	21.7	51%	19.5	52%	33.2	53%	50.5	58%
Entertainment Software	NA	NA	NA	NA	NA	NA	39.0	85%	7.0	75%
Books	5.4	NA	5.3	NA	5.3	NA	5.0	NA	6.0	NA
TOTALS ³	NA		123.3		137.8		177.2		163.5	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$16.2 million and levels of 50% were identified as preliminary. BSA's revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Colombia, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Colombia (including U.S. publishers) and (b) losses to local distributors and retailers in Colombia.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries were \$117.8 million. IIPA's revised loss figures for that year are reflected above.

Upcoming FTA Negotiations

In November 2003, Ambassador Robert Zoellick notified the U.S. Congress that the Bush administration intends to begin Free Trade Agreement (FTA) negotiations with the Andean nations, starting with Colombia and Peru in the second quarter of 2004.⁴ The negotiating objectives specifically include high levels of copyright protection and effective enforcement measures, including criminal, civil/administrative and border enforcement. 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. Presently, 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).⁵ All three programs have standards of intellectual property rights which must be afforded to U.S. copyright owners.⁶

COPYRIGHT PIRACY IN COLOMBIA

The recording industry reports that the estimated level of music piracy in Colombia rose to 70% in 2003, with estimated losses due to music piracy placed at \$49.4 million. Although the value of trade loss estimates decreased slightly in the past year due to devaluation and lower average prices of recorded music, piracy of music CDs in Colombia continues to increase, mostly due to local CD-R replication. 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 CD-Rs are brought in to Colombia in containers from the Far East; pre-recorded pirate CD-Rs are also being smuggled in from Ecuador. A 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, Medellín 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

⁴ See Press Release 2003-74, Office of the U.S. Trade Representative, “USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries,” November 18, 2003, at <http://www.ustr.gov/releases/2003/11/03-74.pdf>; and President Bush’s Letter to Congress, November 18, 2003, at http://www.ustr.gov/new/fta/Andean/2003-11-18-notification_letter.pdf.

⁵ During the first 11 months of 2003, \$148.4 million worth of Colombian goods (or 2.5% 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 16.2% decrease over the same period in the previous year) and \$2.7 billion worth of Colombian goods entered under the ATPA program (representing a 989% increase from the prior year). For more information on the history of Colombia’s status on Special 301, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁶ IIPA reported to USTR in 2002 that Colombia had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA. See 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. 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 also requested that the U.S. government obtain written commitments on Colombia’s actions to meet the IPR 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.

conduct raids in a swift and efficient manner. Most of the music companies are shrinking; the local companies continue to close down their operations and their investments. The legitimate music market in Colombia shrunk in 2003.

The Motion Picture Association of America (MPA) reports there is increasing concern about the recent growth of optical disc piracy in Colombia, as the industry's concerns about systematic television piracy have decreased. Video piracy (VHS format) had been so high that some audiovisual producers had simply abandoned the VHS market, despite the country's potential to support that market. MPA member companies returned to the market as increased purchases of DVD hardware players drove demand for DVDs. However, optical disc piracy (both CD-R and DVD-R) has grown considerably, especially in street markets, and threatens the new legitimate DVD market. The relative success in television actions, however, has reduced the urgency of television piracy, and the concurrent growth of DVD has led to renewed concern for video anti-piracy action. While there is still some television piracy, licensing and inspections by the CNTV (National Television Commission), coupled with MPA legal actions, have greatly reduced the incidence of systematic television piracy. Much of the remaining television piracy is in non-urban areas and in quasi-legal "community associations" where enforcement efforts are only of questionable effectiveness. The television piracy situation has improved due to consistent MPA action (over 60 cases brought in the last five years) and due to the legalization by those cable operators who received licenses in 1999-2000 of their signals. Some of these (now 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; however, the prospects for receiving licensing fees by these actors may be slight, given that they are very small systems in remote 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 grey 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 2003.

The piracy rate for business software still reflects an unacceptably high rate of illegal software use in Colombia, particularly within small to medium-sized organizations. Piracy in cities outside Bogotá is particularly high. The Business Software Alliance (BSA) has encountered sophisticated, high-volume software counterfeit production facilities in Bogotá.

The publishing industry continues to suffer from widespread piracy. Efforts by the Colombian Book Chamber (which includes U.S. publishers) and the government to improve both the "Ley del Libro" itself and its enforcement were unsuccessful in 2003. Commercial piracy of Spanish-language trade books has declined somewhat because of enforcement actions, print piracy and photocopying of university textbooks remains. This phenomenon has increased as students from private universities have migrated to public schools, where photocopying is rampant. 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. Estimated trade losses due to book piracy were \$5.4 million in 2003.

The Entertainment Software Association (ESA) 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

Several Colombian institutions and interagency groups are responsible for anti-piracy activities. 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 number of governmental and independent agencies in the fight against piracy.⁷ The National Anti-Piracy Campaign (*Convenio Nacional*) continues to meet and has achieved some limited success in coordinating the fight against piracy, but it is still far from being an effective anti-piracy force in Colombia.

Several years ago, 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). There are seven special prosecutors, at least 25 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces.

Criminal raids do occur, but prosecutions are few. MPA reports that some enforcement activity has actually improved in the last two years in Colombia, although there are few results in terms of sentences or reductions in piracy. For example, of the over 50 pending television piracy cases brought in the last five years, there have been only two sentences (both suspended while on appeal). The Special Unit for Copyright Crime continues to be active, and the MPA has coordinated with the unit for signal theft raids with good results. After the raids, however, prosecution procedures and sentencing prospects have not been a deterrent for pirates.

BSA reports that its business software anti-piracy campaign 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 2003, legal actions were conducted against 10 end-user pirates, and more than 100 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. 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. After re-activation of its anti-piracy unit (APDIF) in 2002, APDIF has been able to carry out a street-level campaign that contributed to cleaning up some high traffic areas in

⁷ 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.

Bogotá, along with some police cooperation. Unfortunately, the authorities do not 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 2,467 raids in 2003, only 309 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 CD-Rs 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.

Colombian courts fail to issue deterrent criminal sentences. Even with all the criminal raids, the Colombian 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. It 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.⁸

The recording industry states that it takes Colombian courts an average of 45 months to process most cases, all before they end up being either suspended or dismissed. Some cases have taken over 7 years in the judicial system, a period which far exceeds the normal statute of limitations of 5 years; as a result, those cases are also dismissed.

Border enforcement is weak. Millions of blank CD-Rs 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 CD-Rs 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 CD-Rs. 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. Enforcement at the Colombian borders still needs to be improved in practice, especially given the growth of optical media piracy in the region.

⁸ 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.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted		10	2,467
By police (including tax authorities)		8	2,466
By customs			1
By CNTV			0
Number of cases commenced		11	5
Number of defendants convicted (including guilty pleas)		0	17
Acquittals and Dismissals		0	0
Number of cases pending		8	44
Total number of cases resulting in jail time		0	17
Suspended prison terms		0	16
Maximum 6 months		-.-	
Over 6 months		-.-	
Over 1 year		-.-	
Total suspended prison terms			16
Prison terms served (not suspended)			1
Maximum 6 months			
Over 6 months			
Over 1 year			1
Total prison terms served (not suspended)			1
Number of cases resulting in criminal fines		-.-	17
Up to \$1,000		-.-	
\$1,000 to \$5,000		-.-	
Over \$5,000			
Total amount of fines levied			

Administrative enforcement against signal theft piracy remains ineffective.

Licensing and inspections by the CNTV, the national television commission, have contributed to a significant reduction in systematic television piracy in Colombia.

Civil actions and issuance of civil *ex parte* search orders is slow. 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 both 2002 and 2003, conducting only a handful of civil end-user actions.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2002-2003		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2002	BUSINESS APPLICATIONS SOFTWARE 2003
Number of civil raids conducted	6	2
Post search action		
Cases pending	2	2
Cases dropped		-
Cases settled or adjudicated		1
Value of loss as determined by right holder (\$USD)	US\$30,000	US\$40,000
Settlement / judgment amount (\$USD)	US\$21,000	US\$13,500

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1982: Colombia's 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. Colombia already has deposited its instruments of ratification for both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In fact, amendments to the criminal code actually provide sanctions for the circumvention of technological protection measures. Additional amendments to the copyright law and related laws (criminal codes, etc.) will be necessary to implement the high standards contemplated in an FTA IPR Chapter with the U.S.

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. BSA, through a Colombian software publisher, has been working with some representatives of the Superintendency during 2003 in order to offer seminars to its officials regarding the compliance of Law 603. BSA expects to hold some seminars during the first half of 2004.

Criminal code and criminal procedure code: 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 years up to two-to-five years. The code also contains provisions on the 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 sentences of up to three years can be suspended. In practical terms, this scenario translates to no incarcerations for pirates. Congress is in the process of reforming the criminal procedure and, maybe, the criminal code. Any reform should take in consideration an increase in criminal penalties for copyright infringement that would allow the courts to hand down deterrent level sentences that involve prison time for offenders mainly involved in duplication and distribution of pirate product.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

Special 301 recommendations: IIPA recommends that the Dominican Republic be elevated to the Priority Watch List. IIPA also recommends that if concrete commitments and tangible progress in combating broadcast piracy and significantly improving prosecutorial and judicial results in pending criminal copyright infringement cases are not achieved by April 30, 2004, then the U.S. government should make a determination that the Dominican Republic fails to provide “adequate and effective” protection to U.S. copyright owners and action should be taken immediately to withdraw or suspend preferential trade benefits or remove eligibility status under the Generalized System of Preferences (GSP) and Caribbean Basin Initiative (CBI) trade programs.

Overview of key problems/challenges: One of the most looming problems remains the government’s questionable commitment to effective and transparent copyright enforcement. While investigations and raids against broadcasting stations involved with the unauthorized transmission of copyrighted programming were initiated in early 2003 by administrative and criminal enforcement agencies, the ensuing criminal actions taken against certain politically connected stations remains stymied. Criminal trials in key copyright infringement cases have been postponed numerous times under an antiquated court system which permits such delays. During the summer of 2003, the Ministry of Culture issued very damaging regulations, which were partially rescinded only after serious outcry by copyright owners and other official interventions with government officials. This kind of wrangling affecting both criminal prosecutions and non-transparent regulations is an example of a very shaky commitment to strong copyright protection and enforcement, dictated from very high levels of the government. Possible political jockeying between now and the May 2004 elections may have an adverse impact on some anti-piracy actions, given political connections that suspected targets and enforcement officials (respectively) have with, and against, the current administration. In fact, the Ministry of Culture already has told MPA it will allow enforcement against video retail piracy only after the 2004 elections.

Interestingly, the government of the Dominican Republic has taken some commendable steps to address some of the issues and challenges it faces regarding copyright protection and enforcement. While industry cooperation with administrative (such as ONDA-the Copyright Office and INDOTEL-the telecommunications authority) and criminal agencies is generally good, such actions do not result in practical deterrence against copyright piracy. A specialized IPR prosecutor with nationwide jurisdiction was appointed in mid-2003. The administrative enforcement agencies could benefit from more political and economic support within the government in order to pursue more complicated cases. Clearly the Dominican Republic courts remain a significant hurdle in providing effective, deterrent enforcement, due in part to antiquated criminal procedural rules (which will be improved when new amendments enter into effect in August 2004).

Actions for the government of the Dominican Republic to take in 2004

- Stop preferential actions based on political connections which halt or undermine effective anti-piracy enforcement actions (from raids to prosecutions), and instead taken actions based on full transparency;
- Have the enforcement agencies (including ONDA, INDOTEL and the police-Fiscalia) conduct more regular and sustained actions, followed by prompt criminal prosecutions (where warranted);
- Focus particular attention on inspecting/monitoring those broadcast television stations which continue to broadcast U.S. programming without authorization, and follow-up with criminal and administrative actions;
- Assign a squad of investigative law enforcement officers to follow-up on the cases after ONDA or the Fiscalia has conducted a raid;
- Dedicate more resources and training to ONDA inspectors—for example, fund and expand ONDA to include satellite offices;
- Support ONDA's use of penalties under their regulations to fine and close down retail outlets where infringing actions have been identified or infringing products seized;
- Continue to support the cooperative efforts between the copyright-based organizations and companies with ONDA, the Fiscalia and INDOTEL;
- Assure proper implementation of the new Criminal Procedure Code, which enters into effect in August 2004 (i.e., training of judges, prosecutors and police officers);
- Expedite prosecutions and judicial decisions in criminal cases;
- Complete the deposit process to join the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

DOMINICAN REPUBLIC
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	20%	2.0	60%	2.0	60%	2.0	60%	2.0	80%
Records & Music ²	9.9	65%	6.9	65%	7.7	65%	2.0	80%	2.0	80%
Business Software Applications ³	NA	NA	3.6	61%	4.0	64%	6.7	68%	7.4	69%
Entertainment Software	NA	NA	NA	NA	NA	NA	6.0	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS ⁴	NA		13.5		14.7		17.7		17.5	

The IIPA and its members have long supported high-level, bilateral engagement between the U.S. and the Dominican Republic in several fora.⁵ The Dominican Republic has a series of bilateral and multilateral obligations on IPR. First, the industries have used the Special 301 process since its invention to elevate the importance of copyright issues onto the trade agenda. Second, the IIPA filed a petition with the U.S. government in June 1999 to initiate a review under both the GSP and the CBI trade laws of the eligibility of the Dominican Republic to participate in these programs due to its failures to provide adequate effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. GSP hearings were held in April 2000 and again in October 2003.⁶ Third, since our 1999 GSP/CBI filing, the U.S. Congress has amended the intellectual property rights (IPR) criteria in the CBI, to heighten the level of protection expected from beneficiary countries of the Caribbean Basin Trade Partnership Act (CBTPA) benefits, including the Dominican Republic.⁷ Fourth, the

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² RIAA reports that \$9.9 million (2003) represents the estimated sales displacement to the legitimate industry. Actual revenue to music pirates is estimated at \$7.4 million. The recording industry's loss estimates for previous years were based on less complete information, and represented a projection of pirate revenue rather than industry losses.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$2.9 million and levels of 61% were identified as preliminary. BSA's revised 2002 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 the Dominican Republic (including U.S. publishers) and (b) losses to local distributors and retailers in the Dominican Republic.

⁴ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in the Dominican Republic were \$12.8 million. IIPA's revised 2002 loss figures are reflected above.

⁵ For more details on IIPA's summary of the history of the Dominican Republic on IPR issues under Special 301 and other trade programs, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁶ See IIPA's Pre-GSP Hearing Brief of October 1, 2003, available at http://www.iipa.com/rbi/2003_Oct1_DomRep_FTA.pdf, and IIPA's Post-GSP Hearing Brief of October 30, 2003, available at http://www.iipa.com/gsp/2003_Oct30_GSP_DomRep.pdf. During the first 11 months of 2003, over \$2.4 billion in preferential trade benefits were attached to Dominican Republic exports to the U.S., specifically: \$66 million worth of Dominican goods entered the U.S. under the duty-free GSP code (representing a 366.1% decrease from the same period in the prior year); \$777.3 million worth under the CBI (representing a 6% decrease over the same period in the prior year); and \$1.6 billion worth under the CBTPA (representing a 1.9% decrease over the same period in the prior year).

⁷ For a more detailed discussion of the CBI's enhanced IPR standards, see IIPA's submission to the U.S. International Trade Commission on its Annual Report on the Impact of the Caribbean Basin Economic Recovery Act

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

Fifth, and most recently, the Dominican Republic and the U.S. are now engaged in Free Trade Agreement (FTA) negotiations. Three rounds of negotiations are expected to conclude before April 2004. IIPA and its members understand that the government of the Dominican Republic has a renewed sense of urgency to resolve the problems of widespread copyright piracy and ineffective enforcement. However, until the government of the Dominican Republic acts swiftly and effectively to significantly reduce the piracy levels, including halting broadcast piracy and improving its prosecutorial and judicial results in criminal copyright cases, IIPA has gone on-the-record that the reward of extending the Dominican Republic with additional trade concessions (such as an FTA) should be withheld.

COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

The audiovisual industry reports that broadcast piracy remains its key piracy problem in the Dominican Republic. MPA confirms that broadcast piracy has caused far-reaching market distortions, and is the most egregious in the entire region. The broadcast of movies prior to release in theaters or 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. For many years, MPA and its member companies have taken action against television and video piracy in the Dominican Republic. Within the last year, the Dominican Republic has taken notable and successful action to reduce piracy in both of these areas. For example, this has resulted in a significant lowering of the video piracy level, now placed at approximately 20%. Annual losses to the U.S. motion picture industry due to audiovisual piracy in the Dominican Republic are estimated to be over \$2 million in 2003. Although piracy has been significantly reduced in video stores, these same stores continue to violate copyright law by using U.S.-only home-use DVDs for commercial use in the Dominican Republic. As a result, the U.S. film studios have lost the entire video market for development. The government of the Dominican Republic has recognized this practice as illegal, but has refused to apply the law until, at least, after elections in 2004.

However, the government has openly permitted high-profile exceptions in enforcement action because of their “political” nature; that is, the political connections of the suspects. These exceptions exist because of cabinet-level decisions not to enforce copyright laws in specific cases. These subjective and political exceptions to enforcement vitiate the good results obtained by lower level enforcement officials and clearly demonstrate the lack of commitment to adequate and effective copyright enforcement by the highest levels of both the current and prior administrations. In the case of television piracy, the main alleged violators are station owners closely involved in the leadership of the political parties of both the current and prior administrations; in the case of video, the video stores’ representative has a family relationship with a very senior Ministry of Culture representative. These highly visible exceptions provide to those who now comply with copyright law strong incentives to return to piracy.

on U.S. Industries, Consumers and Beneficiary Countries, Investigation No: 334-227 (filed June 30, 2003), available at http://www.iipa.com/rbi/2003_Jun30_CBERA_ITC_REPORT.pdf.

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 \$9.9 million in 2003. The piracy rate estimate for audiocassettes is 97%, compact disc (CDs) is 25% in retail stores, with a noticeable increase in the tourist areas and major shopping areas around the country. Audiocassettes, although still distributed by independent labels, has decreased dramatically as a format, giving way to music CDs that have had an explosive growth in the country and brought on a larger presence of pirate music recorded on the CD-R format. In 2003, the RIAA had its first full year of operations utilizing ADOPROFONO (a group or task-force made up of record labels, the IPR prosecutor's office, ONDA, and the National Police). While addressing perhaps 25% of the pirate market in the Dominican Republic, ADOPROFONO and ONDA seized over 648,000 pirate units from Santo Domingo and Santiago. This would indicate that the illicit market exists at around 2.6 million units. Prices for illicit product has also decreased to around US\$2.50 for a CD-R and about US\$1.25 for a cassette. This has made the pirate market flourish under the economic strain the Dominican Republic is experiencing.

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.

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 stayed at approximately \$1 million in 2003.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

Progress on actual enforcement measures to deter piracy in practice has been slow in the Dominican Republic, and high levels of piracy remain. Several key issues include: political connections in certain broadcast and video piracy cases have severely hindered effective enforcement; criminal copyright infringement cases at the judicial level remain unresolved as the procedures permit lengthy appeals; deterrent-level penalties have not been imposed by courts of first instance. Below is a summary of the various enforcement entities' performance in 2003, with industry-specific views following:

- **ONDA:** In 2003, ONDA was proactive on copyright inspections and investigations, 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.

- **Police (Fiscalia):** Industry reports good cooperation with the fiscalia on anti-piracy actions. The police could better assist ONDA with their inspections of the leads and tips ONDA receives about suspected pirates operating in the Dominican Republic. In fact, ONDA was assigned an investigator from the Fraud Division of the National Police, but his is used as security and not in an investigative capacity for which he was detailed.
- **INDOTEL:** In 2003, INDOTEL conducted two concerted inspection sweeps of broadcast and cable stations (in addition to ongoing activities). Based on its investigations, INDOTEL can and does refer actions for criminal prosecution. Since fall 2003, INDOTEL has been examining possibilities under its own legislation and regulations in order to strengthen its actions against those broadcast stations and cable companies which are infringing copyrights. INDOTEL suggested at the October 2003 GSP hearing that it might adopt additional regulatory measures to strengthen its authority in broadcast piracy and cablecast piracy cases in the November 2003 timeframe. At this time, IIPA does not have additional information regarding this process, and looks forward to seeing what INDOTEL may propose.
- **Prosecutions:** The Dominican authorities appointed a new specialized IPR prosecutor, with nationwide authority in the summer of 2003. This prosecutor will be in charge of IPR, e-commerce and telecommunications prosecutions. Three ministries have ceded authority to this new centralized position. Creation of a nationwide IPR prosecutor has been high on the copyright industries' wish-list for years. In practice, the MPA reports some concerns about the commitment of prosecutors to effectively pursue cases against politically well connected suspects. MPA is also disappointed that key IP cases, such as two key television broadcast piracy cases, are not handled by the IP Prosecutor. The Attorney General explains this by noting that the cases originated prior to his naming the IP Prosecutor; however, the net result is that the IP Prosecutor has no say in the prosecution of two important and current copyright prosecutions.
- **Judges:** Judicial delays are a serious, systemic problem in the Dominican Republic. Delays affect all cases, not just IPR cases. Continuances are sometimes two and three months long. The criminal judicial system in the Dominican Republic allows for virtually unlimited continuances based on any excuse imaginable, with little to no review of the merits. (The current criminal broadcast piracy case against Canal del Sol confirms the continuance saga in a vivid manner.) RIAA adds that these delays cover both the actual start date of the trial as well as the length of the trial. Once a sentence is handed down, request for appeal from the defendant is granted automatically. In addition, the appeals court judges have not sat to hear and/or affirmed any of the 19 cases presently pending appeal for the RIAA.

The new Criminal Code in the Dominican Republic will enter into effect in August 2004. It contains rules which are expected to expedite all new cases (but does not effect cases already in progress, such as the dozens of recording industry cases under appeal). 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. The new code also will permit negotiation of restitution amounts, something that is not presently available. The current failure of the courts to afford adequate and effective protection is a present-day problem which requires present-day solutions.

Specifically, the recording industry continues to experience severe enforcement roadblocks, primarily at the judicial level. So far, 86 criminal cases for copyright infringement of sound recordings brought are still pending trial as of December 2003. Since 1999, the RIAA has been successful in obtaining only 19 prosecutions, including prison sentences, with court fines and restitution in the amount of US\$86,000. All these adjudicated cases are on appeal, with no appellate review dates set.

- **Interagency coordination:** 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.

The Industries' Criminal Copyright Enforcement Experiences in 2003 Vary

Because of the copyright industry sectors' unique experiences in the Dominican Republic, the description below summarizes each industry's recent experiences.

Motion picture industry: The motion picture industry reports that broadcast piracy in the Dominican Republic remains the worst in the entire hemisphere. MPAA brings both criminal and administrative actions in country. The administrative authorities (ONDA and INDOTEL) have met with difficulty in taking actions against the larger television broadcast stations because of their political importance to the government. In April 2003, at the initiative of INDOTEL, a new anti-piracy campaign was initiated in which these two authorities began inspecting broadcast stations to verify they had contracts to authorize broadcasting of all, including U.S., programming. After some delay, these authorities presented criminal complaints to the prosecutors. In August 2003, INDOTEL conducted another series of inspections of broadcast stations. So far, sixteen (16) criminal complaints have been filed. However, the Attorney General has demonstrated little effort in prosecution.

The first criminal hearing against one of the larger broadcast stations, Channel 40-Canal del Sol, was first scheduled for August 20, 2003, but was continued by the prosecution and postponed until October 20, 2003. The trial was postponed again to December 16, 2003, and postponed a third time until March 1, 2004. And this criminal process has had no deterrent effect against this station's action because infringing U.S. programming continues to be broadcast. The hearing in the criminal trial against another broadcast station, Telemicro, is scheduled for February 20, 2004.

The motion picture industry is also concerned about the fair and transparent handling of some its video piracy cases, which have been progressing — at least up until the summer of 2003 — rather smoothly. This problem was illustrated by the Ministry of Culture's non-transparent issuance of objectionable copyright regulations in July 2003, portions of which have since been reversed due to a loud outcry by the copyright community and the U.S. government.

The MPA is very concerned that preferences are being given to political and family connections over even-handed law enforcement, something which has happened for years in broadcast piracy cases and, more recently, in video cases. The Dominican Republic government, through two administrations, has told MPA that it would obtain a resolution to the problem "politically," in lieu of taking enforcement action. During that time, infringing activity has continued, MPA member companies' copyrights have been infringed and their revenues have been damaged, and MPA has continued to request a legal remedy. Government officials from

the Industry and Commerce and Culture Ministries as well as the Attorney General have told MPA that the resolution to these problems is political and cannot be resolved through the legal system.

MPA also notes that non-transparent preferences appear to be happening, instead of even-handed law enforcement, demonstrating the government's predisposition towards political and personal considerations over its legal commitments. These criteria are entirely inconsistent with the effective legal remedies that the government claims to have established. For example, The Minister of Culture has recognized in writing that the current practice of commercial use of US-only home-use DVDs in video stores is illegal, but has prohibited ONDA from applying the law until, at least, after the 2004 elections.

Recording industry: The recording industry continues to experience severe enforcement roadblocks, primarily at the judicial level. RIAA's three-tier effort in the Dominican Republic includes education, training and enforcement (bringing criminal and administrative actions). The judiciary continues to be the weakest link and requires the most urgent attention at both the criminal courts level and the appeals court level. So far, 86 criminal cases for copyright infringement of sound recordings brought were still pending trial in December 2003. Since 1999, the RIAA has been successful in obtaining only 18 prosecutions, including prison sentences, court fines and restitution in the amount of US\$83,750.⁸ All these adjudicated cases are on appeal, and no review dates have been scheduled by the Court of Appeals. As a result, there continues to be no practical deterrence against music piracy in the Dominican Republic.

ONDA reduced operations in music related activities by 227% in 2002. In 2003, ONDA increased their music related operations seizing 141,216 units. To date, ONDA has not used the law enforcement specialist/detective assigned to follow-up on investigations in this capacity. This is the RIAA's first full year of utilizing ADOPROFONO, a local group of music labels brought together as a coalition, to address the increasing piracy problems in the Dominican Republic. ADOPROFONO, with the assistance of the Fiscalia and the National Police, conducted over 40 operations, seizing 414,379-pirate/counterfeit music CDs and 91,184 audiocassettes through December 2003. There were 44 people arrested as a result of their operations. RIAA is encouraged by the results of the task force operations. The Judicial System continues to be the weakest link in the RIAA's anti-piracy strategy in the DR.

Business software: Although the business software industry has reported some enforcement successes in the Dominican Republic, piracy levels of its copyrighted works remain high (61%) as well. BSA runs a campaign involving mainly administrative actions. With respect to administrative actions this year, BSA reports it continues to be able to work very effectively with ONDA and the Fiscalia in this new enforcement regime. During 2003, ONDA and the Fiscalia were proactive on software industry cases, with ONDA conducting inspections and seizures and referring evidence to the Fiscalia for criminal prosecution. Working with Dominican prosecutors in the Fiscalia offices, BSA achieved 13 convictions of software piracy in recent years. Other prosecutions for piracy and counterfeiting are working their way through the Dominican courts. During 2003, ONDA was helpful and supportive in performing inspections not only in Santo Domingo but also in other cities such as Santiago, La Vega, San Pedro de Macorí, La Romana, and San Francisco de Macorís

⁸ The award is in Pesos at RD\$3.35 million at a current exchange rate of RD\$40.00 to US\$1.00.

2003 CRIMINAL ENFORCEMENT STATISTICS IN THE DOMINICAN REPUBLIC

COPYRIGHT ENFORCEMENT STATISTICS 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted by police (Fiscalia)	12 (with ONDA)	12	60
Number of criminal cases commenced	16		86
Number of defendants convicted (including guilty pleas)	0		19
Numbers of acquittals and dismissals	0		0
Number of criminal cases pending	16	8	86
Total number of cases resulting in jail time	0	1	0
Suspended Prison Terms			0
Maximum 6 months		1	0
Over 6 months			0
Over 1 year			0
Total Suspended Prison Terms	0		n/a
Prison Terms Served (not suspended)			
Maximum 6 months			0
Over 6 months			0
Over 1 year			0
Total Prison Terms Served (not suspended)			
Number of cases resulting in criminal fines	0		
Up to \$1,000			5
\$1,000 to \$5,000			5
Over \$5,000			9
Total amount of criminal fines levied (US\$)			83,750
Number of administrative inspections conducted by ONDA	36 (with INDOTEL)	48	Unknown
Number of cases resulting in administrative sanctions	8	6	0
Average fine per case (US\$)	US\$1,500	US\$1,500	n/a
Total amount of administrative fines collected (US\$)		n/a	n/a

The Rules for Civil Enforcement Remain Good

The 2000 Copyright Law corrected several civil litigation omissions which had been in Dominican law and practice. First, it provides for *ex parte* civil searches, an especially important tool used by the business software publishers. Second, the law also expressly prohibits judges from imposing onerous bonds in cases brought by foreign plaintiffs, resulting in a major improvement in the practical ability of copyright holders to defend their ownership rights in Dominican courts. However, to the best of our knowledge, copyright holders like BSA did not pursue civil infringement actions in 2003.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 2000: The Dominican Republic adopted a new copyright law in October 2000 (Law 65-00), fulfilling many years of effort to replace its inadequate 1986 copyright law. That legislative achievement represented success in advancing higher levels of

substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement in the Dominican Republic. The law raised the level of copyright protection up to WTO TRIPS levels, and also integrated several critical obligations of the two WIPO Internet treaties. Copyright regulations were published in January 2002, and included the administrative fines which ONDA could impose against copyright infringers.

Regulations undermining the Copyright Law were adopted (then reversed, in part) in 2003: To the surprise and consternation of the copyright industries, the Ministry of Culture issued a series of resolutions to the copyright law on/about July 11, 2003 (Resolutions 4-03, 5-03, 6-03, 7-03). In particular, two of the more egregious provisions disallowed motion picture studios from determining their own method of distribution and eliminated the Copyright Office's (ONDA) ability to independently investigate copyright violations of audio-visual works (thus administratively weakening the 2000 Copyright Law itself). Sadly, the rapid and non-transparent issuance of these July regulations showed the government's predisposition toward political and personal considerations over its legal commitments. All the copyright industries were very concerned about the July 2003 regulations and the adverse precedent they might have to undermine enforcement actions. After much bilateral engagement, the Ministry of Culture revised its July 2003 regulations in August 2003 (Resolution No. 9-03) to correct the two most glaring problems: that the motion picture studios were not considered copyright holders (thus greatly interfering with their ability to take anti-piracy actions) and that ONDA lost its *ex officio* inspection authority.

However, despite this recuperation of enforcement ability, the Minister of Culture has prohibited ONDA from enforcing copyright law in the case of video stores, while at the same time recognizing that the commercial practices of the video stores are illegal and violate the copyright law. The Ministry of Culture has told MPA it will only allow enforcement after the 2004 elections.

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, filed a constitutional challenge in the Supreme Court of Justice in Santo Domingo, alleging that portions of the 2000 Copyright Law are unconstitutional. Hard Soft argues that the copyright law protects software more stringently than other media, and is thus unconstitutional because of unequal protection, in addition to other arguments. BSA has filed a brief refuting these arguments, and ONDA also filed a brief against this constitutional challenge. The hearing in order to discuss whether Hard Soft committed a copyright infringement was scheduled for November 4, 2003, but was postponed until April 2004. Regarding the constitutional challenge, BSA is still waiting for the Supreme Court's final decision.

WIPO Internet treaties: The Congress of the Dominican Republic has passed legislation to ratify the two 1996 WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. President Mejia has signed the documents for both treaties, but deposit with WIPO is still forthcoming.

Criminal Code amendments: The Dominican Congress on July 2, 2002 passed a new Criminal Procedure Code which continues to allow ONDA and the Fiscalía to conduct *ex officio* actions; this law will enter into effect in August 2004 (refer to discussion above).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

EGYPT

EXECUTIVE SUMMARY

Special 301 Recommendation: We recommend that Egypt be elevated back to the Priority Watch List.

Overview of Key Problems: Egypt has long been noted as a market essentially closed to most U.S. right holders, due to major barriers to legitimate business – piracy being the chief one. There was little change to this situation in 2003. While copyright protection on the books improved with passage of a new IPR Code in 2002, implementing regulations issued in the fall of 2003 did not implement the copyright law provisions, leaving in doubt when purview over business and entertainment software would move to the Ministry of Communications and Information Technology (MCIT) – a badly needed development for the business and entertainment software industries. . The move to MCIT, which is dictated by the law, is necessary because it ensures that enforcement officials with the necessary expertise would be handling software cases. It is hoped that the new IPR Code is implemented and the new mandate of MCIT is fully exercised without further delay.

Meanwhile, little enforcement was taken against massive book piracy, stifling that industry's efforts to do business in Egypt. There was one enormous enforcement action against audiocassette piracy, yielding over 2 million pirate cassettes and uncovering a piracy ring. A significant number of raids were conducted against resellers dealing with pirated software by the Ministry of Interior (MOI). However, the Ministry of Interior did not carry out any actions against end-user piracy of business software, and the few corporate end-user raids that were carried out by the Ministry of Culture did not result in any significant court actions and were vastly ineffective. While there were hopes for a free trade agreement with the United States, Egypt's other trade policies have made this potential vehicle for moving forward copyright protection in Egypt impossible to achieve.

Actions to be taken in 2004

- Enact implementing regulations to the copyright law which cure TRIPS deficiencies, fully implement the WIPO treaties, increase penalties, provide adequate enforcement measures, and complete the move of business and entertainment software to the MCIT.
- Join the WIPO "Internet" treaties, the WCT and WPPT.
- Take sustained enforcement actions against book piracy, including photocopy shops and reprint facilities, and instruct universities to use only legal copies of publications.
- Take sustained enforcement actions against all illegal distributors and retailers of pirate product, and significantly increase audits and enforcement against pirate end-users of business software.
- Improve court functionality and transparency, issue *ex parte* orders and injunctions, and mete out deterrent penalties in piracy cases.

For more details on Egypt's Special 301 history, see IIPA's "History" section.¹ Please also see previous years' reports.²

EGYPT
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	NA	NA	NA	NA	15.0	35%	15.0	35%	15.0	50%
Records & Music ⁴	8.0	45%	8.2	41%	9.2	41%	12.0	48%	12.0	50%
Business Software ⁵	NA	NA	12.7	52%	14.5	58%	10.0	56%	26.4	75%
Entertainment Software	NA	90%	NA	NA	NA	90%	14.9	94%	6.2	65%
Books ⁶	25.0	NA	28.0	NA	32.0	NA	30.0	NA	30.0	80%
TOTALS⁷	NA		48.9		70.7		81.9		89.6	

COPYRIGHT PIRACY IN EGYPT

Egypt is one of the world's worst countries in terms of book piracy. Major losses accrue due to piracy of higher-education textbooks (which are, for example, sold at stalls set up near university campuses), with piracy levels estimated at up to 50%, meaning at least half of the approximately 70,000 students in any one year who use English-language materials are using pirated materials. There is even evidence of bogus requests for "free" supplementary teaching materials, which are not supported by purchases of genuine textbooks. The piracy level for medical books is as high as 90%, and the vast portion of the market for other professional reference books (e.g., engineering, etc.) is taken up by pirate product.⁸ Although legitimate U.S. publishers continue to provide their books at deep discounts (sometimes as deep as 70-80%), their works continue to be pirated on a commercial scale in Egypt. The quality of printing has improved dramatically in Egypt, making the pirate product in some cases virtually indistinguishable from the legitimate product. Pirated "ESL" (English as a Second Language) materials can also readily be found. Publishers have received some evidence of imported infringing product from East Asia, as well as possible exports from Egypt to surrounding territories.

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.pdf>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ The piracy rate for international products is roughly 70%, while it is roughly 50% for the local Egyptian industry.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ In 2002, lower losses of \$28 million to the U.S. publishers due to piracy in Egypt reflect a 40% currency devaluation. Continued devaluation of the Egyptian pound is responsible for shrinking loss figures in 2003. These figures do not reflect a decrease in piracy rates.

⁷ In IIPA's 2003 Special 301 report, IIPA estimated that total losses to U.S. copyright-based industries in Egypt were \$36.2 million. IIPA's revised loss figures are reflected above.

⁸ 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.

Piracy remains a serious problem for other industries, although the recording industry notes some improvement over the past three years. The entertainment software industry report that imports of pirate console-based videogames continue to pour into Egypt from Asia, with Playstation2® and Xbox® coming from Malaysia, while GameBoy Advance® games are coming in from China. Entertainment software for personal computers is either produced locally – a new phenomenon – or imported from elsewhere in the Middle East and Eastern Europe. The largest losses to the business software industry, aside from the retail sale of pirated applications, accrue due to the unlicensed use of software in businesses (corporate “end-user” piracy), which occurs in small and medium-sized companies. While this business end user piracy is still a major challenge in Egypt, the industry is pleased with the Egyptian government’s efforts to root out piracy in the government and the national educational system. The Ministry of Education renewed its licensing agreements with the concerned software companies for the legalization of software used in private and public schools.

While not rampant, there is some Internet piracy in Egypt, mostly involving the advertising on the Internet of “hard goods” pirated product (e.g., CDs and VCDs). Internet piracy makes up about 2% of all piracy of entertainment software in Egypt, including both CD “burning” and downloading of pirate “WAREZ” software from the Internet.

COPYRIGHT ENFORCEMENT IN EGYPT

While copyright enforcement varied by industry in 2003, in general, enforcement efforts failed to have a deterrent effect on piracy in Egypt. For example, for the U.S. publishing industry, there were no actions taken against rampant piracy of academic materials on university campuses (the Police giving the excuse that there are “political sensitivities” with respect to taking actions against such piracy operations). Authorities did continue to take some measures against pirate stalls in cities, like Cairo, October City and Minya City, but the vast majority of illegal textbooks are distributed on the university premises, so it is imperative that action be expanded to include university campuses (no actions were taken within the university campuses in 2003). For the business software industry, a number of raids were conducted by the Ministry of Interior. The Business Software industry is particularly encouraged by the activation of both the Anti-Piracy Unit and the Computer Crime Unit in the Ministry of Interior.

As noted, the situation in Egypt has improved somewhat for the recording industry over the past three years (although sales were down in 2003). The brightest spot for industry came in July 2003, with the closing of a long-term industry investigation with the largest-ever raid against audiocassette piracy in the Middle East. In particular, the raid netted seizures of over 2.3 million audiocassettes (Arabic repertoire of many different companies), 1 million “inlay cards,” 6 audiocassette duplication machines, 2 printing machines, and 1 van used to transport the pirated cassettes. In all, authorities carried out 85 raids to combat sound recording piracy in Egypt in 2003.

Disappointingly, implementing regulations for the IPR Code were issued without coverage of copyright, meaning the change in responsibilities over protection of business and entertainment software to the Ministry of Communications and Information Technology did not occur in 2003. This changeover could also be accomplished by executive order, and IIPA hopes this (or the issuance of implementing regulations with regard to copyright) will occur in the first quarter of 2004. The delay in issuing the various Implementing Regulations of the new Copyright Law is unacceptable. More than 18 months have passed since the adoption of the new IPR Code in June 2002. Further delay will cause grave harm to right holders and send the wrong message to the public as to the seriousness of the Egyptian government in fighting copyright piracy.

One positive highlight in 2003 was the establishment of a website and a hotline by the Ministry of Interior dedicated to software piracy.

The court system continues to be marred by structural defects from initial raid to judgment. Copyright cases brought in Egypt continue to move at a snail's pace. Lack of transparency in the court system is a major concern, as court decisions are not published expeditiously; the situation is worse in cases initiated by the government, as there is simply no means to follow the progress of such cases. For cases that have resulted in positive judgments being awarded to right holders, collections take an unreasonably long time in Egypt.

MARKET ACCESS ISSUES

Egypt is one of the world's most restrictive markets when it comes to trade in copyrighted materials.

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 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, in addition to the entertainment software industry, similarly reports high import duties, significantly increasing the price of legitimate products (e.g., imported video game products for play on the console platform) and making it even more difficult to compete with pirates.

In addition, the Egyptian authorities seem inclined to impose a sales tax on software products and licenses. The business software industry is concerned about this possibility, which will no doubt increase prices of business software and negatively impact computer literacy in Egypt.

Certain other barriers effectively restrict market access for U.S. copyright industries 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. 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. Egypt also maintains a discriminatory and GATT-inconsistent entertainment tax on foreign films. Non-Arabic language films must pay a 20% box office tax, while Arabic language films only pay a 5% tax. In addition, only five prints may be imported for any major U.S. film title imported into Egypt.

On April 24, 2003, Egypt joined WTO's "Information Technology Agreement," which requires Egypt to remove all tariff barriers to information technology products, including software. Egypt should be encouraged to remove tariff barriers with respect to all digital products, including software or not, but at least Egypt's authorities should clarify that music CDs, entertainment software CD-ROMs and console-based CDs, VCDs, DVDs, and reference materials on CD-ROM will have tariffs removed.

COPYRIGHT LAW AND RELATED ISSUES

Egypt's new IPR Code, signed into law on June 2, 2002 (effective date June 3), 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. While the law is an excellent step in the right direction, IIPA has communicated many changes which must be made to make the law completely TRIPS-compatible, and has also made suggestions as to what is needed in implementing regulations to adequately strengthen the law for the fight against piracy in Egypt.⁹

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 2002, over \$23.5 million worth of Egyptian goods were imported into the U.S. duty-free, accounting for almost 1.8% of its total imports to the U.S. For the first 11 months of 2003, almost \$28.5 million worth of Egyptian goods entered the U.S. duty-free under the GSP program, accounting for almost 2.7% of its total imports into the U.S. Egypt should not continue to expect such favorable treatment at this level when it fails to meet the discretionary criteria in this U.S. law.

⁹ IIPA commented in great detail in the 2003 Special 301 report on Egypt, which can be read at <http://www.iipa.com/rbc/2003/2003SPEC301EGYPT.pdf>.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

INDIA

EXECUTIVE SUMMARY¹

Special 301 recommendation: IIPA recommends that India be retained on the Priority Watch List.

Overview of key problems in India: While India has a large, significant indigenous copyright industry,² and a good copyright law, the major issues in India are high piracy rates and debilitating deficiencies in the enforcement system. 2003 saw very little progress in combating piracy. 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 outside the largest cities; lack of resources and training; and an overburdened and slow court system that prevents conclusion of even the simplest criminal or civil cases. CD-R burning is assuming a larger percentage of the pirate market (replacing VCDs and manufactured CDs) but imports of pirate OD product, from Pakistan, Malaysia and other countries, continue unchecked by Customs and other enforcement authorities. The nine local OD factories continue to produce pirate product and a first successful raid was made at the end of 2001. India has been pressed for at least 2 years to adopt an optical disc law like its neighbors in Asia, and recent reports indicate that a drafting process has been completed and the draft law rests with the Ministry of Information & Broadcasting. IIPA has not been able to review this draft. End-user software piracy and hard disk loading continue virtually unchecked, with almost no court cases decided. Book piracy continues as a huge problem and major seizures continue, with some deterrent effect, but no court decisions. The criminal system is slow, cumbersome, and fraught with delays and unnecessary expense, but *ex officio* actions by police cells in some major cities like New Delhi, Bangalore, Hyderabad and Chennai, with some pretrial detention of infringers, has brought some deterrence. While injunctions are issued fairly promptly in some jurisdictions in civil cases, these cases move far too slowly and infringers are known to violate court orders with impunity. While the injunctions offer some deterrence against cable piracy, in particular, this is not sufficient for other forms of piracy. The Civil Procedure Code was amended in 2003 to speed up decisions but it is too early to judge success. India has also engaged in a three-year, almost totally nontransparent, process of drafting amendments to its copyright law. We understand that this process has recently been concluded but IIPA has not seen a draft. It is

¹ For more details on India's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>

² A study done in 1995 concluded that the copyright industries represented over 5% of GDP. IIPA understands an update of this study, based on WIPO's new template, is being planned for India. Software exports alone reached \$9.5 billion in 2003 and are expected to grow by 26-28% in 2004. Another study suggested 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.

hoped that these proposed amendments will correct some of the deficiencies in the current law and also fully and properly implement the WIPO “Internet” treaties. India should then promptly ratify them.

Actions to be taken by the Indian government

IIPA recommendations are virtually the same as in its 2003 submission, few advances in dealing with piracy having occurred:

- Establish a national centralized body dedicated to, and trained in, IPR enforcement, with powers to enforce across state borders;
- Adopt a world-class optical disc law to deal with increasing optical disc piracy;
- Improve and strengthen existing state level intellectual property police cells and ensure that they conduct more *ex officio* (*suo moto*) actions against piracy crimes;
- Work with Customs (a) to reduce significant imports of pirate product, particularly from Pakistan and (b) investigate and prevent illegal exports of low-cost India editions of textbooks, including to the U.S.;
- Adopt meaningful court reform to decrease burdens, costs and delays and ensure that cases are concluded promptly with deterrent penalties and damages;
- Adopt quickly amendments to the copyright law that correct deficiencies and properly implement critical aspects of the WCT and WPPT, including protection for temporary copies, and 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: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	77.0	60%	75.0	60%	70.0	60%	47.0	60%	66.0	80%
Records & Music	6.0	40%	6.6	40%	NA	40%	6.0	40%	8.0	40%
Business Software Applications ⁴	NA	NA	257.7	70%	256.0	70%	181.6	63%	160.2	61%
Entertainment Software ⁵	113.3	84%	NA	NA	NA	90	NA	80%	42.8	86%
Books	36.5	NA	36.5	NA	37.0	NA	36.0	NA	35.0	NA
TOTALS	NA		375.8		363.0		270.6		312.0	

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁵ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

COPYRIGHT PIRACY IN INDIA

The fight against high levels of piracy progressed little in India in 2003. CD-R burning and increased Internet piracy have affected all industries in India. Continued book, music, video, business software 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 and 2003. 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, remain readily available, though continued seizures have helped to contain the problem, particularly in New Delhi and Mumbai. However, publishers' enforcement operations have encountered great difficulty in other cities. Publishers estimate that any bestseller 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.⁶ Moreover, high quality pirated offset printed books are being exported from the south of India to surrounding countries.⁷

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. Continuing in 2003 is the unauthorized publication of books in digitized form (including interactive published materials on CD-ROM), all now widely available in the pirate markets in India, mostly manufactured domestically. Publishers report, for example, cases where 200-250 best selling medical and technical textbooks were being loaded onto CD-ROMS and being sold for US\$5. Reports are unconfirmed, but the source of these digitized pirate copies could have been digital copies made by the government in its announced effort to digitize textbooks and offer free access to them over the Internet. It is suspected that many of these digital copies are unauthorized. The government must ensure that permission is obtained from publishers for the making of all such copies and work with publishers to ensure that they are not diverted to the pirate marketplace.

In 2003, unauthorized copies of trade and textbooks began showing up on the Internet. While the penetration of Internet users in India remains small, this is a disturbing new development and calls, again, for India updating its copyright law and building a much stronger Internet enforcement infrastructure.

IIPA and AAP have urged for years that actions be taken with respect to exports of low cost "India-only" editions of U.S. books, particularly to the Middle East. 2003 saw these being

⁶ For instance, 18,000 pirate copies of the Harry Potter books were seized in 2002 and early 2003. The newest Harry Potter book, "Harry Potter and the Order of the Phoenix," was heavily pirated when it was released in 2003, and many Harry Potter knock-offs also flooded the market. 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.

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

exported to the U.S. both in hard copy form and via the Internet. Immediate action should be taken to halt this illegal activity.

Cable piracy: Through 2002, unauthorized cable television transmission was the predominant form of piracy of motion pictures in India. As many as 40,000 cable systems exist in India, and these systems 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 affected 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 and has achieved substantial success in reducing cable piracy of U.S. motion picture product. 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 points. However, these actions demand constant vigilance and MPA will continue to seek new injunctions and, where possible, contempt orders against recidivist cable systems. Because some cable systems violate these court ordered injunctions (and because of the positive impact of *suo moto* actions), MPA is bringing criminal cases in addition to civil cases for contempt of court. These actions are difficult but have some deterrent effect.

Video piracy: Pirate videos, VCDs, DVDs, and increasingly this year, CD-Rs, 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). A significant number of the VCDs are being manufactured locally by at least one factory located just at the border of New Delhi in the State of Rajasthan (Bhiwadi). The other factory in Kundli, Haryana, however, has largely shifted its operations to legitimate product, after the MPA initiated a raid on it in 2001. Its activities need continuous monitoring, however. The Indian OD factories are also suspected of manufacturing a significant amount of 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. Pirate optical discs are also being imported from Malaysia and Pakistan, but, as noted, CD-R burning in labs located throughout India is also taking over the pirate market.

While losses to the U.S. film industry are large, the popularity of, and high levels of piracy of, Indian films have contributed to reported balance sheet losses to the local industry of \$66 million (not piracy losses). The domestic industry generated close to \$900 million in total revenue in 2002.⁸ Given the importance of this industry to Indian economic development, it is critical that Indian authorities respond with adequate enforcement.

Music piracy: In 2003, the Indian and international recording industry reported significant losses due in large part to rampant piracy, particularly for Indian repertoire. The Indian Music Industry (IMI) reported in April 2003 that its members are losing close to \$30 million annually. In last year's submission, IIPA reported that the industry declined 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. The legitimate music business is decimated by three types of pirate product. In counterfeit cassettes, the inlay cards differ in quality and color of printing, and do not contain the name of the company on the leader tape or embossed on the cassette. In pirated copies, the name and contact of the company manufacturing the cassette is missing,

⁸ *Deccan Herald*, “Film Industry Posted Rs300 Crore Loss in 2002,” March 15, 2003.

the name and contact of the copyright owner and year of publication are missing, the inlay card shows poor quality printing and/or unknown brand name, and compilations of “hit songs” from different albums are collected under names such as “Top Ten” or “Bollywood Hits,” etc. Pirated CDs containing MP3 files and include the same indicia of illegality as pirated cassettes, but in addition, source identification (SID) code is missing. Many pirate CDs emanate from pirate plants in Pakistan (whose music market is also in a precipitous decline due to massive optical media piracy there). Increasingly CD and CD-R piracy is replacing audiocassette piracy in the marketplace with audiocassette piracy focused on street vendors. Retail shops in major cities increasingly use CD-R burners to make compilations of music at the request of a customer. 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) continues unabated 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. Little positive change has been observed, with weak enforcement continuing. BSA, in a study released in 2003, stated that if India reduced its piracy levels from 70% to just 60%, it could add US\$2.1 billion to its GDP by 2006, add US\$92 million in tax revenues, and add 50,000 new software jobs. This is a big incentive for India to begin addressing this problem in a serious way.

Internet piracy: Internet piracy continues to grow as a problem affecting every copyright industry. 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.⁹ In 2002, one U.S. software company took action against the sale of pirated software on the Internet over a popular auction site. In September 2003, BSA obtained its first *suo moto* Internet raid conducted by the Mumbai police against a pirate selling illicit software through a list (www.list1.150m.com). Prior to that it had issued successful cease and desist letters to ISPs involving pirated software offered for sale at auction. These sites were promptly taken down and BSA believes that such piracy is subject to both criminal and civil action. MPA has also successfully issued warning notices to some pirates offering pirate products for sale through the Internet.

Piracy of entertainment software: Pirates sell the most popular games for Rs.175-250 (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 remains high for all products, with CD-R burning occurring in areas with higher PC penetration.

COPYRIGHT ENFORCEMENT IN INDIA

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 low fines and virtually no significant jail terms. While there have been a few recent small signs of progress, detailed below, the situation remains dire for U.S. industry generally.

⁹ See Manohar Sharma, “Music Industry Battles MP3 Piracy,” *Times of India*, January 31, 2002.

Criminal Enforcement

Criminal enforcement against piracy in India has been rife with frustrations for both the Indian and U.S. copyright industries. Last year IIPA reported that in the over 15 years that IIPA has been working on Indian issues, there have been no more than 15 convictions¹⁰ for copyright piracy, as far as industry is able to ascertain. This included BSA's first ever conviction, in 2002, for retail piracy of software, which decision was ultimately reversed on appeal in 2003! The one bright spot, however, in an otherwise grim picture is the continuing cooperation, particularly by the New Delhi police (and by police in some other parts of the country), in running *suo moto* criminal raids. While the pretrial detention of suspected pirates is a deterrent, there have been only a few case decisions this year.

For example, the music industry obtained 1400 raids in 2003 carried out by the police, with seizures of almost 341,462 pirate audiocassettes (about one-half of the seizures in 2002) and over 460,903 CDs and CD-Rs (a 60% increase over seizures in 2002). Of this number 155,972 CD-Rs were seized, indicating clearly that CD-R burning is taking over the marketplace, as it is in other Asian countries. All in all, however, this record is insufficient to deter piracy effectively and the legitimate music industry in India is slowly shrinking, even 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, 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. Overall piracy rates (including local repertoire) in the cassette market are estimated at 40-50% and in the CD market at 60%. The move of police to taking *ex officio* actions is helping but only if followed by convictions with significant deterrent penalties. Piracy of music on the Internet is taking a toll as well. The local music industry established an Internet Anti-Piracy Group in 2002.

The publishing industry has been very active in addressing piracy of published materials. Slightly fewer raids were taken in 2003, due primarily to book piracy becoming more costly to pirates and moving even further underground. The 2003 raids were largely focused on the source of pirate production rather than distribution outlets. Noteworthy in 2003 was a raid against a pirate operating from a medical college campus in New Delhi, netting 1,100 copies of photocopied and hard bound pirate books and four photocopy machines. This was the third raid conducted within the medical college premises in the past three years. Unfortunately, this college seems to be taking no action to ensure that this does not happen again. In other medical college raids, one pirate had been found to have been arrested three times. In another raid in March 2003 at a pirate's printing establishment in New Delhi, 70,000 pirated copies of trade bestsellers were recovered. This was estimated to be one month's stock of pirate books being fed by this pirate alone into an even larger pirate distribution channel. While over 79 businesses/pirates were raided in 2003,¹¹ and while pirated books are regularly removed from many of the traditional markets, publishers have still not obtained a single conviction for book piracy. While 62 criminal cases have been commenced (with the publishers' lawyer undertaking a great deal of the work), progression of cases has been excruciatingly slow. In 2003, the prosecutors have filed charge sheets in 21 criminal cases but none of these cases has yet progressed beyond the preliminary stage. What is clear is that all these raids have revealed the

¹⁰ There have been a number of convictions, in cases brought by the recording industry, for failure to use the required certificate on audio and videograms under Section 52A of the Copyright Act, but virtually none under Section 63B, the criminal piracy provision. As noted in the text below, MPA recently obtained 3 additional convictions under 63B—a welcome development

¹¹ From September 2002 through November 2003.

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 despite training by the publishers, not many *suo moto* actions have been instituted (a direct complaint by the right holder was necessary), it is critical that more such actions, particularly in cities outside New Delhi, be conducted.¹² Beyond this stage, there is an urgent need for effective post-raid prosecution, including time-bound destruction of seized pirate stocks, and actual convictions with deterrent penalties.

With respect to video piracy, between July 1, 2002 and August 6, 2003, police conducted 119 *suo moto* actions across India. Police seized 30,539 VCDs, 15,113 DVDs and 190,610 CD-Rs, the majority of which infringed U.S. motion pictures. This is a marked and welcome increase in such raids and has led to MPA returning to use the criminal system more than in the last two years, when civil actions looked like the only viable enforcement tool. Most important, however, three convictions under the copyright law's criminal provisions, S. 63B, were obtained by MPA, not just under S. 52A, with imprisonment of 9 months in each case plus fines. This is a significant step forward.

To obtain even more *suo moto* raids on CD-R labs, MPA, in May 2003, announced a reward scheme designed to obtain information on CD burning operations. With a concerted program to train more police, MPA hopes to increase deterrence through raiding and more convictions with deterrent penalties.

The business software industry also began a program of criminal actions using the new determination of certain police cells to bring *suo moto* actions against retail and wholesale pirates. A total of 48 *suo moto* raids were conducted in 2003, mainly in New Delhi. The value of software seized in each raid varied from US\$250,000 up to US\$2.2 million, indicating the seriousness of the problem. However, none of these cases has yet reached the court—an all too typical situation in India. In addition, there are now 48 pending criminal cases, some of them filed in the mid 1990s, which have yet to reach court. The difficulty in concluding criminal cases satisfactorily can be seen in a case prominently reported in last year's submission as a major advance. In February 2003 a court in Hyderabad convicted dealers (hard disk loading and selling of pirate software) in two cases initiated in 1999 under S. 63 of the Copyright Act and S. 78 & 79 of the Trademarks Act. In one case there were three accused and in the other case there were four accused; each received a conviction for six months and a fine of Rs. 50,000 (US\$ 1,100), the minimum in the Copyright Act. This marked the first case in which BSA had received a conviction for distribution channel piracy in India. However, the defendants thereafter successfully appealed and the conviction was overturned. BSA has now had to file a further appeal in the High Court. This means, again, that the software industry still has never had a conviction for software piracy in India—even though India is one of the largest software producers in the world!

One major positive development was the first criminal end-user raid ever conducted by BSA in India, which occurred in March 2003 and involved a computer training institute located in Delhi. The software seized in that raid was valued at Rs. 1 Crore (US\$22,000) and the owner was arrested.

¹² The publishing industry reports that its anti-piracy lawyers had a particularly difficult time getting the police in Mumbai to cooperate. Near the end of 2003, for no apparent reason, 30 criminal cases were simply dropped without notice by the Delhi police.

There were 17 software cases active in the criminal courts at the end of 2003. The long, drawn-out nature of these prosecutions and the need to make appearances whenever the cases are heard adds exponentially to the cost of supporting the case.

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. The government announced in 2002 the setting up of 19 such cells. Unfortunately, not all are even remotely active. With the exception of the cell in New Delhi¹³ and a few other cities, these cells lack the necessary resources in terms of manpower (making them incapable of raiding larger pirate distribution and production targets), training and funds. In many locations, 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.¹⁴

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 to 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 most 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. Moreover, 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. This is another key reason why *suo moto* actions have become so important.

Another source of harassment for right holders has occurred recently in the form of counter-cases being filed by pirate syndicates. Pirates who are raided have started forming organized groups. Members of these syndicates have hired professionals whose sole job is to disrupt raid and seizure operations conducted at the behest of rights holders. These professionals use the slow court system to initiate false cases against those representing right

¹³ Publishers report that the Delhi cell now has the capability of running simultaneous actions against six targets.

¹⁴ 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. AAP reports particular problems with the Mumbai police in persuading them to run *suo moto* raids.

holders in anti-piracy actions. Once initiated, the syndicates then create adverse publicity as an obvious tactic to defame these anti-piracy operations. The MPA has specifically targeted these larger organized pirates and is therefore particularly vulnerable to these tactics.

INDIA CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	BOOK PUBLISHING [#]	TOTALS
Number of raids conducted	170	48*	1,400	129	1,747
Number of VCDs seized	54,995				54,995
Number of DVDs seized	19,117				19,117
Number of CDs/CD-Rs seized	114,520		460,903		575,423
Numbers of audiocassettes seized			341,462		341,462
Number of books seized				141,716	141,716
Number of persons arrested				87	87
Number of investigations	379				379
Number of VCD lab/factory raids	0				0
Number of cases commenced	170	0 (17) [^]			170
Number of Indictments	170				170
Number of defendants convicted (including guilty pleas)	3	2**			5
Acquittals and dismissals	1	2**			3
Number of cases Pending	980	48 [^] + 48*			1,028
Number of factory cases pending	2				2
Total number of cases resulting in jail time	3	0			3
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		2**			2
Up to \$1,000		0			0
\$1,000 to \$5,000		2**			2
Over \$5,000		0			0
Total amount of fines levied (in US\$)		\$2,200**			\$2,200

*These cases are criminal retail cases conducted independently by the police (as against the older cases in which BSA was the complainant). We have cross-checked our information with various police jurisdictions who inform us that though charge sheets have been framed in most of the cases, the courts have yet to frame charges in any of them and hence yet to take cognizance of the same. Hence the number of cases commenced is 48, i.e., the number of *suo moto* raids in 2003. Due to this, the number of cases pending would also be zero.

[^] These cases are all pre-2003 cases in which BSA was the complainant.

**These two cases relate to the first ever conviction achieved by BSA, however, the defendant successfully appealed. An appeal is being filed against the acquittal of the two accused.

[#]Statistics for September 2003-November 2003

CIVIL ENFORCEMENT

MPA is still taking civil cases against cable operators, but fewer than in prior years. Recently it has settled one case against a large cable operator in Gurgaon, near New Delhi. In another series of cases involving unauthorized cable transmission of the movie *Monsoon Wedding*, the system owner has appealed to the Supreme Court on the grounds that it should not be liable for the acts of their franchisees or distributors. This case is being watched carefully by industry, since it may set new standards for future enforcement against cable networks.

In addition to its efforts to use civil litigation against cable piracy, MPA has now expanded its operations against rental libraries and video parlors. Last year it obtained an injunction barring unauthorized rental and importation against perhaps the largest video library in India. The pirate involved in that case is the person particularly responsible for organizing one of the syndicates seeking to disrupt MPA's anti-piracy operations, as described above. This tactic is being used to thwart the existing injunction barring the pirate from renting and importing U.S. videos by trying to force the association to settle with him.

While the business software industry also seeks to rely more heavily on *suo moto* actions, historically, BSA has been compelled to focus more on civil redress in end-user cases, as being a complainant in a criminal case can tie up a copyright holder for years pending resolution of the criminal case. Yet, even this course of action has many hurdles. On the practical side of taking civil action, it has been found that it is extremely difficult to obtain statements or affidavits in relation to business/corporate piracy, as people are often fearful of the implications and consequences. The copyright owners often struggle to obtain conclusive evidence of the infringing use. This, coupled with the ease with which this evidence can be removed and destroyed, make effective and expedient criminal enforcement an important component in the drive to reduce piracy in all forms. Unfortunately, this is presently elusive.

In 2003, BSA brought three civil actions against corporate end users. In 2002, BSA filed three civil actions (four were filed in 2001) and conducted civil raids with local commissioners appointed by the Delhi High Court.¹⁵ During 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 savings. Of these 13 cases, 10 have been concluded, with total damages recovered amounting to around US\$54,000. 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.

On July 1, 2003, amendments to the Code of Civil Procedure went into force providing that civil cases must be completed within one year of being brought and that no more than three adjournments would be granted per party. This will hopefully lead to a new docket management culture within the judiciary. For example, the court now accepts an affidavit rather than requiring evidence in chief. Issues that could take two years as a result now can be dealt with in a week. It is too early to say how effective these new regulations will be in expediting civil cases; IIPA members will be monitoring these developments in the meantime.

¹⁵ 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").

INDIA CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	TOTALS
Number of civil raids conducted	2	3	5
Post-search action		-	
Cases pending	19	13	32
Cases dropped		-	
Cases settled or adjudicated	1	0	1
Value of loss as determined by right holder (\$USD)		-	
Settlement/judgment amount (\$USD)	1100	1*	1100+

*This case refers to an out-of-court settlement amount paid to BSA in a criminal matter. Two settlements in end-user cases filed in 2003 are likely to be concluded in 2004.

This overall criminal and civil enforcement record implicates India's TRIPS enforcement obligation in each area. In sum, the 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 *suo moto* criminal raids, pre-trial detention of criminal arrestees, and broad civil injunctions with the appointment of 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 contempt rulings with real teeth. 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 fast track 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 optical disc 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.

COPYRIGHT LAW AND ENFORCEMENT PROVISIONS: INDIA'S COPYRIGHT LAW, TRIPS AND WIPO TREATIES LEGISLATION

The positive and negative provisions in India's copyright law were discussed in some detail in IIPA's 2003 submission and that analysis will not be repeated here.¹⁶

For the last three years, a "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 again urges the Government of India to open up this process fully to all interested parties, and 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 treaties.

The Core Group has now reportedly concluded its consideration of 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;

¹⁶ See IIPA's 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

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; 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.

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. One of the discretionary criteria of this program is that the country provides “adequate and effective” copyright protection. In 2002, \$2 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 17.3% of its total exports to the U.S. During the first 11 months of 2003, \$2.4 billion worth of Indian goods (or 20% 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 30.1% increase over the same period in 2002.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

INDONESIA

EXECUTIVE SUMMARY

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

Overview of key problems/achievements: Piracy in Indonesia remains serious, as piracy levels in Indonesia are among the highest in the world (rivaling countries like China and Vietnam). Investment in illegal optical disc plants increased in 2003, as plants continued to migrate from places like Malaysia, establishing distribution, retail, and, increasingly, export channels. In addition, the huge Indonesian market remains dominated by retail piracy of all copyrighted materials, including optical disc piracy (CDs, VCDs, CD-ROMs, and increasingly DVDs). Several positive legislative developments occurred in Indonesia, as the new copyright law went into effect in July 2003, optical disc regulations were close to being signed into law as of February 2004, and other important regulations had been drafted and were under review. The copyright law failed, however, to modernize legal rights of record producers and to extend terms of protection for all works. By virtue of publicizing the copyright law, and by running a few calculated raids, the Indonesian government was able to halt a major portion of retail piracy activity in August 2003. However, piracy levels soon bounced back as enforcement efforts were not sustained. Efforts in 2003 by the Copyright Office to become more proactive (including raids against piracy) did not have the desired effect of reducing piracy levels, and a new IPR enforcement "Task Force" has similarly been unable to create deterrence in the market. Raids under the copyright law rarely lead to effective prosecutions, and almost never result in convictions of pirates or imposition of deterrent sentences; the court system remains ineffective. The audiovisual sector encounters significant barriers to market access, which exacerbate the piracy problem.

Actions to be taken in 2004

- Sign into law and begin enforcing the optical media regulations.
- Strengthen the new enforcement Task Force by providing the resources and political will necessary to defeat piracy.
- Carry out sustained enforcement activities against pirate production facilities (including optical disc facilities/commercial photocopy shops), distribution channels, and retail outlets.
- Effectively enforce the new criminal provisions against corporate end-user piracy of business software and introduce software asset management in government and business.
- Improve training and performance of prosecutors and judges in IPR cases, while issuing sentencing guidelines that call for deterrent sentences.
- Allow foreign audiovisual producers to participate directly in importation and distribution of their product, and relax bans on foreign investment in media businesses.
- Ratify and implement the 1996 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 2002 copyright law with detailed provisions on technological protection measures that satisfy the WCT and WPPT and adequately safeguard copyrighted materials.

For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing.¹ Please also see previous years' reports.²

INDONESIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	29.0	92%	28.0	90%	27.5	90%	25.0	90%	25.0	90%
Records & Music ⁴	44.5	87%	92.3	89%	67.9	87%	21.6	56%	3.0	20%
Business Software ⁵	NA	NA	109.6	89%	63.1	88%	55.7	89%	33.2	85%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	99%	80.4	92%
Books	30.0	NA	30.0	NA	30.0	NA	32.0	NA	32.0	NA
TOTALS	NA		259.9		188.5		134.3		173.6	

COPYRIGHT PIRACY IN INDONESIA

There are two chief elements to the piracy problem in Indonesia: massive overproduction for domestic consumption and export of pirate optical discs, and massive distribution or use of pirated product (optical discs sold at retail, end-user piracy of business software, book piracy, audiocassette piracy) domestically, which destroys any legitimate market for copyrighted materials in Indonesia. Disturbingly, there is evidence of the infiltration of organized criminal enterprises engaging in piracy in Indonesia, demanding a swift and sustained response.

There are at least 27 plants (and possibly as many as 33 plants when underground plants are included) mass-producing "finished" optical discs (excluding blank CD-R) in Indonesia, with at least 31 lines (excluding CD-R) producing VCDs, DVDs, CDs, and CD-ROMs of all kinds of copyrighted materials; total disc capacity in 2003 (excluding CD-R) was at least 108.5 million discs.⁶ Indications suggest that in 2003, VCD factories continued to relocate from Malaysia to Indonesia, mainly in the Jakarta area, but also in Surabaya and Batam; in addition, there are some plants which have emerged simply due to increased domestic activity in optical disc piracy. In addition, it now appears that there are at least six plants in Indonesia with "stamper" manufacturing facilities (stampers are a key production part needed to mass-produce optical discs, and themselves contain the infringing content, and therefore must be covered in laws, optical disc regulations, and be subject to seizure, etc.). Indonesia is now believed to have

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ 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.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ Estimated production capacity of finished optical discs is ascertained by multiplying the number of production lines (excluding blank CD-R) times 3.5 million; this is by all accounts considered a conservative estimate.

emerged as a base for export of pirate VCDs. It is also believed that up to four pirate facilities have begun producing DVDs (DVD region 5).

Retail piracy in Indonesia remains the norm, with reported piracy levels for nearly all copyright sectors among the highest of any major market in the world. The market in Indonesia is dominated almost completely by pirate optical discs: audio CDs, video CDs (VCDs), DVDs, and CD-ROMs containing business or entertainment software. Ratu Plaza, Mangga Dua, and Glodok Market remained the worst hot spots. The vast majority of pirate DVDs found in Indonesia continue to be imported from Malaysia and are of high quality, but an increasing number of pirate DVDs in the Indonesian market in 2003 were produced domestically (although they are of lower quality). “Price wars” have erupted among pirate retailers of DVDs, and in 2003, pirate DVDs could be purchased for as little as IDR 20,000 (US\$2.38). This pricing negatively impacts the legitimate VCD market (new release legitimate VCDs retail at around IDR 50,000 (US\$5.95) while legitimate DVDs retail at around IDR 140,000 to 200,000, or US\$16.65 to \$23). Both VCD and DVD pirates continue to display savvy marketing skills by releasing pirate VCD and DVD copies of movies to coincide with legitimate theatrical and video release dates.

The situation is similarly bleak for other copyright sectors. Book piracy remains widespread, especially English-language textbooks, reference books, and computer-related volumes. Commercial pirates operate throughout the country, including some that 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 their unauthorized copying. The local recording industry association estimates that seven of every eight sound recordings in the market are pirate. They note that monthly sales have plummeted over 70 percent since 1997, and that their businesses are “on the brink of extinction.”⁷ Software piracy in all its forms (business software and entertainment software) remains rampant throughout Indonesia, as pirate product is readily available at retail. Unauthorized copies of business software applications are prevalent in businesses and public institutions throughout the country, due to corporate end-user piracy. 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. The audiovisual sector reports a 90% cable piracy rate – one of the highest piracy rates for this form of unauthorized transmission of broadcasts in the world.⁸

COPYRIGHT ENFORCEMENT IN INDONESIA

The most significant development in 2003 with respect to copyright enforcement in Indonesia occurred in July and August. As a result of the government’s effort (with the strong support of industry) to publicize the copyright law on or around the effective date (July 29, 2003), coinciding with some impressive raids,⁹ retail piracy levels dropped significantly (in some cases to the lowest levels in years). Reports indicated that replicating facilities were forced to slow down production due to the decrease in demand, and further reports indicated that sales of pirate DVDs in Australia were also affected by the shut down in Indonesia (reinforcing the

⁷ Indonesia Record Industry Losses of IDR11 Trillion; Recording Industry to Survive Until 2008 Due to Pirating, *Bisnis Indonesia*, May 21, 2003.

⁸ Cable piracy in the form of unauthorized reception and retransmission of broadcasts using illegal decoders from neighboring countries such as Malaysia (Astro DTH service) is common.

⁹ The raids included a highly successful raid against a pirate retailer and distributor in the Mangga Dua Mall.

suspicion that Indonesia has become a base for the export of pirate DVDs). These actions and effects demonstrate that piracy levels in Indonesia will drop if the government expresses its intent to enforce the copyright law publicly and takes effective actions against piracy to back up its stated intent.

Unfortunately, on the whole, the Indonesian government's efforts to enforce the copyright law in 2003 fell well short of what is needed to reduce piracy rates on a sustained basis. The good news is that some factories/sources of production and distributors were raided in 2003, and that industry continues to investigate other serious forms of piratical activity (such as a Jakarta-based producer of pirate DVD "stampers" found and seized in Malaysia).¹⁰ The bad news is that in 2003, as in prior years, nearly all criminal actions had to be instigated by right holders, not by police or authorities acting on their own volition, requiring investment of substantial time and resources.¹¹ On the rare occasion when the government of Indonesia acted on its own, it has often been more of a public relations exercise, usually directed against the production and distribution of pornographic material. The Indonesian authorities will not carry out enforcement against book piracy, for example, because they fear antagonizing student militant groups. For the business software industry, while the new copyright criminalizes end-user piracy of business software, no enforcement actions were taken against suspected pirate business software end-users in 2003.

The Indonesian court system has long been a weak link in the nation's copyright enforcement chain, and IIPA continues to note the ineffectiveness of the courts in handling copyright cases.¹² Following numerous retail raids in 2002, only three retailers received convictions, which were handed down in mid-2003, and all were on appeal as of February 2004; of the raids carried out in 2003, there were no convictions as of February 2004.

Notwithstanding the disappointing overall results of general enforcement in Indonesia in 2003, the Indonesian government took several steps in 2003 to coordinate the roles of various government agencies to make them more responsible and accountable for bringing about effective copyright enforcement. Early in 2003, an official in the Ministry of Justice and Human Rights announced the establishment of an inter-agency "Task Force" reporting to the Ministry,¹³ and on September 2, 2003, the Minister issued a Decree appointing personnel to the Task Force. The first plenary meeting of the Task Force was held in early October 2003. A major obstacle to the effectiveness of the Task Force is that the Department of Intellectual Property Rights has no funding for the activities of the Task Force. The Task Force has tried but has been unable to successfully conclude memoranda of understanding (MOUs) with related agencies, e.g., Customs, Ministry of Trade and Industry, etc. (there is an MOU with Police).¹⁴ An effort to move responsibility for the Task Force from the Ministry of Justice and Human Rights to the President's office is underway, but since 2004 is an election year, many suspect that the will

¹⁰ In that instance, the pirate was found to have left Indonesia to return to Hong Kong. This is just one indicator of the organized criminal and international nature of the optical disc piracy business as it exists in Indonesia today.

¹¹ For example, the motion picture industry group, MPA, carried out retail and factory raids in 2003, including, by the end of September 2003, 59 new retail raids and 1,554 retail revisits (targets in 25 malls), 44 retail prosecutions, 4 VCD factory raids, 4 VCD factory prosecutions, 13 raids against distributors of DVDs and 1 prosecution against a distributor of pirate DVDs.

¹² For more detail on the shortcomings of the court system in Indonesia, please see IIPA's 2003 Special 301 report, at <http://www.iipa.com/rbc/2003/2003SPEC301INDONESIA.pdf>.

¹³ Membership of the Task Force includes representatives from the Attorney General's Office, the Department of Industry & Trade, the State Secretariat, Customs and the Courts.

¹⁴ In June 2003, Justice Minister Yusril Ihza Mahendra and National Police chief Gen. Da'i Bachtiar signed a Memorandum of Understanding; this development was highly publicized through government and industry press events, and nearly coincided with the effective date of the new copyright law, thus having a short-term deterrent effect on retail piracy. However, the MOU has not translated into deterrent enforcement.

of the government to commit additional resources to anti-piracy enforcement may in fact diminish. This should not be allowed to happen, and the government should take steps to invigorate the Task Force through funding and devoting adequate resources to eradicate retail and production (source) piracy in Indonesia.

The copyright community in Indonesia remained active in 2003 to promote copyright awareness, and where possible, to take advantage of positive developments within the government (such as the aforementioned MOU between the Police and the Ministry of Justice and Human Rights). A banner campaign was rolled out in late 2003, in conjunction with the Copyright Office, to raise copyright awareness and promote anti-piracy activities. In many other activities, copyright industry groups have been actively working with the Indonesian government to increase awareness and promote good enforcement with respect to the new copyright law.¹⁵

MARKET ACCESS BARRIERS

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. 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.¹⁶ The Megawati government had promised a more enlightened approach to intellectual property rights reform than the previous Wahid administration, and has indicated at least in theory the intent to take steps in that direction following the implementation of copyright law amendments that took effect on July 28, 2003. In October 2003, for example, the Indonesian government announced its intention to liberalize foreign investment restrictions in almost all sectors of the economy. Unfortunately, two new laws go in entirely the wrong direction. A new draft film law, intended to replace Film Law No. 8 of 1992, retains a complete prohibition on investment in the film industry.¹⁷ Also, the new

¹⁵ For example, the Business Software Alliance: held press conferences on copyright awareness with the Director General of Intellectual Property Rights and/or Director of Copyright Junus Emawati in February and June 2003; conducted trainings of PPNS (civil service investigators from DIPR) on gathering of evidence in software infringement cases in March, September and October 2003; held a "Software Asset Management" seminar with DIPR in June 2003; participated in meetings with DIPR and Task Force members regarding enforcement in June 2003; and held a full-day seminar with the heads of all the regional branch offices of DIPR in October 2003. The Motion Picture Association was closely involved in publicizing the new copyright law. The MPA mediated a "Mall Managers Meeting" on July 24, the purpose of which was to explain to malls their potential liability for piracy on their premises. The MPA also assisted in the organization and holding of a press conference on July 29 specifically directed at publicizing the new law. The keynote speaker at this press conference was Pak Yusril, the Minister of Justice & Human Rights.

¹⁶ President Habibie reaffirmed the ban through a Decree in July 1998, and two presidential decrees in July and August 2000 further reaffirmed the ban, prohibiting 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. Presidential Decree No. 96 of July 2000, later ratified by Decree 118 of August 16, 2000.

¹⁷ Under the draft law, only local Indonesian companies would be permitted to operate a "Film Business" or a "Film Professional Service." No provisions exist for foreign investment. Another provision of the draft law provides that film businesses are "obliged to use national potential to the maximum limit while paying attention to the principles of efficiency, effectiveness and quality" (presumably to discourage or otherwise limit expatriate representatives). The draft law also specifies that only national film companies would be permitted to make film commercials, that imported films are expected to be supplementary to national product and imports should be "in proportion to local production," and although the existing film law permits films approved for all ages to be dubbed into Bahasa Indonesian, the new draft prohibits any form of dubbing except for educational, research, or information purposes, but requires that all films be subtitled in Bahasa Indonesian.

Law of the Republic of Indonesia Number 32 Year 2002 Regarding Broadcasting¹⁸ bans the broadcast of virtually all foreign programming in Indonesia.¹⁹ 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.

The Ministry of Information has established an annual import quota for foreign films, set at 160 films. Although the quota has never been imposed due to limited domestic production, its existence in Indonesia sets a negative precedent in the region and could be harmful in the future.

COPYRIGHT LAW AND RELATED ISSUES

Two major developments occurred in 2003: the copyright law went into effect in July 2003, and the implementing regulations related to optical disc piracy were approved by the Ministry of Justice and Human Rights in January and are awaiting signature by the President (the Minister of Industry and Trade Rini Soewandi is reportedly holding the regulations at present). IIPA understands that an all-important implementing decree providing further details in support of the optical disc regulations may have been completed. Immediate implementation of the optical disc controls is crucial to curtail the massive and growing problem of unauthorized production of pirate optical discs (and as noted above stampers which are used to mass-produce discs). IIPA looks forward to having a chance to review the draft and certainly encourages the Indonesian government to give the U.S. government an opportunity to review the draft regulations.

Comments on the Optical Disc Regulation

The Government Regulation of the Republic of Indonesia Regarding High Technology Production Facility for Optical Disc will allow the government of Indonesia to swiftly license optical disc production facilities, and give it the tools needed to inspect plants illegally producing or engaged in piracy. Unfortunately, the Regulation contains some gaps and leaves certain issues to a further Ministerial Decree. It is imperative that the government of Indonesia swiftly implement this Regulation, and close some gaps and resolve some ambiguities, including:

- **Licensing:** The Regulation provides a licensing regime for the manufacture of blank, recordable, and pre-recorded optical discs. License requirements are strict but there are no grounds set out for refusal to license. There is also no express license requirement to produce stampers and masters, which is a glaring deficiency, particularly since Indonesia is

¹⁸ Law No. 32 of 2002 went into effect in February 2003 without the signature of President Megawati, in accordance with the amended constitution that permits a bill to take effect 30 days after its passage regardless of whether it has been signed by the President.

¹⁹ The law has yet to be enforced, pending the installation of the independent regulatory commission (KPI) and issuance of implementing regulations. However, when it is implemented, the law will require that private broadcasting institutions are to be established initially without any foreign investment. Subsequent foreign investments may be made, but only up to a 20% ownership cap shared by a minimum of two shareholders. Additional restrictions in the draft legislation include: (1) a restriction on foreign managers, (2) cross ownership limitations, (3) a local content quota of 60% on broadcast television and 10% on pay-television, (4) a 30% dubbing quota on foreign programs, (5) advertising limits of 20% of total broadcasting time for private broadcast stations and 15% for public stations, and (6) a total ban against the establishment of foreign broadcast institutions in Indonesia.

a known producer for export of such key production parts. It should be confirmed whether this deficiency will be fixed or added by separate Ministerial Decree.

- **Identification Code Requirement:** The Regulation contains an identification code requirement, which includes “stamper code” and “master code.” It should be confirmed that, in addition to finished discs, stampers and masters may not be manufactured or permitted in Indonesia without the relevant code.
- **No Prohibition on Gouging of Discs:** There is no express prohibition on the unlawful manipulation of identification code (the altering, gouging or scouring of a code on or from a mould, master, stamper, or any disc). It should be confirmed whether these prohibitions will be added by separate Ministerial Decree.
- **Revocation:** The Regulation provides for revocation of the license in case of breaches of the Regulation, but not in case of other violations of the law, such as copyright piracy or trademark counterfeiting. Violations of law should trigger revocation.
- **No Government Record-Keeping:** There is no government record-keeping requirement in the Regulations. The government of Indonesia should agree to maintain and make available for inspection records including production licenses, import/export licenses and identification codes granted, as well as inspection actions.
- **Criminal Penalties:** Article 28 of the Copyright Law requires plants producing optical discs to comply with “license regulations and all production requirements” determined by the “authorized agencies,” and criminal liability attaches (Article 72(9)) for violating Article 28. Article 73(1) appears to provide for a broad authority to seize machinery and other “tools” (“the tools used to conduct the [illegal] actions”). An effective optical disc law must ensure that the following key activities are deemed offenses, subject to fines and imprisonment, with officers (managers, owners, directors, etc.) held liable for corporate acts:
 - manufacturing or duplicating discs, stampers or masters without a license or in breach of the license conditions imposed by the government;
 - exporting discs, or importing/exporting stampers and masters, raw materials, or machinery without a license or in breach of the license;
 - forging license documents;
 - altering, gouging or scouring of a code on or from a mould, master, stamper, or any disc;
 - manufacturing/producing discs at a place other than the licensed premises; and
 - failing to apply the required identification code.
- **Plant Closure Remedy:** Plant closure is not available as a remedy (e.g., for a conviction under the optical disc law or another IP law; continued manufacture in the plant/premises when the license has lapsed or has been revoked; etc.). It should be confirmed whether the Indonesian authorities will have the capability to close a plant.
- **Automatic Licenses for Import/Export of Stampers/Masters, Raw Materials and Equipment:** Article 11(5) of the Regulation indicates that provisions regarding import of stampers and masters, raw materials, and manufacturing equipment will be added by separate Ministerial Decree. It should be confirmed what the timetable for this is, and that an automatic license will be required in order to track movement of and quantity of equipment/raw materials export of optical discs, and the import/export of manufacturing equipment.

Comments on the Copyright Law

IIPA also recognizes and congratulates the Indonesian government for the passage of Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law). This comprehensive revision of the law in Indonesia went into effect on July 29, 2003, remedying many shortcomings of the previous law and bringing Indonesia’s copyright regime

closer to compliance with its obligations under the WTO TRIPS Agreement. The new law imposes maximum criminal penalties on copyright infringers of up to seven years in prison and a fine of up to IDR5 billion (US\$595,000). Officials had also indicated, but appear now to have backtracked from the position, that under the new Law they would seek to prosecute “shopping mall owners if they let their tenants sell pirated products,” so-called ‘landlord liability.’²⁰ The new law also takes into account developments of copyright in the digital age, and attempts to implement some but not all key requirements of the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

There are many improvements in the new Indonesian law.²¹ IIPA points out two main concerns in the new Copyright Law which the Indonesian government must resolve promptly. First, the Copyright Law does not reflect the need to modernize protection in Indonesia for producers of sound recordings and performers to meet evolving global norms. While Indonesia’s prompt ratification of the WCT set an excellent example for its neighbors, the failure to ratify the companion WPPT remains a cause of concern for the copyright industries, although we note with hope the stated intention of the government of Indonesia in communications with the U.S. government to ratify the WPPT soon, based on the new Copyright Law.²² Producers of sound recordings must be granted exclusive rights to control the dissemination of their products over the Internet; these include an exclusive communication to the public right including all forms of wire and wireless transmissions (including broadcast) as well as exclusive distribution and public performance rights. Such rights will enable sound recording producers to effectively fight

²⁰ See *Copyright Law Amendments Enacted: Govt to Implement Copyright Law Tuesday*, Indonesia Press, Dow Jones International News, July 25, 2003. Apparently, officials are now insisting that landlord liability would first require a conviction of the stall operator, and subsequent knowledge of such conviction by the mall owner. In an interesting development, we also note that a *fatwa* was issued by the Indonesian Moslem Leader Council (Majelis Ulama Indonesia, MUI) in January 2003, deeming piracy as a crime, and pirated goods as *haram* (forbidden products). See Religious Advice Decision, Religious Advice Commission of Indonesian Council of Religious Scholars, No. 1 of 2003 Concerning Copyright, Jan. 8, 2003 (“Each form of infringement against copyright, in particular piracy, is an unfairness which is forbidden”).

²¹ Improvements include:

- End-user piracy of computer software is clearly defined as a criminal offense under Article 72(3).
- Provisional measures such as *ex parte* seizures are made available under Articles 67-70.
- Criminal penalties are increased in many cases, to levels that could be deterrent if aggressively applied in practice, and minimum penalties (including minimum jail sentences) have been provided for some offenses under Article 72. Seizure provisions (Article 73(1)) in criminal infringements, including violations involving TPMs, RMI, and optical disc production, are improved to include “the tools used to conduct the actions.”
- The Law confirms that temporary reproductions are included in the scope of the definition of “Reproduction.”
- Article 73(1) of the Copyright Law requires confiscation and destruction of the tools used to commit copyright piracy as well as of pirate copies.
- Criminal liability for violations of the neighboring rights of a sound recording producer are more clearly provided for than in the previous law (Article 72(1)).
- Article 27 protects against the circumvention of technological protection measures (TPMs) used to protect copyrighted materials. Criminal liability attaches (Article 72(8)) for violating the Article, although these penalties are far lower than those for copyright infringement, which is a major weakness (maximum penalties are up to 2 years’ imprisonment, with no minimum sentence, and a maximum fine of US\$61,000, with no minimum fine).
- Article 25 protects against the unauthorized omission or change to “rights management information” (RMI). Criminal liability attaches (Article 72(7)) for violating the Article, but as with TPMs, penalties are too low to be adequate and effective.
- Article 28 requires plants producing optical discs to comply with “license regulations and all production requirements” determined by the “authorized agencies”; the Regulations on optical disc production are discussed above. Criminal liability attaches (Article 72(9)) for violating the Article. Article 73(1) appears to provide for a broad authority to seize machinery and other “tools” (“used to conduct the [illegal] actions”).

²² The April 2003 government of Indonesia report to USTR (“April 2003 Report”) includes the statement, “[b]ased on the Law No. 19 of 2002 regarding Copyrights, the GOI has taken the necessary preparation to ratify the *WIPO Performances and Phonograms Treaty*. It is expected that ratification can be completed sooner than later.”

piracy and develop new business models for consumers.²³ Finally, Indonesia should move as quickly as possible to ratify the WPPT.²⁴

Second, it is highly disappointing that Indonesia failed to take the 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 (i.e., life plus 70 years for works, and 95 years from publication for producers of sound recordings, which is the actuarial equivalent of life plus 70). 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.²⁵

There are several other concerns or ambiguities with the new Copyright Law, including:

- **Retroactivity:** The Copyright Law contains no provision confirming retroactive protection for works as well as for producers of sound recordings and performers.²⁶
- **Right of “Publication”:** It should be confirmed that the right of “publication” satisfies the WCT Article 8 requirement with regard to communications to the public and the “making available” of works.²⁷
- **Overly-Broad Exceptions:** Certain exceptions in the new Copyright Law may be overly broad, which would violate Indonesia’s international obligations.²⁸

²³ In implementing amendments to its law, Indonesia should also take the opportunity to ensure that sound recording producers have exclusive control over the importation and exportation of their recordings.

²⁴ The April 2003 Report did not indicate any issues that would bar Indonesia’s swift ratification of the WPPT. In the past, the government of Indonesia has expressed the desire to join the Rome Convention. It should be noted in this regard that ratifying the WPPT should not be delayed by consideration of the mechanisms for joining the Rome Convention, since Rome adherence is in no way a prerequisite to WPPT ratification.

²⁵ The April 2003 Report contained the statement, “[t]he protection of copyright needs no further extension as suggested by IIPA since Article 33 of Law No. 19 of 2002 regarding Copyrights provides copyright protection for good or without time limit.” IIPA would like to point out that Article 33 refers not to extension of term with respect to the economic rights under copyright, but rather, to Article 24(1), which appears to provide the moral right of “attribution” and is indeed perpetual. Given the recent free trade agreement concluded between the United States and Singapore, under which the parties agreed to provide a term of protection of life of the author plus 70 years, or for works authored by a juridical entity, 70 years from publication, Indonesia should take the opportunity to join the international trend and extend term of protection for copyrighted materials.

²⁶ While Article 74 confirms that prior regulations shall remain in effect except where contradictory with the new law, and Article 75 confirms the continued validity of previously issued copyright registrations, provisions should be added in an amendment or regulation to provide Berne/TRIPS-compatible protection for existing works, as well as for producers of sound recordings and performers. (We note that Indonesia is already under a bilateral obligation to provide a TRIPS-compatible term to all pre-existing works of U.S. origin.)

²⁷ The author’s right of “publication” in the Copyright Law explicitly includes an exclusive right of “dissemination of a Work, by utilizing whatever means including the Internet, or by any manner so that such Work is capable of being read, heard or seen by any other person.” It appears that the drafters intended this broad right, as applied to works, to satisfy the requirements of the WCT with respect to “communication to the public.” The phrase “read, heard, or seen by any other person” appears to be an attempt to express the “making available” concept and the government of Indonesia should confirm that this phrase covers the making available of a work so that it can be accessed “from a place and at a time individually chosen or selected” by the user. Also, as noted, it is crucial that the government of Indonesia modernize protection in Indonesia for producers of sound recordings and performers, and as a first step, the government should extend the right of “publication,” amended as necessary, to producers of sound recordings and performers. This would greatly enhance Indonesia’s efforts to implement the WPPT.

²⁸ The language from the Berne three-part test (“provided that they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or owner of the copyright”) should be added to the chapeau language of Article 15 of the Copyright Law, so that it applies to all of the excepted acts enumerated in that Article. In addition, Article 57 of the Law provides an exemption for non-commercial possession (i.e., would exempt from civil liability anyone who possesses “any work,” as long as the person “obtain[s]” the work “solely for his own need and not using it for any commercial purposes and/or any interests related to commercial activities”), but may amount to an overly broad limitation on liability for copyright infringement, since there does not

- **Compulsory Translation and Reproduction Licenses:** Article 16 of the new Copyright Law contains a compulsory translation and reproduction license which does not meet the requirements of the Berne Convention (and therefore TRIPS Article 9). This Article must be deleted.
- **National Broadcasting Exception for “Interests of the State” Arguably Overbroad:** Article 18(1) provides that the “publication of a work” by the Indonesian government “through a radio, television broadcast and/or other means” is permissible without the authorization of the copyright owner if it is “for the Interests of the State,” provided that “the publication does not prejudice the normal interest of the Copyright Holder” and “a reasonable compensation is given to the Copyright Holder.” It does not appear that “reasonable compensation” means a freely negotiated compensation, which would suggest this Article amounts to a statutory license which goes beyond what is permitted by TRIPS and the Berne Convention. If so, this Article must be deleted.
- **Moral Rights Provisions:** Article 24(2), and associated Article 55(c) and (d), go beyond the moral right of “integrity” as that right is set out in Article 6*bis*(1) of the Berne Convention.²⁹ Article 24 should be amended.
- **Inadequate Border Measures:** Indonesia’s border control measures leave serious gaps that must be filled to ensure that Indonesia provides TRIPS-compatible protection. 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 toward issuance of regulations since then.

Comments on the Draft Regulation on RMI

The Indonesian government has released draft “Regulations on Rights Management Information.” IIPA understands that the intent of the drafters was to issue two separate regulations – one regarding “rights management information” (RMI) (as covered in Article 25 of the Copyright Law) and one regarding technological protection measures (TPMs) (as covered in Article 27 of the Copyright Law).³⁰ Nonetheless, it appears that portions of the RMI draft Regulations concern implementation of Article 27. Given this overlap (intended or not), IIPA encourages the government of Indonesia to make certain minor changes to permit the “RMI” regulations simultaneously to deal with both Articles 25 and 27.³¹

appear to be any limitation on the number of copies of the work, the format (i.e., analog versus digital), the method of obtaining (i.e., by importation, purchase, off the Internet). This Article should be deleted, or if not deleted, significantly curtailed so that it passes the Berne three part test.

²⁹ Article 6*bis* of the Berne Convention provides, *inter alia*, the right “to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” Article 24(2) and (3) give the author (and the author’s heirs) the right to refuse to authorize *any* “changes” including any change to the “title” or “subtitle” of a work regardless of whether the copyright in that work has been assigned. This right violates the Berne Convention as it would impinge upon the ability to exercise (and to assign) the exclusive right of adaptation in Article 12 of the Berne Convention.

³⁰ The April 2003 Report indicates that “The Law No. 19 does not provide detailed provisions on the safeguard of technological measures. Rather, such provisions have been accommodated by Law Number 14 of 2001 regarding Patents.” Having perused that law, we are unaware of any articles that deal with TPMs. Article 27 in Law No. 19 of 2002 squarely covers protection of TPMs, providing that “[e]xcept on the consent of the Author, a technological control facility to protect a right of the Author shall not be destroyed, deleted, or made non-functioning.”

³¹ The following changes, among others, to the Draft Regulations on RMI, could ensure that both Article 25 and 27 are implemented:

- adding a definition of “technological protection measure” to the regulations to ensure that measures that control “access” to works as well as measures to control the exercise of any “rights” under copyright are fully covered;

Internet/E-Commerce Legislation and “Cybercrime” Initiative

It appears that the government of Indonesia is taking steps toward enacting some e-commerce-related legislation, namely, legislation on “Electronic Information and Transactions.”³² It is unclear whether there are any aspects of that legislation that deal with intellectual property rights, or with the liability of service providers. IIPA has not seen the draft legislation, but now understands that a final draft was submitted to relevant departments before being considered for passage. IIPA encourages Indonesia to include provisions helpful to achieve adequate and effective copyright enforcement in the various bills, and specifically, to ensure that proper incentives are retained for service providers to cooperate with copyright owners to protect their rights. In February 2003, a “cybercrime task force” was established in Indonesia.³³ It is reported that the Minister for Information and Communications, in cooperation with the Association of Internet Service Providers (APJII) and the Police, decided to form a task force to confront the issue of Internet-based crimes, and was to have begun work in March 2003 to examine ways in which Internet-based crimes can be eliminated. IIPA supports the establishment of this task force, and would encourage the task force to include in its mission ways to combat Internet piracy of copyrighted materials. IIPA also encourages both the drafters of the “cyber” legislation and the task force to look to the Council of Europe Cybercrime Convention for approaches to the issue of combating cybercrime and Internet piracy.

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 2002, over US\$1.5 billion worth of Indonesian goods (or 15.7% of Indonesia’s total imports to the U.S.) entered the U.S. under the duty-free GSP code. For the first 11 months of 2003, nearly \$1.3 billion worth of Indonesian goods (or over 14.3% of Indonesia’s total imports to the U.S.) entered the U.S. under the duty-free GSP code. 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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- amending Article 2(5) so that it is fully consistent with all the treaties’ requirements on the prohibition of TPMs (for example, to ensure that requisite “preparatory acts” with regard to devices or services are covered under the prohibition, and to ensure that the class of devices covered is not defined too narrowly so as to potentially and inadvertently exclude most devices from coverage, etc.);
 - adding a new sub-article to cover the act of circumvention; and
 - making Article 3 of the proposed Regulations expressly applicable only to “rights management information” (not to technological protection measures), or it would run afoul of WIPO treaties’ requirements.

³² Apparently, drafting teams have been assembled at two universities, e.g., the University of Indonesia is apparently drafting an “e-commerce” bill based on instructions from the Ministry of Trade and Industry, while the University of Padjaran is apparently drafting a bill focused on technology based on instructions from the Department of Posts and Telecommunications. These efforts are apparently the next step from a December 2000 “Bill on Information Technology (Cyber Law),” which was prepared by academics. The Ministry of Communications and Information (KOMINFO) has prepared a draft bill on “Electronic Information and Transactions” that is expected to be submitted through the State Secretariat to the Parliament for debate soon. The MPA has made submissions based on available drafts and continues to track the passage of this bill.

³³ *Cybercrime Task Force To Be Established in Indonesia*, Asia in Focus, Feb. 25, 2003.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ISRAEL

EXECUTIVE SUMMARY

Special 301 Recommendation: Israel should be elevated to the Priority Watch List.

Overview of Key Problems: In 2003, the Israeli government, represented by the Ministry of Justice, officially launched a broad legislative process purporting to consolidate and modernize the copyright law, but which in fact seriously threatens the rights of foreign copyright holders, especially U.S. phonogram producers. The actions of the government confirm for us a government policy, which, during the last years, increasingly has targeted the legitimate interests of U.S. right holders, aiming to totally undermine the set of rights currently available to U.S. and other foreign phonogram producers under Israeli law. Essentially, the law abolishes the exclusive rights currently enjoyed by phonogram producers and replaces it with a mere right to remuneration for broadcasts of sound recordings – a remuneration which, moreover, the Ministry of Justice has opined is not to be paid to right holders in U.S. sound recordings. Such a position would squarely violate Israel's obligations under its 1950 Bilateral Treaty with the United States.

The government failed in 2002 to adopt amendments to the copyright law to criminalize the unauthorized use of business software in a business setting – so-called “corporate end-user piracy of business software.” While the draft law would create a new civil remedy against those who “possess” unauthorized copyrighted materials in a business, which would appear to cover end-user piracy of business software (and will be helpful to other industries), unfortunately, there remains no criminal exposure for end-user piracy, as required by TRIPS. In addition, the draft law disappointingly does not take into account all the requirements of the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Finally, the law contains numerous other problems and overly broad exceptions, including an incredibly broad educational exception that would decimate the market for academic books and journals, as well as place in danger a wide variety of copyrighted works.

Actions to be taken in 2004

- Revise draft copyright law to criminalize end-user piracy of business software.
- Maintain full copyright protection for all U.S. right holders.
- Issue a statement that right holders of U.S. sound recordings will continue to enjoy exclusive rights in, among other things, the broadcast and public performance of their recordings, in keeping with Israel's bilateral obligations to the United States.
- Make other changes necessary to the draft copyright law to make it fully compatible with Israel's international treaty obligations, and to fully implement the WCT and WPPT.
- 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, proceed with criminal prosecution of pirates within shorter periods of time, and ask for substantially higher penalties.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing.¹ Please also see previous years' reports.²

ISRAEL
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	50%	30.0	50%	15.0	50%	15.0	50%	15.0	50%
Records & Music⁴	40.0	63%	34.0	50%	40.0	25%	45.0	30%	70.0	45%
Business Software⁵	NA	NA	29.9	37%	36.9	40%	51.3	41%	54.8	44%
Entertainment Software⁶	NA	75%	17.2	68%	66.5	89%	52.0	NA	30.9	54%
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS⁷	NA		112.1		159.4		164.3		171.7	

COPYRIGHT PIRACY IN ISRAEL

Copyright piracy continues to hurt copyright owners trying to do legitimate business in Israel. A large portion of software used by businesses and other end-users in Israel is still pirated, affecting not only U.S. companies but also local Israeli software producers. The "burning" of pirate content onto CD-Rs and DVD-Rs has slowly become the method of choice for pirates, and stores in major marketplaces, including in Tel Aviv, Haifa, and Herzlia, engage in "in-store burning" of music, major motion picture titles,⁸ compilations of entertainment software or business software applications onto

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ The recording industry losses and levels include domestic losses/levels as to U.S. repertoire only. The losses also refer to several millions of illegal cover versions of U.S. repertoire that have been sold in Israel in 2003. The increased loss figure also reflects a substantial weakening of the U.S. Dollar against the IL Shekel.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ ESA revised its methodology for deriving the value of pirate videogame products in-country, meaning that the decrease in the value of pirated videogame products in Israel from 2002 on is due primarily to methodological refinements which allowed ESA to more comprehensively evaluate the levels of piracy in the personal computer (PC) market.

⁷ In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Israel were \$82.2 million. IIPA's revised loss figures are reflected above.

⁸ The popularity of CD-R piracy in the motion picture industry increased in 2003 because of the availability of subtitles on the Internet that can be overlaid onto a movie that has been downloaded from the Internet. Conversely, pirate DVDs are actually declining in popularity due to importation problems and the absence of Hebrew subtitles.

one disc. Flea markets also carry extensive pirated product.⁹ Manufactured optical discs (CDs, CD-ROMs, VCDs, DVDs) made up an ever-decreasing percentage of pirate music and audiovisual works in 2003. Internet piracy of all varieties is increasing in Israel. Israel boasted approximately 2.5 million Internet users aged 13 and above in November 2003,¹⁰ and dozens of websites are taking advantage of this by listing stores that will “custom burn” content onto CD-Rs or DVD-Rs. Illegal public screenings continue to be a problem in hotels, cafes and pubs. Parallel imports of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) are still widely available in Israel (and the government is now contemplating legalizing the trade in parallel imports which will only exacerbate the existing problem). Book piracy, while not a major problem in Israel, consists of photocopying and reproduction of textbooks by various educational institutions, including universities, without authorization of the right holders. Teaching staff in various institutions have been known to produce “study files” that include pirate materials. In addition, pirate reprints have been distributed in retail bookstores selling for full retail price, thereby making it difficult for consumers and enforcement officers to identify. In addition, pirate handheld console entertainment software products and components are imported into Israel from East Asia, and there is evidence of local assembly of these products.

COPYRIGHT ENFORCEMENT IN ISRAEL

Copyright enforcement efforts by the Israeli government were disappointing in 2003. Israeli law enforcement authorities and prosecutors have shown almost no 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).¹¹ Some industry groups (including the music industry and the motion picture industry) took “self-help” measures to achieve some seizures of equipment and pirate product. The recording industry group, IFPI-Israel, and the motion picture industry’s group, ALIS, focused largely on underground CD-R and DVD-R labs in 2003, with some assistance from the IPR Units, and achieved some good results.¹² IIPA also notes a large enforcement action in late December 2003 in the West Bank, that resulted in the seizure of plant equipment that was reportedly responsible for 40% of the discs for the entire piracy market in Israel, between 60,000 and 100,000 discs a month.¹³

⁹ Nearly 90% of the pirate music market is CD-R, with the other 10% of pirate CDs being imported into Israel from Russia and Thailand, among others; the numbers are similar for the entertainment software industry, with most pirate product being “burned” on CD-R but with some factory-produced “personal computer” games being imported from Russia. Piracy of PlayStation® console-based games continues on a massive scale.

¹⁰ See Globes, at <http://www.globes.co.il>.

¹¹ IIPA notes with interest that RIAA made the decision in September 2003 to sue IMesh.com, a Tel Aviv-based company (registered in Delaware and running on a server based in Texas) that provides a peer-to-peer network for the sharing of copyrighted materials over the Internet. While the case was brought in the United States, the existence of a sophisticated Internet peer-to-peer business based in Israel raises concerns regarding the prospects for copyright protection over digital networks, and makes it imperative that the government of Israel take immediate steps to modernize its legislation to address the protection of copyright on the Internet.

¹² In the first five months of 2003, nine labs were raided, resulting in the seizure of 118 CD-R burners, over 16,000 pirate CD-Rs, and over 6,000 pirate DVDs

¹³ *Israelis: Police Bust Big West Bank Copyright Pirate Lab*, Jan. 1, 2004, Dow Jones International News (noting that the special police force found scanners and recording equipment, along with hundreds of thousands of music CDs, DVDs, and entertainment software, which cost roughly 25 cents to produce, and were sold to store owners in Israel for one dollar). The motion picture industry enforcement group, ALIS, knew about this plant for 10 years and noted its transition from VHS to the digital world. Five people were arrested as a result of the raids, and the seizures netted computer equipment (including towers containing 8 DVD-R burners), inlays, boxes, and pirate DVD-Rs. The pirates were also found

Civil raids, and even the largest recent raid, are non-deterrent, as the lead pirates usually replace the vendor/producer that was caught with another who does not have a criminal record in order to minimize the possible penalties to the next offender; of course, the pirate owners of such operations escape liability altogether, leaving the consequences to their henchmen. It is partly due to these factors, but also because of the general lack of deterrent in sentencing, that Israel sustains extraordinarily high recidivism rates (more than 50% of investigated offenses in 2002). Nonetheless, some right holders were able to get some results through the civil courts; for example, the business software industry began to experience some success in civil cases in 2002 and 2003.¹⁴

The criminal courts have also finally begun to come down with some sentences that could begin to make a difference. In at least five known cases in 2001-2002, jail time was actually served.¹⁵ On April 13, 2003, the Tel-Aviv Magistrate's Court sentenced convicted CD pirate Albert Salman (caught in December 2002 operating a CD "burning" laboratory, as well as on several other occasions selling infringing CDs) to 20 months of imprisonment (which we believe will not be suspended), 12 months of probation, and a fine of NIS 30,000 (US\$6,756). In January 2003, an appeals court overturned a particularly light sentence imposed on a repeat offender and instead imposed a fine of NIS 300,000 (US\$67,560). The defendant, originally sentenced in early 2001, had been convicted in 14 separate cases of distributing pirate optical discs. The first instance court imposed a sentence of six months community service and a fine of US\$12,000. The revised sentence also includes a suspended one-year imprisonment term contingent upon payment of the fine.

It is hoped that the Israeli government on the whole has begun to recognize the important role strong criminal sentencing plays in achieving reductions in piracy.¹⁶ Unfortunately, most criminal cases brought in Israel today are against small-time pirate resellers at flea markets, and imprisonment is an exception as a penalty for copyright piracy, but by no means the rule. Most criminal investigations, due to police and prosecutorial bottlenecks, do not result in arrest (and most defendants are never detained for more than two days, meaning they are back on the streets and undeterred from continuing to deal in pirate copyrighted materials).

In 2002, several industry groups affected by piracy and counterfeiting in Israel assembled a work plan. The plan set out a laudable set of cooperative activities of various government ministries and enforcement agencies in the Israeli government, including calls for: increased raiding;

to be producing pirate videocassettes.

¹⁴ For example, in August, 2002, the Haifa District Court delivered a favorable civil judgment against an end-user pirate, awarding NIS210,000 (US\$47,300) in damages (the lower end of the statutory damages scale, given the number of infringements). See Civil File 554/00 in the District Court of Haifa, dated August 4, 2002. Another important decision 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. See *Microsoft Corporation v. Agama Ltd.* (Jerusalem District Court, Civil Case 4219/02), November 11, 2002, upheld in the Supreme Court decision of Jan. 29, 2003. 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.

¹⁵ 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.

¹⁶ 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).

allocation of resources to special IPR enforcement units; involvement by the Ministry of Finance to go after piracy on tax evasion or other independent grounds; involvement by the Ministry of Justice in bringing the Israeli law up to international standards (including criminalizing end-user piracy of business software), and working with judges to make them more aware of the severity of copyright piracy and the need for strict sentencing; and involving the Ministry of Education to include in the school curriculum a set of lessons designed to increase awareness of copyright and the importance of intellectual property rights, and to foster use of legal published materials in schools. IIPA is unaware whether or to what extent any of these measures has been carried out in Israel in 2003.

COPYRIGHT LAW AND RELATED ISSUES

The present legal regime in Israel is comprised of the Copyright Act (1911) of the United Kingdom (made applicable to Israel by an Order), the Copyright Ordinance (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).¹⁷ The present regime provides a relatively sound basis for copyright protection in all works (including sound recordings).¹⁸ The various laws have been amended a number of times over the years.

In 2003, the Ministry of Justice released a draft Copyright Law, 5764 – 2003, which is intended to replace the older regime with an integrated, modern copyright law. The draft law shares many similarities with the current legal regime, and makes some notable improvements (e.g., term extension for most works to life of the author plus 70 years, an exclusive WIPO treaties-compatible “making available” right, an infringements/remedies section which folds in 2002 amendments, good presumption of ownership of copyrighted materials, etc.). However, it is most unfortunate that, for a draft that has evolved over seven years, the government of Israel still has not taken the opportunity in this drafting process to attempt full implementation of the WIPO “Internet” treaties, the WCT and WPPT. Instead, the draft seems more focused on reviewing existing rights with a highly disturbing tendency to erode and undermine the protection granted to certain specific groups of right holders. Indeed, with burgeoning Internet piracy in Israel, the high percentage of Internet usage in the country, and Israel’s penchant for high-tech industry, Israel’s delay in implementing these key treaties for the establishment of an adequate legal framework for electronic commerce and its clear tendency to undermine key elements of the existing legal system are extremely distressing.¹⁹ We urge leaders in Israel to reconsider what a truly big mistake the Ministry of Justice is making in not preparing its laws for the world of electronic commerce. It is not only the world’s copyright community that will suffer from lack of an adequate legal framework, but Israeli authors, creators, musicians, film-makers, and artists that will have to live with this legal vacuum in a rapidly changing technological marketplace.

¹⁷ 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 Copyright Ordinance was last amended through passage in 2002 of the Act for the Amendment of the Copyright Ordinance (No. 8), 5762-2002 (effective November 3, 2002).

¹⁸ Detailed discussion of the merits and deficiencies of the current legal regime has been included in prior reports, and can be found at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-152.

¹⁹ Also, Israel’s laws do not yet deal with the issue of service provider liability, but should not, for example, leave unclear the consequences (in terms of liability for infringement) for a service provider who fails to promptly take down an infringing site. An effective response to the challenge faced by the changing nature of digital copyright piracy in Israel will require both new legal tools and substantial improvements in current enforcement practices.

The Israeli government has asked for comments from the public at large regarding the draft, and IIPA will reserve the option to file more complete comments at a later time. The following bullets are intended only to identify some key issues and concerns, but by no means represent an exhaustive review of the draft legislation:²⁰

- **Broadcasting or Public Performance Compulsory Remuneration – the Need for Equal Treatment for U.S. Sound Recordings:** Section 20 of the draft establishes a weak remuneration right for the broadcasting or public performance of a record. This would replace the existing exclusive right, which is based on the Berne Convention. U.S. sound recordings were long protected and continue to be protected in Israel as works. Royalties have long been paid for these uses and they must continue to be paid to the right holders in U.S. sound recordings.²¹ The U.S. and Israel committed to provide national treatment to each other's nationals, through the U.S.-Israel Bilateral Copyright Agreement of May 4, 1950. That Agreement consists of an exchange of notes between then U.S. Secretary of State Dean Acheson and Eliahu Elath, then 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.” The 1950 Bilateral has never been superseded or amended, so that the operable language is still in force. The change announced by the Ministry of Justice would, without any proper justification, after more than half a century of strong copyright protection, degrade the rights in phonograms to mere neighboring rights, covered by a seriously outdated Rome Convention of 1961, and effectively result in the abolition of any right in broadcasting and public performance for U.S. right holders.²²
- **Excessive State Intervention in Collective Management of Rights:** The draft introduces the idea of creating a joint collecting mechanism, under which royalties for public performance and broadcasting would be administered by a single “umbrella organization” which will collect for all copyright and performing rights societies. Such an umbrella organization would be authorized by the Minister of Culture and its terms of operation set by the Minister.²³ Mandatory collective management of this sort disregards the basic principle of freedom of association, disregards the specific characteristics and economic interests of each right holder group, and runs counter to any known established practice in the world, particularly in the United States and in Europe. Right holders are entitled to decide individually and freely about the organization that will represent their rights and with which (other) organization their representative body may or may not cooperate in certain specific circumstances. The current initiative is another illustration of a growing government policy aimed at seriously weakening the interests of certain copyright owners.

²⁰ The comments of software manufacturers and right owners as represented by the Business Software Alliance were submitted to the Ministry of Justice on December 31, 2003, and certain of these comments are incorporated herein.

²¹ The Israelis' argument is undoubtedly that, applying Section 9 of the draft law, they would be able to deny sound recordings payment of remuneration for broadcasts or public performances under Section 20. They will argue that this would not be a violation of the Rome Convention (and is subject to the exception to National Treatment – Article 3 of TRIPS); but non-payment would amount to a violation of Israel's longstanding 1950 bilateral agreement with the United States, by which they expressly agree to accord national treatment to “mechanical reproductions of musical compositions.”

²² It is important to note that users are currently paying for U.S. repertoire, so the replacement of the current regime and exclusive rights in sound recordings with the remuneration right will essentially change what has been the Israeli policy for more than 50 years. Once the ‘new’ points of attachment are established, and assuming the Ministry of Justice's view is that U.S. repertoire is excluded from the new broadcast and public performance protection, users will immediately stop paying for U.S. music. This could bog down the music collecting society in court proceedings and hinder royalty collection altogether.

²³ See Section 20(a) of the Draft.

- **Coverage of End-User Piracy:** It appears that the draft law, by changing the language in Section 60(A)(2) from “possession for commerce in [the infringing copy]” to “possession for a business purpose” may be broad enough to cover the unauthorized use of business software in a business setting (albeit with the necessity that the company be found in possession of an infringing copy). Unfortunately, the criminal provisions in Section 71(D) do not criminalize end-user piracy. This exclusion makes it legally impossible to take criminal actions against corporate end-user pirates, which may leave Israel’s law in violation of TRIPS.²⁴
- **National Treatment/Reciprocity:** Section 8 sets out that Israel will provide “point of attachment” through a Ministerial order to WTO members (i.e., to members of “convention[s]” to which Israel is a party), and then provides the equivalent of national treatment (therefore, U.S. works will be protected as if they were Israeli works, and are to be protected in line with a treaty to which both the U.S. and Israel are party, even if that goes beyond the scope of Israeli law). Unfortunately, Section 9 provides an exception to Section 8 that allows the Minister of Justice to limit protection to material reciprocity if the country “does not provide appropriate protection to the works of authors who are Israeli citizens” and “to limit by order all or some of the rights determined in this law to the works of authors that are citizens of that country.” This provision violates Berne and TRIPS to the extent its application results in the failure to accord national treatment as required under those agreements.
- **Temporary Copy Protection:** The definition of “copying” in Section 11 includes “[s]toring the work by an electronic means or another technological means.” While this statement does not expressly protect “temporary” copies, the statement is very close to the second sentence of the Agreed Statement of Article 1(4) of the WIPO Copyright Treaty (and the analogous statement in Articles 7, 11, and 16 of the WPPT), which interprets Article 9(1) of the Berne Convention (the reproduction right). As Dr. Mihály Ficsor has noted, the “concept of reproduction under Article 9(1) of the [Berne] Convention, which extends to reproduction ‘in any manner of form,’ must not be restricted just because a reproduction is in digital form, through storage in an electronic memory, or just because a reproduction is of a temporary nature.” Therefore, it can be interpreted that the Israeli draft would protect temporary copies. Further support that this provision would suffice to cover temporary copies is the exception in Section 31, which exempts from liability certain limited “temporary copies.” It would still be preferable for the phrase “whether temporary or permanent” to be added to Section 11(1).
- **Overly Broad Secondary Retransmission Compulsory Remuneration:** While Section 13 of the draft provides a broad exclusive broadcast right as to wire or wireless transfers of sounds or sights to the public, that right is then severely curtailed by the establishment in Section 18(A) of a compulsory remuneration (“in the absence of consent”) that may go beyond what is permitted under the Berne Convention (to the extent that Internet transmissions and foreign satellite transmissions are subject to the compulsory license). The broad wording of Section 18(A) must be trimmed to exclude Internet broadcasts or foreign satellite broadcasts from being subject to “secondary broadcast” without permission from the copyright owner.
- **Overly Broad Exception as to Computer Programs:** Sections 29(B) and (C) attempt to create an exception for decompilation of a computer program, but the provisions are overly broad and, as written, violate the Berne Convention (and TRIPS).²⁵ The provision allows reproductions or

²⁴ A more detailed discussion of the lack of a criminal remedy against end-user piracy is in the 2003 Special 301 report for Israel, at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-149.

²⁵ As an example of a provision that satisfies international discipline, see Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, O.J. L. 122 (1991), art. 6:

Article 6 Decompilation

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning

adaptations of a software program to be made to permit “adaptation to another software program or to another computer system, for the use thereof” or to permit “adaptation of another software program or computer systems to work with the software [being copied].” The limitations imposed in section 29(c) do little to narrow the provision’s scope. As drafted, Section 29 would appear to permit decompilation of software for many purposes that are unrelated to achieving interoperability. The provision should be reworded to more closely reflect generally accepted standards such as those articulated in Article 6 of the EU Computer Programs Directive.

- **The Temporary Copy Exception in Draft Section 31 Should Not Apply to Software:** Consistent with the legislation on which it is based (the EU Copyright Directive), the temporary copies exception should not extend to software.
- **Exception for “Permitted Uses in Educational Institutes” Is Overly Broad:** The proposed exception in Section 35(A) of the Israeli draft is overly broad and a violation of the Berne Convention and the TRIPS Agreement. While Israel may craft exceptions in special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder, Section 35 clearly does not pass that test.²⁶ Insofar as the exception may apply to all works (including software), this exception could lead to the unlimited copying of works under the guise of an educational exception, and goes far beyond what a

of Article 4 (a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

- (a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;
 - (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and
 - (c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.
2. The provisions of paragraph 1 shall not permit the information obtained through its application:
- (a) to be used for goals other than to achieve the interoperability of the independently created computer program;
 - (b) to be given to others, except when necessary for the interoperability of the independently created computer program; or
 - (c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.
3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder’s legitimate interests or conflicts with a normal exploitation of the computer program.

²⁶ The following is a non-exhaustive list of issues:

- First, the exception is seemingly boundless as to both “reproduction” and creation of “derivative” works as long as those are done in an educational context and are “justified” – a completely undefined but clearly overly broad criterion. Berne and TRIPS do not permit such broad exceptions.
- Second, the exception is in no way limited to the analog, face-to-face, educational setting, thus clearly contemplating digital copies (the explanation of the draft confirms that this exception applies to digital), or worse yet, derivative works in a digital format without the authorization of the right holder.
- Third, one of the criteria set out to determine whether the use of the work in the education setting is justified is “[t]he existence of a reasonable possibility of receiving permission for use.” We are uncertain as to the meaning of this passage. It could mean that if the use by the educational institution was one in which the user would be able to get permission from a reprographic rights organization (RRO), then the user may avail him/herself of the exception and use it for free! Or it could mean the opposite, i.e., where there is no reasonable possibility, then the exception may be invoked. In either instance, this criterion is unacceptable.
- The exception in Section 35(B) which would allow anthologizing of “passage[s] from a published work” also has some problems (for example, we are unclear as to the meaning of “not published for the purpose of teaching in educational institutes” but it appears that would apply to any publication other than textbooks).
- The exception is unacceptably broad in that it imposes no limit whatsoever on the length or substantiality of the portion of the work copied.
- Finally, it should be noted that Section 35 applies to the reproduction or creation of derivative works of all kinds, including audiovisual works, computer programs, sound recordings, as well as books.

“distance-learning” type exception may contemplate and remain consistent with international standards.²⁷

- **The Exception as to Public Performances of a Work [Section 35(C)] Impinges on the Berne Article 11 Right and Must be Deleted.**
- **Term of Protection:** IIPA is heartened that the government of Israel has decided to extend term of protection to “life of the author” plus seventy years. There is no reason to afford shorter protection to the owners of audiovisual works and sound recordings.²⁸ The international trend is to provide at least seventy years for both audiovisual works and sound recordings, and the government of Israel should not do the creators of audiovisual works and sound recordings the extreme disservice of prejudicing them by providing shorter terms.
- **Parallel Importation:** Of any country, it would seem that there is no question that Israel should retain parallel import protection. Israel is a relatively developed market that receives substantial imports of unauthorized editions or works from locales like Russia, or from the Palestinian territories, or from other nations. The negative effects of lifting parallel import protection in Israel will undoubtedly be twofold: 1) increased “mixed” shipments of piratical and parallel imports “disguised” as parallel imports (IIPA has anecdotal information of such shipments in countries that newly lifted restrictions on parallel imports); and 2) destruction of local distribution networks, and resulting loss of jobs and revenue to Israelis who now participate in the market for copyrighted goods.
- **Remedies:** Section 66(c) of the draft law defines as a single infringement “a number of infringements committed as part of a single group of acts.” Under this definition, the making of countless copies of numerous titles could be a single infringement for purposes of statutory damages, a clearly unreasonable result and in violation with Israel’s commitment under Article 41 of TRIPS. Moreover, Section 70(a)(2) of the draft law gives courts the discretion to make the transfer of infringing copies to the plaintiff contingent upon the plaintiff’s paying the defendant the value of the copies had the infringement not occurred. This means rights holders in some cases must pay the infringer’s costs for the infringement; the more sophisticated the infringer is and the more costly the underlying infringing copies are, the greater the cost to the rights owner. This provision violates Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort.”

Unauthorized Retransmissions by Cable Operators

Israeli cable operators continue to refuse to make payment for retransmissions of any broadcast television signal, despite protections accorded to retransmitted works under Israel’s copyright laws and court decisions confirming that Israeli law affords such copyright protection to cable retransmissions. (Such court decisions were on appeal as of November 2003, with rulings expected soon.) Cable operators have rejected all efforts by AGICOA, a group representing an international group of right holders including the Motion Picture Association, to negotiate retransmission licenses. AGICOA filed legal proceedings against cable operators in the District

²⁷ Public Law 107-273, the Technology Education and Copyright Harmonization Act 2002 (the TEACH Act), creates exceptions for use of copyrighted materials for distance learning. By comparison with the Israeli bill, the TEACH Act creates exceptions that are appropriately narrow for the purposes it sets out to achieve. The Israeli government should, to avoid going afoul of well established international standards, including the three-part test of the Berne Convention (and Article 13 of TRIPS), rework its proposed exception so that it is narrowly tailored and can satisfy international standards.

²⁸ Indeed, since those works are measured from the date of publication (or in the case of “records” from the date it was created) it is even more imperative that, for the sake of providing proper incentives for further creation and dissemination, that an attempt be made to arrive at an equivalent number of years to “life of the author” plus seventy years. In the United States, studies were conducted to arrive at the actuarial equivalent of “life of the author” plus seventy years, which was demonstrated to be ninety five years from publication.

Court of Tel Aviv in early 2000. Efforts to seek appropriate redress on behalf of copyright owners from Israeli courts have been hindered by the recent approval by antitrust authorities of a merger of the country's three cable operators and the court-ordered supervision and liquidation of one of these three entities.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

KUWAIT

EXECUTIVE SUMMARY

Special 301 Recommendation: Kuwait should be elevated to the Priority Watch List.

Overview of Key Problems: Kuwait ranks worst in the Gulf region for retail optical disc piracy; most industry sectors report piracy levels well in excess of 50%. Such piracy levels reveal an enforcement system which cannot on its face be said to meet the requirements of TRIPS. Except for a couple of raids against business software piracy, and some aggressive activity to curtail cable piracy, virtually no enforcement actions were taken against piracy in 2003 despite specific industry requests to do so. An Interministerial Task Force formed in 2002 has had no coordinating effect on enforcement activities. The Kuwaiti government is aware of shipments of pirate materials coming into Kuwait and the locations of suspected warehouses and pirate retailers, but has done nothing, leaving tens of thousands of pirated products to be freely sold on the streets. Kuwait's law remains TRIPS-incompatible and the government has not indicated any intention to fix the law or further modernize copyright protection. The record industry notes the October 2003 opening of a local Virgin Megastore, which should give authorities yet another reason to fight piracy. On the other hand, because of the severity of the audiovisual piracy problem, legitimate distributors of filmed entertainment in Kuwait are seriously questioning their continued presence in the country. Kuwait just signed a Trade and Investment Framework Agreement (TIFA) with the United States and wants a Free Trade Agreement (FTA). Such negotiations should not commence without the Kuwaiti government taking actions to demonstrate its seriousness about eliminating piracy of copyrighted materials from the country.

Actions to be taken in 2004

- Make public declarations at the highest level of the Kuwaiti government that piracy will not be tolerated in Kuwait.
- Run concerted and sustained raids against piracy of all copyrighted goods, including, in conjunction with police, against residences and warehouses being used as sources of piracy, and including raids against corporate end-user piracy of business software.
- Publicize raids in order to achieve a deterrent effect.
- Prosecute infringers (including distributors, resellers, end-users, dealers in unauthorized "smart cards," producers, etc.), resulting in deterrent sentences, including jail times (not suspended but 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.

For more details on Kuwait's Special 301 history, see IIPA's "History" appendix to this filing.¹ Please also see previous years' country reports.²

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

KUWAIT
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	12.0	95%	10.0	95%	9.0	85%	8.0	85%	8.0	85%
Records & Music ⁴	3.0	55%	3.4	64%	NA	70%	3.0	70%	1.0	65%
Business Software ⁵	NA	NA	4.7	73%	4.5	76%	6.6	80%	10.5	81%
Entertainment Software	NA	95%	NA	NA	NA	85%	NA	NA	3.1	82%
Books	2.5	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS ⁶	NA		20.6		16.0		20.1		25.1	

COPYRIGHT PIRACY IN KUWAIT

Kuwait Remains a Pirate Market for Optical Discs

Most optical discs of copyrighted materials sold in Kuwait are pirated. The motion picture industry continues to report a 95% piracy rate for its materials, and all industry sectors reporting optical disc piracy data report piracy levels at well above 50%. Pirate optical discs (DVDs, VCDs, CDs, CD-ROMs and “burned” CD-Rs) have become the dominant carrier in the Kuwaiti market and hundreds of thousands of units of pirated movies, music, business software, and entertainment software are openly sold on the streets and in the *souqs*. Large quantities of uncensored, pirate VCDs and DVDs (many of which have not yet been released in the theaters or on video) are flooding Kuwait from Asia,⁷ and home-produced “burned” CD-Rs, are becoming more widely available. Audio CDs of international repertoire are sold by Kuwaiti wholesalers for as little as US\$1.20, and are mainly sourced from Pakistan. Unauthorized compilation CD-ROMs, including copies of top-end engineering programs, entertainment software, and routine business software applications, are openly available on the streets. Cartridge-based entertainment software is also widely available in the market, mostly imported from Asia. Pirates even blatantly use entertainment software publisher brands and trademarks in their advertising.

Other problems include 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). In addition, some individuals in Kuwait continue to illegally retransmit television programming,

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ The piracy level figures from 1999-2002 are for “international” repertoire. The overall piracy level for the same period remained roughly 50%.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ In IIPA's 2003 Special 301 report, IIPA estimated that total losses to the U.S. copyright-based industries in Kuwait were \$15.9 million. IIPA's revised loss figures are reflected above.

⁷ For the entertainment software industry, pirate copies of Nintendo's GameBoy Advance® games are all apparently imported from Asia.

including U.S. motion picture titles, to residences without authorization of the right holders (“cable piracy”).

In contrast to some of the other industry sectors, book publishers report a modest degree of success in the Kuwaiti market. U.S. publishers report a high ratio of legitimate sales to known student adoptions at universities and are pleased at the relatively transparent ‘adoption’ (procurement/purchase) processes in universities in Kuwait. University purchasing departments tend to publicize lists of adopted textbooks and numbers of texts required, allowing booksellers to bid for the supply contracts, providing a straightforward mechanism for tracking legitimate sales by publishers. Nonetheless, some book piracy issues remain in Kuwait. Piracy of English language teaching materials continues unabated, and editions of academic texts intended for the market in India pour across the borders.⁸ In addition, publishers report the presence of pirate editions coming into Kuwait from Iran and Jordan. Publishers also report some continued illegal photocopying in universities.

COPYRIGHT ENFORCEMENT IN KUWAIT

The Kuwaiti government carried out very little enforcement activity against copyright piracy in 2003. Sparse raiding was carried out by the government only after immense pressure was applied by the industries, the U.S. government, and local Kuwaiti companies. Kuwaiti Customs carried out three raids on retail outlets in Kuwait city and seized a total of 3,000 audiocassettes,⁹ and intercepted 10 shipments at the airport which resulted in the total confiscation of 26,010 pirated audio CDs. Most CDs seized at the airport came by plane from Indonesia. The government also took some enforcement actions in 2003 involving piracy of business software and cable piracy. The Business Software Alliance was successful in securing 12 reseller raids from the Ministry of Information in 2003.¹⁰ The Ministry of Information also conducted three inspections of companies in 2003 to determine whether there was corporate end user piracy of business software (the inspections apparently revealed no illegitimate software usage, but the actions were non-transparent).¹¹ The Kuwaiti authorities raided 15 cable pirate operations in 2003, seizing all supporting dishes, decoder boxes, and cables; these cases were transferred to the public prosecutor for criminal litigation.

The rare cases that have been brought to court have not gone particularly well. The industries were happy to report one conviction for copyright piracy in 2002, but the fine was the paltry maximum of 500 Kuwaiti Dinars (US\$1,700), and no imprisonment was imposed – hardly a deterrent to further infringement. The Kuwaiti courts did not sentence any violator to prison nor close any shop or company dealing with illicit software in 2003. One case against one of the largest commercial groups in Kuwait for unlicensed software usage remains pending after three years.

⁸ Publishers are growing increasingly concerned about possible transshipment of pirated editions of books from India to neighboring countries such as Bahrain and Iraq.

⁹ It remains the case that the Mojil complex at Abdullah Mubarak Street in Kuwait is replete with piracy and should be cleaned up.

¹⁰ See, e.g., *Kuwaiti raid on software pirates*, Feb. 27, 2003 (Kuwaiti Ministry of Information raided two resellers in Kuwait City and seized three PCs loaded with pirated software); and *Kuwaiti authorities raid four companies dealing in pirated software*, June 4, 2003, at <http://www.menareport.com/story/TheNews.php3?action=story&sid=250874&lang=e&dir=mena> (Ministry of Information in Kuwait conducted raids against four companies using illegal software, resulting in the seizure of 53 PCs loaded with pirated software).

¹¹ The Ministry of Information claims that inspections are ongoing throughout the year and that it seizes illegal software on a regular basis. However, there is no way to confirm this information, as MOI does not reveal the number of raids nor the quantities of confiscated CDs.

While IIPA had great hopes that officials in the Ministry of Information would follow through on verbal commitments made to address the blatant piracy situation, those officials have done little to stem the tide of piracy in Kuwait. An Interministerial Task Force was set up with great fanfare in late 2000,¹² but virtually no progress has been made to combat piracy. 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 an overwhelming 64 cases still being considered by the prosecutor or awaiting decision or sentencing.

MARKET ACCESS BARRIERS

In the absence of genuine copyright enforcement in Kuwait, local licensees and distributors of audiovisual works have 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 continued to provide 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 KD34.5 (US\$117) per title is prohibitively expensive. This fee should be reduced and limited to new titles only. For the business software industry, there is a four percent (4%) customs duty which should be eliminated. Finally, the government of Kuwait should lower or eliminate entirely the fee it imposes on each satellite receiver imported into Kuwait (the current fee, KD100 (US\$339), is 100 times more expensive than that in other Gulf countries (which generally charge the equivalent of US\$3.30).

COPYRIGHT LAW AND RELATED ISSUES

Decree by Law No. 5 of the Year 1999 with Regard to Intellectual Property Rights (which went into effect on February 9, 2000) governs copyright protection in Kuwait. As a member of the World Trade Organization (WTO), Kuwait must comply with its obligations under the TRIPS Agreement. The copyright law, however, remains TRIPS-incompatible in many ways, and contains other problems and ambiguities.¹³ The Kuwaiti government promised the U.S.

¹² The Task Force originally comprised the Ministry of Information (Sheikha Rasha Naif Al-Sabbah, and Ms. Manal Baghdadi, Legal Affairs Controller), the Ministry of Interior (under Lieutenant Colonel Mahmoud Al Tabakh), the Ministry of Commerce (under Abdullah Al Kalaf), the 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.

¹³ See complete analysis in 2003 Special 301 Report for Kuwait, at <http://www.iipa.com/rbc/2003/2003SPEC301KUWAIT.pdf>. For example, the copyright law needs to:

- Provide full retroactive protection for works, including sound recordings, and performances consistent with TRIPS.
- Confirm that Article 43 binds Kuwait to protect foreign copyrighted materials (including sound recordings) in accordance with the principle of national treatment. It should be confirmed that the fifth excerpt of the Explanatory Memorandum regarding Article 43 is meant to confirm protection on the basis of national treatment, and does not impose material reciprocity, which could violate TRIPS.
- Confirm protection of sound recordings under the law (probably as “audio-visual broadcasting works” in Article 2(6)). Confirm that Article 25 does not apply to sound recordings, since that provision does not provide TRIPS-compatible exclusive rights to producers of sound recordings.
- Narrow or delete a Berne-incompatible compulsory license in Article 14.
- Confirm that performers and broadcasters are protected under the law as required by TRIPS.
- Replace the term “innovative” in Article 1 with the word “original.”
- Delete the word “financially” from Article 4.
- Confirm that Article 6 (moral rights) does not impinge on the exclusive adaptation right, thereby violating TRIPS.

government in 1999 (in the context of bilateral discussions largely related to Special 301) that it would pass amendments to fix TRIPS deficiencies in early 2000, but this never occurred. The government of Kuwait should swiftly amend the law to comply with TRIPS, and should also modernize its law to establish an adequate legal framework for the protection of copyright in digital environments, including by fully implementing and then acceding to the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Kuwait wants a Free Trade Agreement with the United States; the IPR chapter of that Agreement must: (a) be TRIPS-plus; (b) include in specific terms obligations which would meet the requirements of implementing the WCT and WPPT; (c) include modern and effective enforcement provisions, including those to respond to the threats of digital and Internet piracy; and (d) contain specific commitments with regard to combating optical disc piracy through regulations on production and strict enforcement.

United States and Kuwait Sign Trade and Investment Framework Agreement (TIFA)

In a step that is expected to be a precursor to announcement of negotiations toward a free trade agreement, on February 6, 2004, U.S. Trade Representative Robert Zoellick and Kuwaiti Minister of Commerce and Industry Abdullah Al Taweel signed a Trade and Investment Framework Agreement (TIFA). The TIFA sets a framework for stronger intellectual property rights protection and enforcement. It also establishes a United States-Kuwait Council on Trade and Investment in which high level officials from each country will meet periodically to advance trade and investment issues.

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- Narrow the “personal use” exception in Article 8, through amendment or explanatory memorandum, to ensure that it does not allow anyone to copy complete books without authorization, and is limited to analog form.
 - Provide an express rental right for sound recordings and computer programs, or confirm that Article 4(2) which provides a broad exploitation right, includes a rental right.
 - Amend the law to expressly provide for *ex parte* civil searches as required by TRIPS.
 - Amend Article 42 so it can comply with Articles 46 and 61 of TRIPS with respect to seizure/forfeiture/destruction of copyright materials, materials and implements.
 - Amend the law to strengthen criminal penalties, including deterrent minimum and maximum fines (double for recidivists), and mandatory imprisonment in willful piracy cases (and for recidivists) in order to comply with TRIPS.
 - Affirm that unauthorized use of business software in a business setting is a crime. Resolution of the pending end-user case with imposition of criminal remedies would be a first step toward confirming this TRIPS-compatible remedy.
 - Confirm that Kuwait has laws providing TRIPS-compatible border measures. If not, Kuwait must immediately enact such measures to comply with TRIPS Articles 51-59.
 - Amend Article 25 so that the producer of an audiovisual work has the exclusive rights under copyright. Vesting economic rights in an audiovisual work in the producer enhances the ability to commercialize works and improves the economic viability of the industry, which benefits all groups that contribute to the success of an audiovisual work.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

LEBANON

EXECUTIVE SUMMARY

Special 301 Recommendation: Lebanon should remain on the Priority Watch List.

Overview of Key Problems: The market in Lebanon continues to be dominated by piracy. Cable piracy destroys the local market for audiovisual materials, as over 1,000 pirate cable operators serve 60% of Lebanon's population. Retail piracy of optical discs (CDs, VCDs, DVDs, CD-ROMs, "burned" CD-Rs, etc.) of business and entertainment software, sound recordings, published materials, and movies remains blatant and open in Lebanon. Some discs are produced locally in one unregulated optical disc plant, while many more are imported from Asia, particularly Malaysia, and lesser quantities from Eastern Europe. Syria is a major transit country for pirated optical discs from Malaysia, and large quantities of those transshipped discs and discs locally burned (CD-Rs) in Syria are being smuggled into Lebanon. The government has done nothing to shut down the one optical disc plant; however, in 2003, Customs increased its activities in intercepting pirate products at the borders. Book piracy remains serious, including production for export of pirated scientific, medical and technical materials to other countries in the Middle East and the Gulf, and music piracy (music CDs and cassettes) remains a major problem with astonishingly high piracy levels. The government lacks the will to reduce piracy; it follows that staffing and resources of key ministries also remain inadequate. A few raids in 2003 yielded significant numbers of pirate products, but police often left pirated goods with the raided stores as "judicial custodians," and only intermittently seize. Cases proceeding to criminal court are marred by delays, procedural hurdles and non-deterrent results. On September 3, 2003, USTR accepted a Petition brought by IIPA against Lebanon under the Generalized System of Preferences (GSP) program for failure to meet the criteria of "adequate" and "effective" copyright protection, and review of that Petition is currently under way.

Actions to be taken in 2004

- Issue a statement at the highest level of the Lebanese government that copyright enforcement will be treated with a higher 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.
- Close down all unlicensed "community cable" television stations in Lebanon.
- Carry out raids and initiate prosecutions against many pirate retail stores and street vendors.
- 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.
- Amend the copyright law to comply with TRIPS and the WIPO "Internet" treaties, including deletion of overly broad exceptions (e.g., for educational use of business software); accede to the WCT and WPPT.

- Adopt an optical disc regulation, requiring optical disc manufacturing plants to obtain licenses and conduct themselves in accordance with specific business practices that promote due care and discourage piracy.

For more details on Lebanon's Special 301 history, see IIPA's "History" Appendix to this filing.¹ Please also see previous years' reports.²

LEBANON
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	10.0	80%	8.0	80%	8.0	80%	8.0	60%	8.0	60%
Records & Music⁴	2.5	70%	2.0	65%	2.0	65%	2.0	68%	2.0	60%
Business Software⁵	NA	NA	3.5	74%	1.1	79%	1.3	83%	1.6	88%
Entertainment Software	NA	80%	NA	NA	NA	NA	1.5	96%	0.5	70%
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.5	NA
TOTALS⁶	NA		15.5		13.1		14.8		14.0	

COPYRIGHT PIRACY IN LEBANON

Rampant cable piracy (90% piracy level for U.S. content) continues to devastate the local theatrical, video, and television markets. There remain well over 1,000 cable operators that serve over 60% of the Lebanese population, retransmitting domestic and foreign terrestrial and satellite programming without authorization to their subscribers 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.⁷ The theatrical market continues to suffer,⁸ and the legitimate video market has been almost entirely destroyed by the various forms of piracy in Lebanon. Local broadcast television stations have canceled long-standing licenses with copyright owners because they cannot compete with the pirates.⁹

Lebanon has become a producer of pirated materials and an exporter of piracy. One

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ Loss figures for sound recordings represent U.S. losses only.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Lebanon were \$12.0 million. IIPA's revised loss figures are reflected above.

⁷ 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.

⁸ Largely as a result of cable piracy, receipts from ticket sales to movie theaters dipped approximately 27% in 2002, compared with sales in 2001.

⁹ While IIPA supports a law to regulate the cable television industry, and looks forward to assisting the Lebanese government in addressing this sector, such a law cannot substitute for aggressive enforcement against cable piracy under existing laws.

unregulated CD plant operating in Beirut has been producing over 150,000 discs per month, of a range of unauthorized copies of copyrighted products including entertainment software, business software, and sound recordings. There is also increasing evidence of massive “burning” of CD-Rs of music and other copyrighted materials. Some of the CD-Rs are sourced back to Syria¹⁰ and the Palestinian territories, while most imported optical discs come into Lebanon from Asia (mainly Southeast Asia),¹¹ Ukraine, or elsewhere in Eastern Europe. As a result, pirated optical discs (CDs, VCDs, DVDs, CD-ROMs, etc.) of copyrighted materials (movies, business software, entertainment software, sound recordings, and published/reference materials) inundate the Lebanese market. The government of Lebanon must 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.

Other piracy problems abound. Pirate videocassettes of motion pictures not yet released in the theaters or on video continue to cause major commercial damage in Lebanon (an estimated 80% of videos in Lebanon are pirate). Such pirate copies are often of poor quality, having been taken with camcorders inside theaters. Locally and regionally manufactured music sound recordings on CD or audiocassette are ubiquitous in Lebanon, including at an airport shop. 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. End user piracy of business software remains prevalent in Lebanon, particularly in small and medium enterprises. Book piracy remains a serious problem, as 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. In 2003, the legitimate university community continued to make some efforts to have students use only legitimate textbooks.

COPYRIGHT ENFORCEMENT IN LEBANON

The lack of proper enforcement in Lebanon is chiefly due to a lack of political will on the part of the Lebanese government to make fighting piracy a priority. Enforcement agencies do not self-initiate actions, waiting for complaints by right holders before commencing an investigation. Staffing and training of the Department of Intellectual Property Protection at the Ministry of Economy continues to be meager. In mid-2003, a joint task force that includes inspectors from the Ministry of Economy, the Ministry of Finance, and Lebanese Customs was formed. It was tasked with raiding targets identified in complaints filed with the Department of Intellectual Property Protection. However, that task force refuses to act on its own, and the results have been mostly non-deterrent so far.

In 2003, some raiding activity was taken by the police, continuing the positive trend that started in 2002.¹² And, for the first time in 2003, the Minister of Economy improved the Ministry’s

¹⁰ Syria is being used as a major “transit country” for shipments of pirated discs into Lebanon from Malaysia. The pirated goods are mostly ‘smuggled’ into Lebanon via so called Military roads between Syria and Lebanon. There are no real Customs checkpoints at these roads as they are used by the military.

¹¹ We are also aware that CD-Rs “burned” with “MP3” music data files are being imported from Malaysia.

¹² In 2002, the police, in conjunction with the business software and recording industries, conducted more than 20 store raids, revealing substantial numbers of pirate business software, entertainment software, and sound recording titles. After the raids, the pirate CDs were left with the store owners as “judicial custodians.” It took many months of meetings and discussions with the Chief Public Prosecutors office to convince him to have the pirate CDs and the computers used to produce them removed from the premises and stored in a police warehouse. Recently, those pirates were indicted, and referred to the criminal court of Baabda for trial.

enforcement track record and participated in several raids and copyright awareness drives. For the record industry, the Ministry of Economy in Lebanon conducted roughly 20 raids in 2003 on warehouses and retail outlets in Lebanon. Separately, Customs authorities stopped a large number of piratical imports of optical discs, predominantly originating from Southeast Asia. Seizures by the MOE and Customs included a total of more than 155,000 music carriers (1,000 audiocassettes, 74,000 pirated audio CDs, 5,000 pirated audio CD-Rs by the MOE; and another 75,000 pirate audio CDs by Customs). Furthermore, the Prime Minister and the Minister of Economy have met with representatives of the copyright industries and issued strong statements of support for IPR, in sharp contrast to previous years' meetings, in which industry had been told it would take several years before copyright enforcement could begin. The President and the Prime Minister should continue to 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.¹³

In the past, raids were fraught with problems, as targets were often tipped off, or the Lebanese officials left pirated materials in the hands of the pirates as "judicial custodians." Lebanese Customs officials were notorious for letting pirated materials into the country even when given adequate evidence of the illegality of the goods.¹⁴ IIPA hopes that the early indications of increased enforcement activities in 2003 are a good sign of what is to come in 2004. Lebanon's leaders still should 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.

The situation in the courts needs improvement. IIPA has noted in previous reports detailed instances of prosecutorial error in preparing piracy cases – errors which have doomed those otherwise straightforward piracy cases to failure (in one set of cases, the prosecutors filed the cases in the wrong court). Movement should be made to establish a specialized group of prosecutors, trained in copyright, to handle all copyright cases. Such a core group would work with the IPR unit or other enforcement officers (e.g., Customs) to prepare cases for prosecution. It would also be a positive development if a cadre of judges who have received specialized training in copyright could be regularly assigned to hear such cases.

A judiciary sensitized to the copyright law, aware of the severe economic damage caused by piracy, and aware of the technologies employed by pirates, is sorely needed in Lebanon. There were a few positive court results in 2003 which give some cause for hope. Civil copyright cases brought against pirates in Lebanon have never led to deterrent results.¹⁵ The criminal justice system showed some promise in 2003. In July 2003, 41 cable pirates were sentenced for cable piracy in the first such criminal convictions in the country's history.¹⁶ Unfortunately, the sentences included no jail time, and the fines ranged from a mere US\$4,533 for some defendants to \$9,335 for the

¹³ There are only 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. 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").

¹⁴ 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 continue to be allowed into Lebanon.

¹⁵ Procedural problems in two cases in 2002 resulted in ineffective enforcement against known cable pirates. 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 successfully conclude 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 to obtain the evidence necessary to proceed.

¹⁶ One conviction in 2001 and three convictions in 2002 against software pirates resulted in sentences, including for the first time, in April 2002, a one month jail sentence handed down by the Criminal Court of Beirut, but again, the fines were non-deterrent.

most egregious defendants, hardly a deterrent.¹⁷ In August, 2003, a judge in Beirut issued the first-ever injunction against seven cable pirates (responding to requests brought by two petitioners, Showtime, and Arab Radio & Television). The judge also imposed a fine equal to US\$333 per day for any of the pirates that violated the injunction. Nonetheless, most cases get bogged down by procedural problems, judges' relative lack of familiarity with intellectual property laws, inefficient handling, and delays in adjudication. It should be noted that in a recent case, a judge refused to issue an injunction because the plaintiff did not register his copyright in Lebanon with the Ministry of Economy and Trade; this bench decision, if not reversed, would directly place Lebanon in violation of international copyright standards, which do not permit formalities (such as a registration) to interfere with the exercise of rights.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Law of Lebanon (effective June 14, 1999) provides, on its face, a sound basis for copyright protection for U.S. works and sound recordings,¹⁸ including stiff penalties (on the books) for copyright infringement, stiff penalties against 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), but does not take other necessary steps to fully implement the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).¹⁹ The government of Lebanon should be encouraged to fully implement these important treaties, and accede as soon as possible.

Unfortunately, the law remains deficient with respect to international standards in several respects,²⁰ including:

- There is no direct point of attachment for U.S. sound recordings (however, point of attachment for U.S. sound recordings can be achieved by simultaneous publication in the U.S. and any Rome Convention Member).
- Works and sound recordings are not explicitly given full retroactive protection in accordance with international treaties.
- Article 25, even as implemented by decision No. 16/2002 (July 2002), still does not meet the standards/requirements of the Berne Convention or the TRIPS Agreement. 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. The implementing decision addresses some areas of concerns raised by IIPA in the past, but not the chief area, which is that the exception is essentially a free compulsory license for students to make multiple copies of a computer program. Such an

¹⁷ IIPA does recognize that the total award to the two right holders, US\$160,000 for one and US\$20,000 for the other, was relatively substantial for copyright cases decided in Lebanon.

¹⁸ Lebanon is a member of the Berne Convention (Rome [1928] Act) and the Rome Convention. Lebanon should be urged to accede to the Paris Act of 1971 of the Berne Convention, and should join the Geneva (phonograms) Convention in order to provide clearer protection to international sound recordings.

¹⁹ For example, the law should prohibit circumvention of technological protection measures used by copyright owners to protect their works in the digital environment from unlawful access or unlawful exercise of rights. The law should also prohibit preparatory acts (e.g., manufacture) of circumvention devices or provision of circumvention services.

²⁰ A more detailed discussion of remaining deficiencies in Lebanon's copyright law can be found in the 2003 Special 301 report, at <http://www.iipa.com/rbc/2003/2003SPEC301LEBANON.pdf>. 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.

exception violates the requirements of Berne and TRIPS since it “conflicts with a normal exploitation of the work” (software aimed at the educational market) and it “unreasonably prejudices the legitimate interests of right holders” (eliminating completely the educational market for software).

- There are certain other overly broad exceptions to protection (e.g., Article 32).
- Most significantly, since the deterrent penalties provided on the books are not carried out in practice, Lebanon’s legal framework at present pays only lip-service to the severe problem of piracy. Each of the items noted would arise in the WTO accession process, and Lebanon must take measures to address these deficiencies.

Because Lebanon has emerged as a major producer of pirated optical discs (including “burned” CD-Rs), Lebanese authorities must 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 registration of locations engaging in the commercial duplication of optical discs onto recordable media (CD-R “burning”); the tracking of movement of optical disc production equipment, raw materials, and production parts (so-called stampers and masters); the compulsory use of identification codes (both mastering codes and a mould code), in order successfully to track the locations of production; 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 law.

Generalized System of Preferences

On September 3, 2003, the United States Trade Representative “accepted for review” a Petition filed by the IIPA 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 Petition noted three major deficiencies in Lebanon’s protection of copyright that caused economic harm to U.S. right holders that result in Lebanon failing to meet the GSP standard of providing “adequate and effective” copyright protection in practice: (1) deficiencies in the copyright law in Lebanon that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators, making protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon that are inadequate and ineffective.

USTR, in its 2003 Special 301 decision in May, reiterated the concern of the U.S. government regarding “Lebanon’s severe copyright piracy problem and the lack of a comprehensive government commitment to eliminate piracy and foster legitimate business.”²¹ The decision continues:

Despite the entry into force in 1999 of a new copyright law, there has been little action by Lebanon against piracy. Some raids of pirate store and operations occurred in 2002, leading to the first sentencing of a software pirate and financial penalties in other cases. However, pervasive cable piracy continues to undermine legitimate theatrical, video, and television service providers. Overall Lebanon had made little progress in 2002 in addressing its significant IPR deficiencies. The United States urges the Lebanese Government to press forward with its recent proposal to draft a law regulating the cable television industry and to mount an aggressive campaign against pirates. End-user piracy of computer software is

²¹ USTR 2003 Special 301 Report, May 1, 2003, available at the USTR website at <http://www.ustr.gov/reports/2003/special301-pwl.htm#lebanon>.

widespread among large companies, banks, trading companies, and most government ministries. Also troubling is an overly broad software exception for certain educational uses in the new copyright law that seriously undermines the viability of this market for legitimate products. Book piracy also remains a serious problem...A committed and vigorous program to enforcement intellectual property rights, particularly copyright protection, is essential to the success of the Lebanese Government's efforts to reform its economy, increase trade and foreign direct investment and prepare for accession to the WTO.

Lebanon should heed USTR's language, and take concrete steps toward eradicating piracy in 2004; otherwise, its trade benefits under GSP should be suspended (IIPA urges Lebanon's industrial sector to review the goods that benefit from current GSP benefits, and to consider whether it is in their interest for the government of Lebanon to further delay action against copyright piracy, at the risk of cutting off the trade benefits they currently enjoy). During the first 11 months of 2003, Lebanon imported almost \$28.2 million of products into the United States without duty, or almost 33.6% of its total imports into the U.S.²²

²² During 2002, Lebanon imported almost \$22.7 million of products into the United States without duty, or almost 37.7% of its total imports into the U.S.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

PHILIPPINES

EXECUTIVE SUMMARY

Special 301 Recommendation: The Philippines should remain on the Priority Watch List, and an out-of-cycle review should be conducted later in 2004 to determine whether the new optical disc law has been implemented, whether inspections and enforcement activities against unauthorized optical disc plants have effectively curtailed pirate production, and whether adequate actions have been taken against pirate reprinters and photocopy shops.

Overview of Key Achievements/Problems: Pirate optical discs (CDs, VCDs, DVDs, CD-ROMs) of copyrighted materials (music, audio-visual, business and entertainment software, and published materials) continue to be imported into the Philippines from Malaysia, Thailand, China, Hong Kong, and Taiwan, decimating the domestic market. Other problems include end-user piracy of business software, book piracy (reprints and unauthorized photocopies), and piracy occurring on the Internet (including in Internet cafes, where the majority of entertainment software used is illegal). The Videogram Regulatory Board (VRB) remained one of the success stories of 2003 for the Philippine government in the fight against piracy, successfully prosecuting two cases to final conviction. On February 9, 2004, President Macapagal-Arroyo signed into law a new optical disc law. As a result, the VRB will be reorganized into a new Optical Media Board (OMB) (with new head of the VRB Edu Manzano, who replaced Ramon "Bong" Revilla). This new grouping must be even more active and successful in the fight against piracy than the VRB has been. The prosecutorial and court systems remain marred by delays, procedural hurdles, a lack of IP expertise in the Department of Justice, clogged court dockets, and a lack of specialized IP courts, resulting in IP cases being given low priority.

Actions to be taken in 2004

- Run sustained enforcement raids against pirate optical disc production facilities, seizing and destroying, dismantling and impounding illegal goods and equipment.
- Run coordinated sustained raiding, including against pirate book reprint facilities and photocopy shops, cable pirates, and businesses or Internet cafés using unauthorized software; monitor progress toward prosecutions.
- Training and closer liaison with the Bureau of Customs (BOC) and Philippine Postal Service (Philpost) to shore up the flood of pirated optical discs being smuggled into the country.
- Clear backlogs of investigations and court cases.
- Reinstate specialized IP prosecutors in the Department of Justice.
- Ensure that expert judges handle copyright cases (consider reinstating specialized IP court).
- Ensure that the new "Optical Media Board" (OMB) is fully funded through the Congress and that the new OD law is implemented immediately.
- Pass draft copyright law amendments (S.B. 1704 and H.B. 3182) to fully implement the WIPO "Internet" treaties.
- Announce an end to the amnesty with regard to "sell-off" of supposedly P.D. 1203 compulsory reprints of books; start enforcing against those who attempt to continue to exploit P.D. 1203; reject consideration of "Lacson" Bill that would violate TRIPS by allowing compulsory reproduction of books for schools.

For more details on Philippine's Special 301 history, see IIPA "History" Appendix to this filing.¹ Please also see previous years' reports on the Philippines.²

PHILIPPINES
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	33.0	89%	30.0	80%	28.0	80%	25.0	70%	18.0	65%
Records & Music ⁴	22.2	40%	20.9	40%	23.9	36%	1.4	33%	2.0	20%
Business Software ⁵	NA	NA	25.0	68%	19.9	63%	21.8	61%	26.7	70%
Entertainment Software	NA	95%	NA	NA	NA	99%	41.0	98%	23.8	89%
Books	45.0	NA	45.0	NA	44.0	NA	44.0	NA	44.0	NA
TOTALS⁶	NA		120.9		115.8		133.2		114.5	

COPYRIGHT PIRACY IN THE PHILIPPINES

Copyright Piracy Decimates the Domestic Market in the Philippines

Notwithstanding some raids on retail establishments and production factories in 2003, particularly by the VRB, pirates remain emboldened and continue to ruin the legitimate domestic markets in the Philippines. Pirate optical discs flood the Philippines' market from places like Malaysia, Thailand, China, Hong Kong, and Taiwan. Pirate product in many formats (music CDs, VCDs, DVDs, CD-ROMs containing pirate business software, entertainment software for personal computer, Xbox®, PlayStation2®, GameBoyAdvance®, and pirate copies of published or reference materials) is available virtually everywhere, displacing legitimate retail sales.⁷ The market for movies is hurt in part due to the affordability of hardware (imported primarily from China and Taiwan) for playing VCDs and DVDs, creating a market for pirated discs of movies not yet released in the theaters as well as previously released titles. Market share for pirate DVDs (versus VCDs or videocassettes) climbed from 30% in mid-2002 to 60% by mid-2003, as unit prices dropped from US\$3.50 to P80 (US\$1.40) over the same period. There was a significant escalation in the amount of "burned" pirate CD-Rs in 2003, due at least in part to the low costs of production.

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ Losses to the U.S. recording industry calculated beginning from 2001 are represented by estimated displaced sales in the Philippines. Prior to 2001, losses were calculated based on the value of pirate sales at pirate prices.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in the Philippines for 2002 were \$116.0 million. IIPA's revised loss figures are reflected above.

⁷ For example, several areas in Metro Manila are considered to be video piracy hotspots: Quiapo in Manila, Greenhills in San Juan, ABC Mall in Makati City and Cubao in Quezon City.

U.S. book publishers suffer from pirate photocopies and reprints of textbooks and other publications, mainly in the academic environment, but also from piracy of professional medical books. 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 of piracy of published materials persists, and attitudes among some university officials, and even professors (many of whom are authors themselves!) are truly appalling. U.S. publishers also suffer from pirate printing of medical books, with the pirates selling at medical conventions and door-to-door at hospitals and doctor's offices. Another problem is that pirates continue to claim they are exempt under an ancient compulsory license (Presidential Decree No. 1203) which was repealed in 1997! The Philippine government must stop permitting pirates to claim this exemption by issuing a directive indicating that P.D. 1203 may no longer be invoked and instructing authorities to take raids against pirate booksellers and printers.

The motion picture industry also suffers from the unauthorized transmission of motion pictures on hundreds of cable systems in the country, the theft of satellite signals of home entertainment channels, and traditional pirate sales of videocassettes (which is most severe in Manila, but has spread to the provinces as well in 2003). Although cable systems outside Manila are regulated, there was still a proliferation of infringing transmissions in 2003, including transmissions of newly-released motion pictures repeated several times a day. The National Telecommunications Commission (NTC) monitors the operations of licensed and non-licensed cable TV operators, but other than issuing the occasional warning letter, has not been effective in curbing cable TV piracy. Despite mounting complaints aired by the foreign content providers on the continuous piracy of signals in even the most remote areas in the Philippines (particularly in the Mindanao area), NTC officials insist they have no jurisdiction over copyright violations, nor any enforcement resources, and that the responsibility for enforcement lies with the Intellectual Property Office (IPO). Foreign content providers have consistently argued that NTC must be able to suspend or cancel licenses of local cable TV operators found to be pirating programs. A proposed Cable Bill has languished in the National Assembly for five years, leaving a vacuum in this area.

End-user software piracy remains the most serious threat to the business software industry in the Philippines. After five years of steady declines, the end-user software piracy rate rose from 63% in 2001 to 68% in 2002. About 1,500 Internet cafés are in operation in the Philippines, and estimates are that virtually all of these establishments profit from unauthorized exploitation of the most popular entertainment software titles (99% unlicensed).

Optical Disc Pirate Production for Export Remains a Serious Concern

Currently, IIPA can verify the existence of 7 optical disc plants having roughly 21 production lines operating in the Philippines, with an estimated overall production capacity of 73.5 million discs per year,⁸ many multiples of any rational legitimate domestic demand for discs in the Philippines, which is estimated at 7 million discs per year. The result is overproduction for the domestic market. Covert production facilities, often protected by law enforcement and local government officials, remain in existence in both remote areas of Luzon and within the major cities. Currently it is believed that such manufacturing facilities only produce pirated optical discs

⁸ Estimated production capacity of finished optical discs is ascertained by multiplying the number of production lines (excluding blank CD-R) times 3.5 million; this is by all accounts considered a conservative estimate.

in VCD and CD-R format. However, there is the increasing concern that the Philippines may soon become a manufacturing hub of optical discs in the DVD format, for both local consumption and for export.

COPYRIGHT ENFORCEMENT IN THE PHILIPPINES

THE PHILIPPINES CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE
Number of raids conducted	1,957 ⁹ 545 ¹⁰	3
Number of VCDs seized	859,003	
Number of DVDs seized	1,309,621	
Number of CD-Rs seized	843,969	
Number of investigations	2,126	
Number of VCD lab/factory raids	2	
Number of cases commenced	2	1
Number of Indictments		
Number of defendants convicted (including guilty pleas)	12	0
Acquittals and dismissals	0	0
Number of cases Pending	543	12 ¹¹
Number of factory cases pending	3	
Total number of cases resulting in jail time	1	0
Suspended prison terms	0	
Maximum 6 months	N/A	
Over 6 months	N/A	
Over 1 year	N/A	
Total suspended prison terms	0	
Prison terms served (not suspended)		
Maximum 6 months	1	
Over 6 months	0	
Over 1 year	0	
Total prison terms served (not suspended)	1	
Number of cases resulting in criminal fines		
Up to \$1,000	N/A	
\$1,000 to \$5,000	N/A	
Over \$5,000	N/A	
Total amount of fines levied (in US\$)	N/A	

THE PHILIPPINES CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	BUSINESS SOFTWARE ¹²
Number of civil raids conducted	0
Post-search action	0
Cases pending	0
Cases dropped	0
Cases settled or adjudicated	3
Value of loss as determined by right holder (\$USD)	\$221,352.11
Settlement/judgment amount (\$USD)	No Judgments

⁹ Inspection Orders.

¹⁰ Including three search warrants for VCD labs/factories.

¹¹ There are four cases pending, and eight cases pending on appeal with the Department of Justice, Court of Appeals and Supreme Court.

¹² All raids for 2003 were conducted based on search warrant applications which result in criminal liability.

THE PHILIPPINES ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES
Number of raids/searches conducted	1,960
Number of administrative cases brought by agency	1,960
Number of defendants found liable (including admissions/pleas of guilt)	0 ¹³
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)	

Steps to Coordinate Enforcement

The government of the Philippines attempted to take several steps to coordinate efforts toward a more effective regime to eradicate piracy. For example, in June 2003, a new, broad-based coalition composed of private organizations and government agencies was formalized, called The Intellectual Property Rights Enforcement Action Panel (IP-REAP).¹⁴ In mid 2003, the VRB signed Memoranda of Understanding (MOUs) with both the Philippine National Police (PNP) and the Bureau of Customs (BOC) to enhance joint enforcement action against piracy. Such agreements have been partially successful. In September 2003, President Arroyo declared (through Proclamation 448) that the month of October of every year would be "National Anti-Video Piracy Month." Finally, with final passage of the new optical disc law, the Optical Media Board will be established – another multi-agency group tasked with eradicating unauthorized production of optical discs.

Some Raiding Occurred, But No Deterrent Effect

Notwithstanding these various efforts to coordinate enforcement, results in 2003 varied by industry, and no industry reported reductions in piracy levels as a result of enforcement actions taken in 2003. For example, the VRB registered video establishments in an attempt to eradicate piracy of audiovisual materials, and then proceeded to inspect unregistered establishments. From January to August 2003, VRB registered 272 video establishments for the first time, and renewed 553 out of 1,824 licenses granted in 2002.¹⁵ According to VRB records from inspections and raids (against unregistered locations), from January to August 2003, VRB impounded nearly 2.5 million discs, at least five optical disc production lines and 273 CD-R burners.¹⁶ In one of the raids in March 2003, it was discovered that the two optical disc lines

¹³ Cases are dropped after 15 days from date of seizure and nobody claims the items.

¹⁴ *Intellectual property rights tie-up forged*, Business World, June 19, 2003. IP-REAP is made up of the Intellectual Property Office (IPO), Department of Justice, NTC, VRB, Philippine National Police, Bureau of Customs, IP Coalition, Council to Combat Piracy and Counterfeiting of Patents, Copyrights and Trademarks, Intellectual Property Association of the Philippines, Philippine Internet Commerce Society, Electronics Industry Association of the Philippines, Quezon City Chamber of Commerce and Industry, and Davao City Chamber of Commerce and Industry.

¹⁵ Unregistered locations generally deal in piracy. The motion picture industry noted an increase in the number of stalls selling pirated optical discs in 2003: from 177 on January 31, 2003, to 229 on March 31, 2003.

¹⁶ To demonstrate the magnitude of the raids, two major raids conducted at the notorious Bartertrade Center in February 2003 resulted in the seizure of around 461,500 pirate optical discs. See *Macapagal sees destruction of*

seized had been seized once before in August 2001, but were returned to the pirates after the 2001 proceedings were quashed.¹⁷ The National Bureau of Investigation (NBI) has traditionally been much less active than the VRB, and in 2003 conducted several raids against corporate end-user piracy of business software. The raids against corporate end-users of business software revealed a complete disregard for software licensing on the part of the companies raided.¹⁸ There were virtually no actions taken in 2003 against book piracy.

Procedural Problems in Raids

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; delays in obtaining search warrants (sometimes because the IPR judge does not hear the request for the warrant, and the presiding judge is unfamiliar with IPR laws); "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); and the requirement that an informant corroborate his allegations with sworn evidence of a witness.¹⁹ IIPA members continue to provide training when the opportunity arises in order to improve the situation and resolve some of these difficulties.²⁰

Lack of Specialized IP Prosecutors

The disbanding of specialized IP prosecutors as a result of two orders in late 2000 has resulted in most piracy cases being referred to regional prosecutors, who have less experience dealing with copyright cases than the Department of Justice prosecutors. As a result, 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 asking for evidence to be examined and re-examined, including an appeals process all the way to the office of the Secretary of Justice. Formal complaints investigated by regional prosecutors take months to complete (in one case more than five years), and decisions to prosecute are subject to endless appeals to the office of the Secretary of Justice.

First Major Convictions Against Pirates in 2003

In a positive development, two cases in the Philippines resulted in convictions of major pirates in 2003. On April 4, 2003, the Bulacan Regional Trial Court found seven Indonesian nationals and five Chinese nationals guilty of illegal production of DVDs and music CDs under

pirated audio, video CDs, NQ7.net, Nov. 13, 2003, at http://www.inq7.net/brk/2003/nov/13/brkoth_10-1.htm.

¹⁷ That action also demonstrated the international and organized nature of the crimes being committed, since six workers from China and two Indonesians were arrested for immigration violations.

¹⁸ Erwin Lemuel G. Oliva, *P37M worth of pirated software seized in NBI raid*, INQ7.net, Jun. 18, 2003 (in which an estimated 37.2 million pesos worth of pirated software and 223 computers were confiscated by NBI during a raid of several establishments in San Pablo City in Laguna province).

¹⁹ For a detailed discussion of problems previously experienced, please refer to our 2003 Special 301 submission on the Philippines, at <http://www.iipa.com/rbc/2002/2002SPEC301PHILIPPINES.pdf>.

²⁰ For example, the Business Software Alliance conducted training for the IPR division of the NBI on August 21-23 on corporate end-user piracy and software licensing issues. This training involved the nuts and bolts of an end-user case from intelligence gathering to raiding and collecting evidence to ensuring a successful prosecution. The Motion Picture Association conducted a number of training workshops on "product identification and cross border smuggling of pirated optical discs" for the VRB, Bureau of Customs and the Philippine Postal Service.

Sections 6 and 7 of Presidential Decree 1987 (“An Act Creating the Videogram Regulatory Board”). The case was prosecuted by Bulacan Provincial Prosecutor, and is, according to the VRB, the first successful conviction for video piracy by the VRB since its creation in 1985. The 12 defendants (all foreigners) were each sentenced to jail terms ranging from three months and one day to one year in prison and were ordered to pay fines totaling P1.2 million (approximately US\$23,000). They were or will be deported after serving their sentences. The case took seven months to complete. Although the reasonably quick processing of the case through the Court is welcomed as an indication of the new-found conviction of the government to deal with piracy, the result is in stark contrast to years of inaction and inordinate delay that has continually plagued the Philippines’ enforcement system. In another case, a Legaspi City court convicted a couple, also under Sections 6 and 7 of P.D. 1987, for illegal production of CDs and DVDs, resulting in sentences of three months and a day to one year of imprisonment each, without probation, and fines of P50,000 each for each offense.²¹

Three similar convictions in plant cases were achieved in 2003, but all resulted from guilty pleas by those operating the plants. In every case the defendants were illegal immigrants and by the time their cases reached the court they had already been detained longer than they might have served upon conviction. In each case, pleading guilty resulted in their deportation; meanwhile, the operators/controllers of the plants have never been arrested or tried.

Most Court Cases Are Marred by Delays and Non-Deterrent Results

By contrast with the successful prosecutions, which are the exception rather than the rule, the Philippine justice system remains on the whole largely ineffective in dealing with piracy cases. Most copyright litigation drags on for years. All aspects of a court case, from pre-trial procedures such as applications for search warrants (as noted above), to applications for *ex parte* search orders (granted without the presence of the defendant),²² to imposition of fines or damages, are fraught with delays and problems (many cases running up to four years, which remain in preliminary processes, such as challenges to warrants, etc.). It remains very difficult to recover damages in the Philippines in a civil case, and thus many right holders prefer to settle cases out of court.

The creation of the Intellectual Property Courts in 1995 was designed to achieve a more expeditious and effective management of intellectual property rights cases; however, on June 17, 2003, the Philippine Supreme Court, by Administrative Memorandum No. 03-03-03 SC (effective July 1, 2003), ordered the consolidation of the Intellectual Property Courts with the previously-designated Commercial Courts, into new “Special Commercial Courts.”²³ This consolidation has only exacerbated problems previously experienced, since now it is even more likely that the judge hearing a copyright case will be unfamiliar with the laws, the need for swift adjudication, and the need for adequate compensatory damages and deterrent sentencing. It also remains the case that under the 1998 Intellectual Property Code, there has not been a single criminal conviction for business software piracy or music piracy, although in 2003 there were a couple of guilty pleas for music piracy. Presently, the business software industry has

²¹ Marinel R. Cruz, *Two more video ‘pirates’ convicted*, Philippine Daily Inquirer, May 3, 2003.

²² Applications for *ex parte* civil searches are now governed by the January 2002 Supreme Court “Rules on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights.” 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>.

²³ The Regional Trial Court, Branch 24 in Manila has also been designated as an additional Special Commercial Court.

three cases with the prosecutions department and 13 active criminal cases in court, including one case on appeal.

Customs Attempts to Become More Active in IP Enforcement

The Bureau of Customs (BOC) has taken several steps in the past two years to get more heavily involved in copyright enforcement, and conducted some seizures at major seaports throughout the Philippines and at the international airport in Manila in 2003.²⁴ Customs Administrative Order No. 6-2002 of September 23, 2002 was issued to implement the Customs-related provisions of the TRIPS Agreement (Articles 51-60), and expressly provides that a good “which constitute a piratical copy or likeness of any work, whether published or unpublished on which copyright subsists” may not be imported into the Philippines. The BOC is required to maintain an Intellectual Property Rights Registry where intellectual property holders may record their rights, and a mechanism to request Customs to issue an alert or hold order against the import of a consignment of suspected infringing goods. 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. By virtue of the Order, an “Intellectual Property Unit” within BOC was formed, and in June 2003, a Memorandum of Agreement was signed between the BOC and the VRB to enhance operational assistance. Notwithstanding these efforts, as of January 2004, BOC was still in the process of submitting to the Philippine Department of Finance a work plan for the creation of a permanent intellectual property service or division. In the meantime, pirate products continued to enter the country in significant quantities in 2003.

MARKET ACCESS ISSUES

Restrictions on Foreign Ownership of Mass Media and Advertising

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.²⁵ As the broadcast industry moves toward a converging environment, operators are encouraged to provide both infrastructure and content; it is essential in this environment that foreign equity restrictions such as those found in the Philippines be removed. Pending legislation (a “Convergence Bill”) may provide some relief, but consideration of this bill stalled in 2003.²⁶

Under Presidential Decree 1986, advertising on pay television is currently limited to 10 minutes per hour of programming. Provisions in the current draft cable legislation also unduly limit advertising to 10 minutes per hour, and require exhibition at the start and/or end of the

²⁴ In actions taken in December 2003 and January 2004, 2.8 tons of DVDs imported by air from Malaysia were seized by Customs.

²⁵ Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

²⁶ IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

program only. Restricting advertisement placement will tend to reduce the utility of advertising, leading to a reduction in advertising-based revenue, further impeding the development of the television industry in the Philippines.

COPYRIGHT LAW AND RELATED LEGISLATION

Optical Disc Law Enacted

On February 9, 2004, President Macapagal-Arroyo signed into law the “Act Regulating Optical Media, Reorganizing for This Purpose the Videogram Regulatory Board, Providing Penalties Therefor, and for Other Purposes.” The Philippine government is to be congratulated for this long awaited achievement. The Act must now be implemented swiftly, since it will go into force 15 days after being published in the gazette. We note the following regarding the transition period:

- The existing VRB will “continue to perform their duties and functions in a hold-over capacity,” meaning enforcement action by the VRB can continue (Section 24); current appropriations from the VRB are provided to the new OMB to start up its activities but thereafter the OMB must appropriate its own budget (Section 31).²⁷
- Implementing regulations must be drawn up within three (3) months of the effective date, and given to the “Congressional Oversight Committee” on the OMB (COC-OMB) (after which COC-OMB has 30 days to approve the regulations). Given the urgency needed to address the optical disc piracy problem, IIPA urges the government to draft and submit implementing regulations on an even swifter timetable than that called for by the Act.

The Act will provide a solid basis for establishing control over the production of optical discs (and stampers and masters) in the Philippines, as well as monitoring the movement of equipment and raw materials used to manufacture discs.²⁸ The following are some discussion points and some examples of issues which must be corrected in implementing regulations:

- **Coverage of Blank Media:** The Act provides for a licensing regime for the manufacture of pre-recorded optical discs, but the definitions of “optical media” and “manufacture” do not appear to cover “blank” or “recordable” media. Failure to cover blank and recordable media leaves a serious gap in the regime which should be remedied.
- **Increase Criminal Fines and Provide for Some Additional Offenses:** The Act establishes criminal penalties (including mandatory prison sentences) that, if imposed at the maximum levels, should have a deterrent effect on illegal manufacture of optical discs. Criminal fines, however, are generally too low. The maximum fine for a first offense of producing optical discs without a license is US\$27,000, which will generally be non-deterrent against a plant mass-producing pirate optical discs. The Act should also deem the following as offenses: 1) manufacturing/producing discs at a place other than the licensed premises, 2) deliberate misrepresentations, or false/misleading information in applying for a license from the OMB, or in submitting required information under the Act, and 3) forging a license document or using an expired license document.
- **Gouging of Identification Codes Should Be Prohibited:** Section 19(a)(5) of the Act prohibits use of false or unauthorized identification codes. It should be confirmed whether

²⁷ In mid-2003, it appeared that Senator Oreta had succeeded in convincing Philippine lawmakers to support allocating an initial fund of P200 million (US\$3.6 million) to the OMB, but this did not survive markups.

²⁸ The Act also closely tracks the “Effective Practices Regarding Optical Disc Production” paper that was endorsed by Ministers at the APEC Ministerial in Bangkok in late 2003.

Section 19(a)(5) also prohibits the practice of “gouging” or otherwise removing identification codes from discs.

- **Authority to Seize:** Section 19(b)(3) of the Act deals with seizure of discs and equipment during an inspection or raid, and expressly applies to materials “found during inspection operations to be in violation of the provisions of this Act.” Section 19(b)(3) should also be applicable to all items ‘which the OMB has the authority to inspect, detain, or seize.’
- **“Good Faith” Defense Must Be Deleted or Modified:** Section 19(b)(2) makes it an offense to produce discs knowing that the customer ordering the discs does not have authorization from a right holder, but appears to make it a defense if the manufacturer gives the OMB five days’ notice of any transaction entered into and furnishes all material information about the transaction. Section 19(b)(2), para. 2 should be deleted; at least implementing regulations can clarify that verification of the material information submitted must be obtained from the OMB/relevant right holders in order for the manufacturer to qualify for a “good faith” defense.
- **Coverage of “Burned” CD-Rs:** It appears the drafters (e.g., in Section 19(c)) intend to prohibit certain activities with regard to “items . . . produced in violation of this Act, or “optical media that are in violation of this Act.” It should be clarified that these provisions apply to illegal CD-R “burning,” which would greatly strengthen the scope of the law. It also appears that the definition of “manufacturing equipment” may be used to cover CD-R machinery, which would at least permit this machinery to come under the statute when used for commercial purposes.

Passage of Cybercrime Bill, with Electronic Commerce Act, Could Provide Needed Tools to Fight Copyright Piracy on the Internet...

In 2003, the government of the Philippines began consideration of a Bill entitled “Cybercrime Prevention Act of 2003” (reportedly, the “science and technology committee” of the House of Representatives recently approved the proposed bill’s fifth draft, which IIPA has not seen). The Bill would impose penalties on hacking into a “computer system” or “computer network,” but also contains several provisions relevant to copyright protection. For example, the Bill would create in Section 6 a new violation and offense for anyone who, without the knowledge or consent of the owner thereof, willfully copies, reproduces, disseminates, distributes, or makes available online any protected works (defined as “works, including but not limited to computer programs, systems, and design, protected under Philippine laws”) by means of a computer system or network, for his or another person’s benefit, provided that the same is inconsistent with fair use as defined in the Copyright Act. While the definition of “protected works” appears to be independently and broadly defined in the Bill (i.e., it is not tied to the definition of copyright “works” in the Copyright Act), it must be confirmed that sound recordings (as well as all other copyright subject matter not explicitly mentioned) are included, preferably by expressly listing them as covered by Section 6.

The anti-hacking provisions include a prohibition on the unauthorized “access” to a computer or network (i.e., hacking), and a prohibition on “the use, production, sale, procurement, importation, distribution, or otherwise making available” of “devices ... designed or adapted primarily” to obtain unauthorized access to a computer or network, etc., as well as “computer passwords, access codes, or similar data by which the whole or any part of a computer system or network is capable of being accessed.” While we do not believe this was intended to apply to circumvention of access and copy controls protecting copyrighted works, as required under the WIPO “Internet” treaties, the WCT and WPPT, there may be minimal overlap. When the Philippines enacts its copyright law to provide protection against

circumvention of technological protection measures used by copyright owners in the digital environment, much of the skeleton for those provisions can be taken from the Cybercrime Bill.

Finally, the Cybercrime Bill provides a mechanism to ensure service providers will cooperate with right holders trying to enforce their rights by having them turn over, in the case of a warrant or order from a competent court, records of users who are suspected of breaching the law (including Section 6 on IPR). The Cybercrime Bill might, if enacted, complement the provisions of the Electronic Commerce Act (2000),²⁹ which criminalizes acts of copyright piracy carried out “through the use of telecommunications networks, such as, but not limited to, the Internet” [Section 33(b)].³⁰ That Act contains one 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 preserves the ability of courts to enjoin service providers from continuing to allow infringing uses on their networks. The Cybercrime Bill will provide added assurance that service providers will cooperate with copyright owners attempting to protect their rights in the online environment.

...But Philippine Government Is No Closer to Passage of Modern Copyright Law

IIPA has been advocating for several years the passage of Senate Bill 1704 and House Bill 3182,³¹ which would bring the law of the Philippines up to modern standards, including full implementation of the WCT and WPPT (which the Philippines acceded to on October 4, 2002). IPO Director Emma Francisco’s position has been that the WCT and WPPT are self-executing in the Philippines, but the Philippines would greatly benefit by revision of its copyright law to meet the standards of the treaties, since the treaties are not drafted with sufficient specificity to substitute for a national legal instrument.

IIPA is also concerned about a Bill introduced in mid-2003 by Senator Panfilo M. Lacson introduced a called “An Act Providing Mechanism in Compulsorily Reproducing Unavailable Prescribed Books and Printed Materials for School and University and for Other Purposes.” This Bill, if enacted, would place the Philippines in violation of its obligations under the Berne Convention and the TRIPS Agreement, as it essentially proposes compulsory licenses for photocopying of textbooks and reading materials in cases where the books are not available within 30 days after the commencement of academic classes.³²

²⁹ Republic Act No. 8792 (2000).

³⁰ Section 33(b) establishes a minimum penalty for violations that includes both a mandatory six-month jail term and a minimum fine of P100,000 (approximately US\$1,789).

³¹ 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>.

³² There is a long history of compulsory licensing of books in the Philippines, dating back at least to 1973. Presidential Decree No. 285 of 1973 violated national treatment (Philippine authors got a higher royalty rate than foreign authors) and the “Appendix” of the Berne Convention. Various subsequent Decrees attempted to narrow the compulsory reprint license, but never met the minimum standards in the Berne Convention. In 1997, the government finally recognized that its Decrees violated its international obligations and they were finally repealed. However, even though the Decrees were revoked, reprint piracy remains a major concern for publishers in the Philippines, causing millions of dollars in losses every year to legitimate right holders. The Philippine government also continued, and continues even today, to acquiesce in the so-called “sell-off” of unauthorized reprints (undoubtedly all newly published books, in violation of current Philippine copyright law) even though it is now six years after the reprint license provision was revoked. The Lacson Bill fails to meet the requirements of the Berne “Appendix” and TRIPS, for example:

- The Berne Appendix provides that a license can only be granted by a government only after the passage of five years following the date of first publication of the book in the foreign country or origin (three years in the case of “works of the natural and physical sciences, including mathematics, and ... technology”; seven years in the case

Generalized System of Preferences

The Philippines 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 the Philippines meet certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” In 2002, over \$707.7 million worth of Philippine goods were imported into the U.S. duty-free, accounting for a substantial 6.45% of its total imports to the U.S. For the first 11 months of 2003, more than \$824.8 million worth of Philippine goods entered the U.S. duty-free under the GSP program, accounting for a substantial 8.86% of its total imports into the U.S. The Philippines should not continue to expect such favorable treatment at this level when it fails to meet the discretionary criteria in this U.S. law.

of “works of fiction, poetry, drama and music, and ... art books”). The Bill does not contain these time periods, but would permit compulsory reproduction at any time “thirty (30) days from the official start of classes” if materials/books are “unavailable,” even where the book has just been published abroad.

- The Berne Appendix contains requirements that a license first be sought from the right holder and provides time periods within which the right holder can then bring the book into the Philippine market. The Bill contains no such safeguards.
- The Berne Appendix has many safeguards to ensure that the rights of the legitimate publisher of the book are protected, e.g., as soon as the book in question is distributed with authorization of the right holder, the license would terminate. The Bill contains no similar safeguards.

There are many other technical requirements in the Berne Appendix, contained in Articles III-IV of the Berne Appendix. It would be most unfortunate for the Philippines to continue consideration of a Bill that would so squarely fall outside of its international obligations.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Poland remain on the Special 301 Priority Watch List and that an out-of-cycle review be conducted later in 2004.

Overview of key problems/achievements: Imports of pirated copyrighted products — most in optical disc format — remain a top piracy problem in Poland. Furthermore, optical disc (OD) production within Poland grew in 2003 at a faster pace than anticipated, and production capacity is now far in excess of local demand, with over 385 million units capable of being produced by seven operating Polish OD plants. Given this excess production, it is imperative that Poland implement regulations on the production, distribution and export of optical media (such proposals are included in its recent amendments to its copyright legislation). The serious problems of high volume of piratical imports and generally ineffective border enforcement remain particularly troubling.

In 2003, the Polish government devised a national strategic plan to combat copyright piracy. Some industries report progress made in lowering the amounts of pirated and counterfeited products at the Dziesięciolecie Stadium (also known as the Warsaw Stadium), yet others report that progress is temporary and cosmetic. The presence of organized criminal elements in the Stadium remains a concern, as does the fact that these criminal enterprises are now leaving the confines of the Stadium and spreading their operations throughout the country. Industry cooperation with police agencies throughout Poland remains generally good. Polish customs became more active in 2003 than in prior years. However, few prosecutions are brought and court decisions with deterrent sentences are rarely imposed. The Polish court system is full of thousands of backlogged copyright cases (this problem, sadly, is not restricted only to IPR cases). Prosecutors and judges need to improve their performance by expeditiously moving cases forward and issuing deterrent sentences. Copyright reform efforts were adopted by the Council of Ministers in December 2003, and reforms are expected to be adopted in 2004 as Poland joins the European Union.

The copyright industries acknowledge the several notable achievements Poland made in 2003. Several of the elements of the government's anti-piracy action plan were met last year. Progress was made in reducing piracy in the Warsaw Stadium, drafting copyright law amendments which include optical disc regulations, depositing instruments for the two WIPO Internet treaties, and amending the criminal code to expedite certain procedures. However, the situation is still quite fragile, thus an out-of-cycle review is necessary. It will take some time to adopt amendments to the copyright law and adverse changes could be made in the Parliament. It remains imperative to monitor progress in this legal reform as well as evaluating the piracy situation in the Warsaw Stadium and its expected June 2004 public contract tender. Huge domestic OD capacity in Poland remains a serious concern. Border enforcement, especially at

Poland's eastern and northern borders, must be strengthened. Actions taken (and not taken) by prosecutors and the courts have been less than acceptable; the actual imposition of deterrent penalties has been missing entirely for many years.

Actions which the government of Poland should take in 2004

Legal Reform

- Continue to consult with rightsholders during legislative efforts in early 2004 to pass amendments to the Polish Law on Copyright and Neighboring Rights;
- Continue to consult with rightsholders to adopt the regulations on optical disc manufacture in the copyright law as well as in the secondary decree;
- Refrain from over-regulating collective management of copyright and neighboring rights;
- Withdraw Poland's reservation to Article 12 of the Rome Convention.

Enforcement

- Halt the sale and distribution of all optical media product containing copyrighted materials and hard-good copyrighted products in and around the Warsaw Stadium as well as in other stadiums, bazaars, outdoor markets and public places which sell infringing products, and prosecute these cases;
- Improve border enforcement to halt the flow of pirate products, especially at the eastern and northern borders (Belarus, Ukraine, Russia and Lithuania) 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;
- Bring criminal copyright prosecutions more expeditiously;
- Use existing organized crime legislation to investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials;
- Assign more judges to criminal IPR cases;
- Appoint specialized prosecutors in each office to handle copyright cases;
- Conduct and support more training seminars for police, prosecutors, and judges on copyright enforcement. Many were conducted in 2003, and training should continue in 2004.

POLAND
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	34.0	45%	45.0	45%	37.0	30%	31.0	30%	22.0	40%
Entertainment Software	NA	NA	337.7	91%	115.8	90%	103.1	85%	70.9	60%
Motion Pictures	30.0	30%	25.0	30%	25.0	27%	25.0	25%	25.0	25%
Business Software Applications ²	NA	NA	107.9	54%	77.1	53%	82.7	54%	130.0	60%
Books	5.0	NA	5.0	NA	6.5	NA	7.0	NA	7.5	NA
TOTALS	NA		520.6		261.4		248.8		255.4	

COPYRIGHT PIRACY IN POLAND

Optical media production in Poland continues to grow, making the adoption of OD regulations more urgent.

Domestic production in Poland: The estimated total capacity of the seven operating optical disc plants in Poland is 385.6 million discs per year (as of January 2004) — a 20% increase compared to estimated annual capacity of 316 million discs which IIPA reported in its February 2003 Special 301 report. One industry estimate places the total legitimate demand in Poland for all copyrighted content on discs at 120 million discs per year. Needless to say, the legitimate demand for optical discs in Poland and in this region (where there already is a huge overcapacity, such as in Russia, Ukraine, the Czech Republic) has certainly not increased by 20% in a matter of months.

There have been some changes in OD plant ownership over the last year. The “New City” plant was sold to a British company. The lines earlier used by “Pomerania Optical Disc” and “Yield” have been purchased by a new plant, “Vegart,” and are still not operational. Most importantly, it should be highlighted that the Polish law enforcement agencies were extremely ineffective in the pending Pomerania court case (see discussion, *infra*) where the equipment was allowed to be sold to Vegart while under the control of the courts.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission, and is available on the IIPA website at <http://www.iipa.com/pdf/2004spec301methodology.pdf>. For more details on Poland Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Poland are posted at <http://www.iipa.com/countryreports.html>.

² BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA’s statistics for 2003 will be finalized in mid-2004 and also posted on the IIPA website. BSA finalized its 2002 numbers in mid-2003, and those revised figures are reflected above.

OD PLANTS IN POLAND	ESTIMATED TOTAL MAXIMUM ANNUAL CAPACITY ³
OPERATIONAL PLANTS (7)	
DIGIPRESS	12,274,950
DIGI RECORDS	7,358,400
GM RECORDS	93,129,750
MEGAUS	22,403,700
PM / SNAKE'S MUSIC	9,887,850
TAKT	165,695,400
TECHNICOLOR HOME ENTERTAINMENT SERVICES (FORMERLY THOMSON MULTIMEDIA)	74,880,480 ⁴
TOTAL	385,630,530
NON-OPERATIONAL PLANTS (2) :	
SILESIA	
VEGART (YIELD PLUS POMERANIA/GENERAL GROUP)	
Source: IFPI, December 2003	

Already, over the last few years criminal investigations and prosecutions have been brought by Polish authorities against several CD plants.⁵

Imports of piratical optical media: A large volume of pirated optical media products (CDs, DVDs, and CD-ROMs), including illegal sound recordings, audiovisual products, videogames and business software applications, continues to enter Poland. Large amounts of pirate music CD imports (amounting to about 85% of the pirated music) still enter Poland mainly from Ukraine, Lithuania, Belarus and Russia. Pirate movie DVDs are mostly produced in Russia. Pirate entertainment software products are imported from Russia (CD format), from Malaysia (DVD format) and China (cartridge format).

According to the Polish police, these compact discs and other media are being produced and distributed via a network of plants and distribution chains that illegally smuggle product into Poland and are run by regional organized criminal elements. The Polish police and customs still

³ Actual production capability of machines can vary, depending on age and condition of the equipment. The "Total Maximum Annual Capacity" figure is estimated at 75% of what could potentially be annual capacity.

⁴ Thomson announced that it will expand its DVD capacity at its Technicolor facility in Poland to 200 million units/year; see Thomson Press Release, <http://www.thomson.net/gb/06/c03/030918.htm> (Sept. 18, 2003). If this production capacity is realized, the estimated OD capacity in Poland (using the above figures) could balloon to 511 million units/year.

⁵ With respect to enforcement efforts against plants involved in illicit production, there are currently eight criminal proceedings against five CD plants in Poland, two of which were initiated against Silesia and Pomerania/General Group in 2001. In 2003, two cases were instigated — against DigiPress and another one against Pomerania/General Group. Three of the eight criminal cases (two against the Selles plant, initiated in 2000 and 2002, and one against Pomerania/General Group) are pending in the courts due to the notoriously slow Polish judicial system; the remaining five cases (Silesia, Pomerania/General Group, Digi Records, Yield and DigiPress) are still at the prosecutorial level. The Polish recording industry group ZPAV has requested that the National Police Headquarters investigate the incident in the Silesia CD plant in Wrocław, where one of the CD lines was moved out of the plant while it was under police custody. The Investigation Department of the National Police Headquarters has 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.

regularly seize pirate CD shipments, particularly from Ukraine, Russia and Belarus, on trains, buses and private cars (suitcase smuggling), which strongly indicates that thousands of pirated optical discs are finding their way onto the Polish markets daily. 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. For example, Customs has found individuals carrying over 4,000 pirate discs.

Need for optical disc regulation: Given the high volume of domestic OD capacity and the weak border situation which permits pirate imports, there is an urgent need for optical disc legislation in Poland. The copyright industries, both in Poland and in the U.S., have long advocated that Poland adopt optical disc regulations. It is imperative to recognize that following the decision in the Action Plan of the Polish Inter-Ministerial IPR Protection Committee (adopted by the government in August 2003), the Council of Ministers approved the optical disc regulations as the part of the Copyright and Neighboring Rights Law amendments. These amendments include a separate chapter on optical disc manufacture as well as a secondary regulation to be issued by the Minister of Culture. The draft amendments were sent to the Polish Sejm in January 2004 (see discussion, below).

Progress in Reducing the Levels of Piracy at the Warsaw Stadium

What is distinct about 2003 is that the Polish government has been energized to address the problems associated with piracy at the Dziesięciolecie Stadium. This stadium has historically served as a centralized distribution point for pirate optical media material; it exemplified the convergence of serious optical disc piracy, organized crime involvement in distribution, and weak border measures. Widespread piracy at the Warsaw Stadium has been identified as a serious problem by the copyright industries⁶ as well as the U.S. government⁷ and the European Commission.⁸ Finally, the Polish government also acknowledged that the Warsaw Stadium is “a source and centre of all kinds of criminal offences committed in Warsaw.”⁹ A particularly objectionable fact has been that the Polish government has been directly involved with the Stadium; the state owns the land on which the Stadium is situated.¹⁰ The industries vigorously objected to the government's vested interest in the Stadium because it suggested why no concrete, sustained and definitive action to close the Stadium or eradicate

⁶ 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, we stressed two actions: (1) 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), and (2) intensified raids in and through the stadium.

⁷ See Press Release 200-28, U.S. Trade Representative, “Special 301 Report Finds Some Progress on Intellectual Property Protection, but Significant Improvements Needed,” (May 1, 2003), with USTR's report on Poland posted at <http://www.ustr.gov/reports/2003/special301-pwl.htm#poland>.

⁸ 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.

⁹ 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,” adopted by the government on May 20, 2003.

¹⁰ 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 trade in pirate copyrighted goods had taken place over the years. Recent reports indicate that the Central Sports Center will not extend a full contract to DAMIS, but only allow it to operate the Stadium until June 2004, when at such time a new administrator will be chosen in a public bidding process.

In terms of piracy at the Stadium and anti-piracy action taken by the authorities there, the copyright industries report mixed results on achieving progress in 2003. For those reporting progress, the continuing concern remains whether the progress will be maintained effectively, such that there is no backsliding or worsening of the situation there. Progress in removing pirated audiovisual films, sound recordings and business software from the Warsaw Stadium is reported by these three industry sectors. MPA, IFPI and BSA report significant progress in reducing the amounts of pirated recordings and audiovisual products openly offered for sale within the Stadium. One estimate suggests that since May 2003, the amount of pirate CDs for these products at the Stadium has declined by some 80-90%. So far, this situation has been sustained. There are no open stands, and sales of infringing products take place only by vendors holding bags of pirated materials. It is critical to sustain this low level of piratical activity, and not let it resume to prior notorious levels, or spread to other stadium facilities.¹¹

Progress at the Stadium in 2003 was not achieved in reducing piracy in all copyright industry sectors. It is true that all industries remain very concerned about the underground nature of the piracy problem associated with this stadium, and continue to closely monitor the situation to confirm that the reductions in piracy levels will remain, and not return to notorious levels of the past.

Piracy Levels in Poland Remain High

Entertainment software piracy remains very high with no concrete progress made in 2003. The Entertainment Software Association (ESA) reports that 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. Almost all PC-based product is being imported into Poland from Russia and Ukraine. The predominant form of entertainment software piracy continues to be factory-produced silver CDs and DVDs, most of which are manufactured in Russia, and readily available throughout Poland. Such OD entertainment software products are usually sold in plastic sleeves, with no manuals included. Prices for these products range from US\$3 to \$5, and include materials not yet released legitimately to the Polish market. In addition, significant quantities of pirate cartridge-based games arrive in Poland from the Greater China region. Operations run by entertainment software 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. Interestingly, the local (legal) Polish distributors' names are usually stripped off the packaging, but the original publisher's name remains. Mini-stadiums are spreading throughout the country, controlled it appears by the same syndicates that have controlled the pirate entertainment software trade at the Warsaw

¹¹ Although the Warsaw Stadium has received the most attention in recent years, there are other stadium-style flea markets in Poland. The Polish government already has identified other trouble spots such as the LKS football stadium in Lodz, the marketplace in Balice in Krakow, Wilda bazaar in Poznan and the Hala Ludowa sports hall in Wroclaw.

Stadium. There is no evidence at this time of pirate entertainment software being produced within Poland in any of the OD plants.

The recording industry is being devastated by optical disc piracy in Poland. The estimated piracy levels for international/U.S. music repertoire is 45%; estimated trade losses due to piracy of sound recordings were \$34 million in 2003. The major problem facing this industry remains that huge amounts of pirate music CD imports (amounting to about 85% of the pirated music) come into Poland mainly from Ukraine, Lithuania, Belarus and Russia. The volume of these imports is based on customs seizures from cars, trucks and buses, and those seizures are only the tip of the iceberg, given the large quantities found in the markets. These pirated products are then distributed via a network of plants and distribution chains that illegally cross borders, which are run by regional organized criminal elements. The recording industry reports that the Warsaw Stadium is no longer the major source of pirated music product in Poland. The industry is also very concerned with the high capacity of the seven Polish OD plants and the possibility that such capacity levels might involve production of pirated music. The local recording industry, ZPAV, reports that the total number of pirated sound recordings seized in Poland in 2003 were 621,750 units, with an estimated value of 16,821,973 PLN (US\$4.4 million). The amount of seized CD-Rs with music (including CD-Rs with MP3 files) was 47,474 units, which represents about 8% of all sound recordings seized in 2003 in Poland. In 2003, 177 proceedings have been instituted against distributors of pirate CD-Rs. As a result of enforcement agencies' actions a few single one-pocket computer burners were seized together with computers.

The problem of CD-Rs in Poland is systematically becoming more and more significant, and especially popular with youths. The seized CD-Rs have professionally prepared artwork, which indicates greater financial involvement of criminal groups involved in such activity. The police actions conducted in this field are disproportionate to the scale of the phenomenon. However, ZPAV notes an increase in 2003 in the proceedings instigated against individuals involved in the distribution of recorded CD-Rs over the Internet. Upon the motion of ZPAV, over a dozen raids were conducted by the police in which CD-Rs and computer equipment were seized.

Pirated DVD imports are the top motion picture piracy problem in Poland. Pirate DVDs continue to be imported into Poland and are distributed in almost every metropolitan area. Russian-sourced pirate DVDs are the number one piracy problem for the motion picture industry in Poland, as these pirated goods are threatening to overtake the legitimate theatrical and home entertainment industries. In the past, the primary point of distribution was the Warsaw Stadium, but this appears to have changed in recent months due to government and industry efforts to halt the blatant piracy at the stadium and around Warsaw. These pirate DVDs began to appear in substantial numbers at the end of 2002 and volumes have continued to increase in 2003. In 2003, FOTA seized over 51,000 pirate DVDs, all believed to have been produced in Russia. The discs contain Polish subtitling options as well as other Eastern European languages. The titles include pre-theatrical releases and current DVD releases. It is believed that organized criminal networks involved in music piracy are now primarily responsible for the distribution of these discs. Most pirate audiovisual product is brought across the border by cars, trains, trucks, and buses. Problems include poor border controls and very little coordination among the various government agencies. In the summer of 2003, there were several significant Customs seizures that may indicate an increased willingness to address the problem. CD-R piracy is also a major problem, and FOTA estimates that CD-Rs represent 50% of the pirate optical discs

in the local market. FOTA is pursuing the same strategies against CD-R pirates that were effective in combating videocassette piracy. Not surprisingly, CD-Rs are the generally accepted format used by pirates selling hard goods over the Internet. Seizure totals are smaller because pirates work on a burn-to-order basis. Still, in 2003, FOTA has seized almost 49,000 pirate CD-R discs. The level of cable television piracy in Poland is estimated to be 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 to distribute programs on their networks without license. However, the changing of the smart cards used by Canal Plus in Poland has had a substantial impact on piracy.

End-user software piracy and retail problems: The business software industry reports that piracy levels in Poland remain relatively high. However, there has been a significant decline in business applications piracy in the last decade, when the piracy level was 75% of the market (in 1995). One of the largest piracy and enforcement challenge faced by BSA and its members in Poland continues to be the unauthorized copying and use of business applications software within legitimate businesses (corporate end-user piracy). To combat this piracy, BSA uses criminal enforcement predominantly, and relies on good police cooperation to carry out raids. (BSA brought no civil actions in 2003).

Unauthorized photocopying of books continues: AAP reports rampant illegal photocopying of academic texts and journals, most often undertaken on an individual basis by students in universities. Traditional print piracy remains quite low, having been completely overtaken by photocopying. AAP members report that in some cases they are losing the majority of their market to this type of individual photocopying. This is happening with both English language and Polish language materials. The government should work with university administrations and lecturers to ensure that proper measures are taken to cultivate a climate of respect for copyrights on university campuses. Estimated trade losses due to book piracy in Poland were \$5 million in 2003.

Internet Piracy in Poland Remains a Concern

Internet piracy has been a steadily growing problem in Poland, as it has around the world. In general, however, the industries report that the problem to date is relatively contained, and the cooperation with criminal authorities as well as Internet Service Providers (ISPs) in 2003 has been good. Reports indicate that the police take actions against Internet piracy increasingly at their own discretion. Also, the largest portal owners regularly monitor their servers. The recording industry reports that the biggest problem is widely used peer-to-peer services like KaZaA, e-Donkey and DirectConnect. At the same time the distribution of illegal music files through the websites and FTP-servers continues. In 2003, the police pressed charges against 21 individuals offering recorded CD-Rs on the Internet upon ZPAV's request. However, no proceedings have been brought against P2P users so far. The ISPs removed 112 websites and FTP-servers with 11,575 files from the Internet upon ZPAV's notification.

The motion picture industry also reports that Internet piracy for its products appears to be somewhat contained. MPA indicates that FOTA has conducted many successful investigations and raids on Internet pirates. With respect to filmed entertainment, Internet piracy is primarily focused on the sale of hard goods through websites and networks, but several cases of illegal download offers have also been presented to Polish prosecutors. Unauthorized downloading of films currently is not a major issue due to the lack of high-speed access in

Poland. ESA 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.

The various rightsholders groups such as ZPAV, FOTA and BSA cooperate very closely in their actions against Internet piracy through the jointly founded Anti-Piracy Coalition. In June 2003, the coalition launched an educational campaign informing Internet users about the risks resulting from uploading and downloading illegal files of music, film and computer software. The campaign letters were sent to 627 of the largest companies and 84 academic institutions in Poland. In October 2003, the coalition provided the interested companies and academic institutions with free software to audit computer applications and files, allowing maintenance of a rolling inventory of installed applications and files. To date, 191 packages with the software have been distributed.

COPYRIGHT ENFORCEMENT IN POLAND

The Polish Interagency IPR Committee Develops Anti-Piracy Strategies

In 2002, a Polish interagency committee (the Interdepartmental Committee for Counteracting Acts of Infringement of Copyright and Related Rights) completed its survey on the copyright piracy situation in Poland. On May 20, 2003, the Minister of Culture held a press conference to announce the government's commitment to fight piracy and to tackle the problem of the Warsaw Stadium. In mid-2003, the IPR Interministerial Committee developed a strategy, outlining its main goals (along with interim objectives) to combat piracy in Poland.¹² This strategy was accepted by the government in August 2003. In December 2003, the committee met to discuss the IPR strategy plan and noted five achievements: (1) the supply of pirated goods in the Dziesięciolecie Stadium has been reduced; (2) the Warsaw Stadium contract to DAMIS will not be extended past June 2004, and there will be a public tender for a new administration of that stadium; (3) the National Public Prosecutor outlined a methodology on the criminal IPR cases and this methodology has been forwarded to all prosecutors, and two prosecutors in every Public Prosecutor's Office of Appeal will be in charge of giving professional advice on IPR cases within their office; (4) intensified anti-piracy actions have been carried out by the police, border guard and customs service, and; (5) the draft amendments to the Act on Copyright and Related Rights (which include provisions regarding the production of optical discs) have been prepared and approved by the Council of Ministers.

These efforts represent the Polish government's revitalized attention to the severe piracy problems in Poland, and the government appears to be addressing the major piracy issues. However, the copyright industries believe that much more work still needs to be done to reverse

¹² The five strategies to be completed by the end of 2003 were: (1) To improve the effectiveness, efficiency and coordination undertaken by law enforcement agencies (police, border guards, customs); (2) to improve effectiveness and efficiency of actions taken by the criminal justice system; (3) to analyze current regulations and if needed draft amendments to improve the efficiency of anti-piracy measures; (4) to limit and subsequently eliminate piracy at the Dziesięciolecie Stadium; and (5) to monitor the activities of the public administration. These goals are to be implemented by various Polish government agencies, working in conjunction with the private sector.

the piracy situation and engage in, and sustain, more effective and deterrent enforcement measures. 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 generally positive. The Polish police and customs performed more joint operations in 2003 than in prior years. However, the Polish judicial authorities are still slow, and rarely impose deterrent penalties in copyright cases. Few cases progress expeditiously from the complaint stage to the hearing stage because of procedural delays.

Border measures must be strengthened to reduce piratical imports.

A top priority for the Polish government must be to clamp down on illegal imports of musical recordings, business and entertainment software, and audiovisual products. Poland's eastern border is particularly porous, and large amounts of pirated product enter the country. According to Polish customs data, 366,195 pirate optical discs containing music, films and software have been used as evidence in cases instigated by customs in 2003 — 98,000 discs were seized at the eastern border alone. Customs authorities have the authority to conduct *ex officio* seizures of suspected pirated goods, and several copyright industries entered into agreements with Polish customs to improve cooperation.¹³ For the past several years, Polish customs has undergone a restructuring which caused significant confusion regarding the competences in the respective customs bodies.¹⁴

Polish customs did take some key actions last year. For example, in June 2003, customs stopped a Ukrainian vehicle that was specially designed to conceal thousands of optical discs. The recording industry reports that the Warsaw Customs House conducted biweekly raids in mid-2003, resulting in seizures ranging between 4,000 to 7,000 CDs (this reflected a similar level of operations as in 2002). BSA also reports that the Poznan customs units have been active, conducting three raids at the end of 2003 on local flea markets where imported pirated materials were being sold. There are also reports that Polish customs officers are being reallocated, with a primary focus on shoring up the country's eastern borders. This is a highly unpopular move within customs, but one that is applauded and considered necessary by those industries most affected by cross-border operations.

Several copyright industry sectors conducted training for Polish customs during 2003, and the officials seemed willing to cooperate with industry. Further funding, resources and training are necessary to support improvement in border enforcement.

¹³ 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 cooperation between the private sector and customs in the fight against piracy. These agreements are still in force, even after the 2002 reorganization of Polish Customs, but are not often used.

¹⁴ Following the 2002 reorganization of Polish Customs, there is currently one IPR office at the Ministry of Finance which employs three persons. There are also 14 customs houses throughout the country with IPR coordinators in each of them (although IPR protection is not their only responsibility).

Criminal Anti-Piracy Enforcement Involves Good Cooperation between Industry and Enforcement Agencies, But No Effective Deterrence In Practice

Polish police run many raids but deterrence is lacking: The industries generally report good cooperation with Polish enforcement agencies with investigations and raids.

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, also in cities other than Warsaw, such as, Kraków, Gorzów Wielkopolski, and key border towns of Biała Podlaska, Przemyśl and Poznań — also with regard to new categories of crimes and methodology of disclosing and securing evidence. In a recent action in Gorzów Wielkopolski, the local police found a computer server operating illegally in one of the city's high schools. This allowed the identification of over 40 private premises, where personal computers were used for downloading music, films and software. The motion picture industry also reports that police enforcement initiatives in 2003 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 and also coordinates activities with the national Chief of Police.

There have been a few problem points. In July 2003, Warsaw police raided the DigiPress plant and took exemplars from the two operating lines in the plant; the third line was under repair at the time. Despite several requests from ZPAV, the police have not taken any action by going back to the plant to obtain a complete exemplar set from each mold. Moreover, it should be pointed out that the law enforcement agencies continue to be extremely uncooperative in assisting in identifying where the machinery of the Silesia CD plant in Wrocław was located.

ESA 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. The continued lack of action against the pirate syndicates, who originated in the Warsaw Stadium but are now spaced throughout the country, is giving these criminal groups the impetus to expand their operations. Specialized organized crime units of the police must be available to assist rightsholders who cannot stop these dangerous syndicates.

BSA notes that the Polish police are still among the most active in Eastern Europe in investigating cases of software piracy and in conducting *ex officio* raids. For example, in late 2003, BSA reports that the police have been cooperative in several Internet piracy cases. BSA reports that it has received exceptionally good cooperation from the Polish government in its education and marketing campaigns as well as in the form of police enforcement against different types of piracy (End-User, HDL, CD-ROM and Internet).

Delays are all too common at the prosecutorial level: With respect to software cases, BSA suggests that prosecutorial 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, although this pace is gradually increasing. Fines and sentences imposed under these judgments have been relatively insubstantial despite improvements in the law.

Expert reports add a bureaucratic layer: The recording industry continues to report the problem of courts appointing independent experts to secure the proof of ownership even in simplest copyright cases, even 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 rightsholders' 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.

Polish courts fail to apply deterrent sanctions: Polish courts have only recently begun to hear significant numbers of criminal copyright infringement cases and have issued comparatively few decisions. However, a common problem experienced by all the copyright industries is the failure of the Polish judiciary to issue sufficiently deterrent sentences in criminal copyright infringement cases. Many elements of Poland's enforcement regime remain incompatible with its TRIPS enforcement obligations, including the failure to impose such deterrent criminal penalties in commercial piracy cases and lengthy delays in bringing and completing both criminal and civil infringement cases. The penalties in the 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.

In July 2003, amendments were made to the Polish Criminal Procedure Code to simplify procedures, including those applicable to intellectual property cases. Three significant changes were made. The first allowed copyright cases to be heard summarily, thereby providing for a faster hearing. The second allowed courts to conduct cases even in the absence of the defendant. The third obliged the courts to order the confiscation of pirate product even when the cases were dismissed. These changes should, in time, expedite the handling of copyright piracy cases in Poland.

Backlogs of cases delay judicial action: 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 recording industry, ZPAV, reports 4,500 criminal cases are currently pending. For the motion picture industry, FOTA had over 3,663 cases pending in the criminal courts at the end of 2003. Last year, FOTA filed 1,165 new cases, with only 120 cases resolved by the Polish courts.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS POLAND IN 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	1,189	154	1,336
Led by Police	1,189	154	1,207
Led by Customs			105
Number of cases commenced	1,165	102	1,336
Number of defendants convicted (including guilty pleas)	76	25	40
Acquittals and Dismissals	44	77	82
Number of Cases Pending	3,663	452	4,500 (applies to cases instigated as of 2000. No data available before)
Total number of cases resulting in jail time	0	10	12
Suspended Prison Terms		10	
Maximum 6 months		10	2
Over 6 months		-	0
Over 1 year		-	10
Total Suspended Prison Terms		-	12
Prison Terms Served (not suspended)		0	Data not available
Maximum 6 months		-	Data not available
Over 6 months		-	Data not available
Over 1 year		-	Data not available
Total Prison Terms Served (not suspended)		-	Data not available
Number of cases resulting in criminal fines	76	15	21
Up to \$1,000	76	15	21
\$1,000 to \$5,000			0
Over \$5,000			0
Total amount of fines levied		US\$2,000	Data not available*

*NOTE: Data on the amount of fines levied in sound recording cases is not available due to the fact that the courts delay in sending this information to ZPAV (sometimes this takes several months, even years).

Civil Copyright Enforcement in Poland Not Yet a Viable Remedy

BSA did not carry out any civil actions in Poland during 2002 or 2003. Instead, BSA has relied on criminal enforcement to address its piracy problems in Poland. In prior reports, BSA and IIPA had previously recommended the copyright law be further clarified so that judges could begin to implement such procedures. Procedural delays in obtaining civil order in the past have been so great that the target had been able to legalize its software shortly before any raids could be carried out. Such procedural delays vitiate the potential of *ex parte* civil searches. It can take up to five years for a civil copyright infringement case to be heard.

COPYRIGHT LAW REFORM IN POLAND

Copyright Law and Deposit of the two WIPO treaties: Poland is again considering amendments to its Law on Copyright and Neighboring Rights (1994, as amended in 2000 and 2002) in order to complete harmonization as it accedes to the European Union in 2004. After the 2002 amendments were adopted, IIPA and its members highlighted at least four deficiencies in the Polish copyright law.¹⁵

Poland succeeded in depositing its instrument of accession to the WIPO Performances and Phonograms Treaty with WIPO, with entry into force on October 21, 2003. Later in 2003, Poland deposited its WCT instrument, and the WCT will enter into force on March 23, 2004.

Copyright Law Amendments of January 2004: During 2003, the Ministry of Culture worked on a package of draft amendments to the Copyright Act, with four primary objectives:¹⁶ (1) to implement the EU Copyright Directive; (2) to provide a *droit de suite*; (3) to issue optical disc regulations; and (4) to include amendments relating to collecting societies. The locally-based copyright industries have offered numerous proposals during 2003 to support the legislative reform process. The Polish Council of Ministers approved a package of copyright law amendments (which includes a separate chapter on optical disc manufacture as well as the need to for the Minister of Culture to issue an implementing regulation on such) on December 23, 2003. This package was forwarded to the Sejm in January 2004.

First, the Polish copyright law amendment package introduces a new chapter which introduces a system to control the production and reproduction of optical discs (e.g. CDs, CD-Rs, DVDs, DVD-Rs). The copyright industries viewed the inclusion of an OD regulatory system within the copyright law amendments as a positive legislative drafting move. The Polish government indicated that its proposal is aimed at placing certain existing, voluntary obligations of the OD plants into statutory requirements. For example, the new OD chapter would establish the following key elements:

- Optical disc plant owners are required to use source identification codes in all devices throughout the whole production process.
- OD plant owners must provide monthly information regarding their production processes to the ministry responsible for controlling OD production and distribution (this will be the Ministry of Culture and National Heritage).
- The ministry will establish and maintain an accurate registry of information regarding OD plants and their production.

¹⁵ As detailed in IIPA's 2003 Special 301 report, the four major areas of remaining concern in the Polish copyright law after the 2002 amendment involved: (1) the need to broaden the definitions of the reproduction right for phonogram producers and performers in order to comply with the international standards; (2) give performing artists and phonogram producers an exclusive right of public communication, instead of merely a claim for remuneration; (3) remove the cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights; (4) clarify that police and public prosecution services take action *ex officio* in respect to all criminal offenses provided under the copyright law.

¹⁶ More comprehensive discussion on the successes and challenges involved in Poland's copyright law reform over the past decade are outlined in IIPA's 2003 Special 301 report, found at <http://www.iipa.com/rbc/2003/2003SPEC301POLAND.pdf> (pages 244 et seq.).

- The minister can order an inspection of the OD plant at any time, to be carried out by an inspector who is entitled to review documents, interview personnel and secure evidence.
- Violations of the enumerated acts regarding OD manufacturing and production are subject to penalties including fines outlined in the Administrative code.
- The minister must issue an implementing decree to establish this OD regulatory regime within three months after the law amendments enter into force. OD plant owners must comply with the law's obligations within this same three-month time period.

The copyright industries look forward to working with the Ministry of Culture to ensure that an effective OD regulation is promptly issued which elaborates on the broad guidance provided by the amendments outlined in the copyright law.

Second, this legislative package also proposes to amend several substantive copyright law provisions, primarily involving changes affecting certain rights, certain exceptions to protection and collecting society issues.¹⁷ Given that the legislative draft is still under early consideration and its text could change, we offer several remarks about what we understand is the scope of this bill. The copyright industries observe that the current draft amendments omit several issues highlighted numerous times by the local private sector. Unfortunately, the proposed legislation does not address several key improvements offered by the local copyright industries during 2003 which would better align Polish law with their international obligations and international standards.¹⁸ The Polish Parliament should work with the private sector to eliminate the following deficiencies from the current law and include them to the list of draft amendments. The copyright industries will continue to monitor the passage of this copyright reform package as it makes its way through the legislative process.

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,

¹⁷ For example, the bill proposes to accomplish the following (illustrative) changes: amend the exception for temporary copying to come closer to tracking the EU Copyright Directive regarding certain transition or incidental reproductions; include a definition of technological protection measures and rights management information; amend the private copying exception to permit only single copies (this proposal remains too broad and does not track the EU Copyright Directive which limits the personal use exception to reproduction made by natural person for their private use and not for any direct or indirect commercial purposes; allowing digital copying is not normal exploitation of a work and conflicts with the three-part test); amend the entire chapter affecting the creation, organization and permissible activities of collective management organizations; adds several additional acts which are exceptions to copyright (the exceptions with research to educational and research institutions should be construed in the most narrow way possible).

¹⁸ An illustrative list of important issues omitted from the copyright law reform package which, if implemented, would serve to strengthen the Polish copyright law includes: clarifying the important distinctions between the rights of broadcasting, the communication to the public and making available; expanding the reproduction right for neighboring rights to meet international standards; extending the term of protection for producers of sound recordings beyond the TRIPS minima (and extended the term of protection as well for products whose term is not measured by the life of a natural person); strengthening the general exception language to explicitly track all three elements of the TRIPS Article 13 three-step test; further strengthening the remedies for violations involving TPMs and RMLs; improving one provision to improve the ability of Polish enforcement officials to take *ex officio* action on their own initiative (such as all criminal copyright cases as well as those with an organized crime element) instead of always waiting for a rightsholder's motion; ensuring a rebuttable presumption of ownership for producers of sound recordings, such as already is afforded to authors; acknowledging that the bill's proposal to require collecting societies to distribute statutory percentages of their collections interferes with private contractual negotiation among rightsholders; removing a provision which adversely affects the freedom of negotiations which should be respected between producers of sound recordings and performers; and increasing criminal penalties (especially the minimum jail sentence from 2 years up to 3 years) and removing the "economic gain" element in order to improve deterrence.

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. 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. Reportedly the Polish government remains uninterested in withdrawing this reservation.

Broadcast Act of 1993: 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

RUSSIAN FEDERATION

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that the Russian Federation remain on the Special 301 Priority Watch List in 2004,¹ and that such listing be coupled with a 60 day out-of-cycle review, after which (on July 1, 2004) barring significant progress on the list of benchmarks below, the United States government would suspend Russia's duty-free trade benefits that it enjoys under the Generalized System of Preferences (GSP) program. Russia's copyright piracy problem is one of the most serious of any country in the world, and the performance of the Russian government over the past decade can only be summed up as representing a legacy of failed commitments on IPR obligations (noted in the list below). Russia is now one of the world's largest producers and distributors of illegal optical media material. This production has devastated the domestic market, and the export of pirated optical discs from Russia threatens markets for American copyrighted works throughout Europe and the Middle East. Russia's criminal enforcement system has failed to stem persistent commercial piracy. Overall copyright industry losses have well exceeded \$6 billion for the past seven years. Russia's law and enforcement regime is neither in compliance with the 1992 Bilateral NTR Trade Agreement nor with the Berne Convention.

IPR benchmarks: The three highest priority problems in Russia are: (1) the explosive growth of illegal optical media plants run by organized crime syndicates with widespread distribution networks; (2) inadequate enforcement, in particular, the lack of deterrence in the Russian criminal enforcement system to address persistent commercial piracy; and (3) the critical need for legal reforms.

In order to address these problems effectively and in a timely manner, **IIPA proposes the following benchmarks.** Failure to show substantial progress on these issues by the conclusion of a short out-of-cycle review (July 1, 2004) should result in the immediate suspension of Russia's GSP benefits. In addition, the United States must continue to condition Russia's accession to the World Trade Organization on full compliance of its copyright regime, both from a legislative and enforcement standpoint, with the WTO TRIPS obligations.

The benchmarks that need to be undertaken by July 1 by the Russian government are:

1. To immediately commence plant inspections and close plants producing pirate product using existing law—especially by withdrawing licenses for plants operating on government property, as well as by undertaking effective border measures to stop the export of illegal product. The Russian government must

¹For more details on Russia's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2004SPECIAL301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

separately introduce a comprehensive optical media regulatory and enforcement scheme.

2. To show significant improvement in the number and disposition of criminal investigations and raids against pirates engaged in commercial manufacture or distribution (and take administrative procedures against street piracy).
3. To significantly improve the number of major cases that prosecutors bring against major commercial pirates. The Russian government must also initiate investigations into and prosecutions of the organized criminal syndicates that control piracy operations both in the country, and from within Russia to markets outside of Russia. Separately, the Russian government must indicate to the judiciary that it expects the courts to impose deterrent criminal penalties.

In addition, the Russian government must make it a high priority to push for the necessary legal reforms in the copyright law (failed again, in November 2003), the criminal code, the criminal procedure code, and administrative code detailed in this and previous Special 301 reports, to facilitate stronger and more effective enforcement compatible with WTO TRIPS and the WIPO digital treaties.

The Russian Government's Legacy of Failure on IPR Commitments: The Russian government has an unfortunate history of failing to meet its commitments to the U.S. government with regard to copyright protection and enforcement. A history of the most significant failures, and the dates upon which the (still unfulfilled) commitments were first made, includes:

1992: In the Bilateral NTR Trade Agreement, the Russian government committed to provide protection for pre-existing works and to meet its obligations in this agreement no later than December 31, 1992.

1992: In the Bilateral NTR Trade Agreement, the Russian government committed to provide effective criminal penalties and enforcement. In 1996, Criminal Code amendments were adopted (after a 1995 veto) but a deficient provision (a "grave harm" threshold) prevented effective enforcement; in 2003 an amendment to "fix" the grave harm provision was finally adopted, but implementation of these criminal provisions remains a matter of concern, and there is a critical need for effective enforcement.

1992: In the Bilateral NTR Trade Agreement, the Russian government committed to pass a strong copyright law without interference from a separate Civil Code (Chapter 4). Notwithstanding this commitment, the U.S. government and members of the IIPA were forced to spend much of the past decade fighting against a variety of proposals for civil code reforms that would have further eroded copyright protection in Russia. Ongoing civil code reform continues to threaten to undermine the copyright law.

1993: During passage of the copyright law (in force August 1993), the Russian government committed to extend protection to pre-existing sound recordings (and for works, including filmed entertainment). The 1993 Implementing Decree denied such protection to foreign works (pre-1973) and recordings.

1995: Russia acceded to the Berne Convention but failed to comply with Article 18 to provide protection for pre-existing works.

1995: Russia acceded to the Geneva Phonograms Convention but provided no protection for pre-existing foreign sound recordings prior to the accession date of March 13, 1995.

1995: The Russian government agreed to provide the police and prosecutors with proper authority to confiscate illegal material and ex officio authority to commence criminal investigations. The 1996 Criminal Procedure Code reversed that authority, and

required rightholders to formally press charges to commence investigations in some instances, thus thwarting effective enforcement.

1995: The Russian government agreed to provide ex parte search provisions; these were adopted in part in the Arbitration Procedures Code in 2002 but were never implemented and are absent from the Civil Procedure Code adopted in 2003.

1996: IIPA and USG first identified optical disc plant production as a problem to the Russian and U.S. governments and suggested the need for an enforcement “action plan” to address this problem, including legislative reforms. Two optical disc (“OD”) plants were identified in the IIPA’s February 1996 Special 301 Report. There are now 32 OD plants (with a total plant capacity of 371.6 million discs/year but a legitimate market capacity approximating only 30 million discs/year). At all levels of the Russian government there have been promises to address this problem (starting in 1999) including a pledge, never met, in 2002 to issue an “action plan”—but to date, there has been virtually no action taken against the plants, no comprehensive plan of action issued by the Russian government, and no legislative reforms have even been introduced.

RUSSIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2003²

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	275.0	75%	250.0	80%	250.0	80%	250.0	90%	250.0	90%
Records & Music	405.0	64%	371.9	66%	285.0	64%	250.0	70%	200.0	70%
Business Software Applications ³	NA	NA	370.0	89%	90.6	87%	89.0	88%	134.5	89%
Entertainment Software	NA	80%	NA	90%	173.6	90%	NA	94%	241.1	95%
Books	40.0	NA	40.0	NA	48.0	NA	48.0	NA	48.0	NA
TOTALS⁴	NA		1031.9		847.2		637.0		873.6	

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA’s statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ In IIPA’s 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Russia were \$755.8 million. IIPA’s revised loss figures are reflected above.

COPYRIGHT ENFORCEMENT

Illegal Optical Media Production and Distribution

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 uncontrolled optical disc plants. Russia's 32 known CD plants, including at least 16 DVD (that is, audiovisual) lines, are wreaking havoc on the Russian domestic market. In addition, illegal discs exported from Russia have been found in over 25 countries worldwide. Organized criminal enterprises are involved in many aspects of optical disc piracy in Russia, and they run operations in other countries as well. This is not a matter that can otherwise be left to private parties to resolve, but instead requires the help of governments, particularly in this area of law enforcement. With profits rivaling or exceeding those made through the distribution of illegal drugs, it requires a similar commitment by governments to clean up criminal syndicates running piracy operations.

IIPA has documented the problem of optical disc production and distribution in Russia since 1996 when there were two known plants. Over the past 8 years of inaction by the government of Russia, the problem has been allowed to mushroom to today's 32 known plants. The steady growth of optical disc production has been documented (in numerous IIPA filings) as follows: In 1996, there were 2 known plants; in 1998, 3 plants; in 1999, 6 plants with a capacity of 60 million discs; in 2000, 10 plants with a capacity of 90 million discs; in 2001, 13 plants with a capacity of 150 million discs; in 2002, 17 plants with a capacity of between 150 and 183 million discs; and, in 2003, 26 plants, including 5 DVD plants, with a total capacity exceeding 300 million discs. In addition to the 32 known plants today, there are several additional plants in the process of coming on line. IIPA's evidence indicates that at least 18 of the 32 plants are engaged in illegal activity.

To address optical disc production, the Ministry of Press and Information is using reproduction and licensing regulations (issued in June 2002) to provide licenses for replication facilities for optical discs and analog tapes. The regulations allow for unannounced inspections of replication plants and for the suspension (but not withdrawal) of operating licenses of facilities found to be in breach of the regulations. Last year, the Ministry reported the issuance of 150 such licenses. Its Inspection Commission had conducted a total of 53 inspections of replication facilities, noting 45 infringements of the licensing regulations. It further reported the suspension (but not revocation) of 12 optical disc plant licenses in 2003. The existing law and regulations pertaining to plant licensing fall far short of IIPA's model optical disc legislation (provided to the government of Russia), and is demonstrably inadequate—evidenced by the fact that the existence of these regulations has done little to stem, or even slow, the production of pirate discs in the country's optical disc facilities. In the absence of a comprehensive scheme, however, these regulations must be used as a starting point for action. In the long run, a comprehensive series of legal reforms is needed. These include legislative and regulatory steps—proposals that IIPA gave to the Russian government in 2002.

Raids and Seizures in 2003

The copyright industries can report some successful raids and seizures (including the first at a DVD plant in 2003). However, these activities have not resulted in any appreciable reduction in the amount of pirate optical disc product being produced in Russia, nor in any

criminal convictions. Pirate manufacture continues unabated and the pirates are getting more entrenched.

In 2003 as in prior years, the federal police and the IP unit in the Ministry of the Interior were generally cooperative in running raids against major pirates (although the Unit "R" has had IPR enforcement jurisdiction taken from it). However, the raids run by the police and the municipal authorities were not always followed up by prosecutors and the courts. The pattern of successful raids without successful prosecutions (with a few exceptions) has been a recurring problem for years.

There were successful raids and seizures in 2003 against some optical disc plants and warehouses. A large raid in April 2003 resulted in the closure of a DVD factory in Zelenograd, near Moscow (reported to be the source of up to one third of the pirate DVDs on the Russian market). A criminal case was initiated and remains "pending" in this matter. In September, the Organized Crime Police conducted a major raid against an optical disc factory in Moscow, which resulted in the seizure of hundreds of thousands of pirated discs. Eight CD replication lines were found on the premises even though the plant had declared the existence of only six lines to the Press Ministry, and despite the fact that the Ministry had suspended (but not revoked) this factory's license to replicate CDs following an inspection of the plant in August. Unfortunately, the case against the plant was closed, apparently as a result of pressure on the authorities to drop the case. Russian police have also raided a number of other optical disc plants including the UVK Stimul plant, and plants in Korolov and the Unitechno Plant (Lobnia). None of these three plants are currently in operation and criminal cases have been initiated against all three.

In total, major warehouse raids have resulted in the seizure of close to half a million pirated optical discs this year. In a raid on November 5 in St. Petersburg, the Organized Crime Police seized over 185,000 pirate DVDs from a warehouse. About half of the DVDs contained two feature films (the first time this activity has been known to occur in Russia). No criminal case was initiated, reportedly because of the "disappearance" of the owners of the warehouse.

It is estimated that 75% of the pirate product seized in raids finds its way back into the marketplace through either the Veteran's Fund or the Trade Houses in the Ministry of Justice, which both claim the right to sell the pirate discs on the open market. The government of Russia must put a stop to these practices.

The film industry's anti-piracy organization, RAPO, seized over 226,000 pirate DVDs in raids on warehouses and outlets across Russia in 2002; in 2003, this number exceeded 1 million DVDs.

To address retail piracy, the government of Russia introduced a legal ban on the street sales of audio and audiovisual products, for example, at kiosks. This was a promising step that resulted, at least in the short term, in a significant reduction in the availability of pirated home video entertainment, especially on the streets of Moscow. However, the ban has been irregularly enforced and music CDs remain widely available. Retail cases have resulted in some administrative fines, but these are generally of a *de minimis* nature.

In 2003, 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. Only a handful of cases made it to the courts and even then, the disposition was disappointing because the operators received neither deterrent penalties nor imprisonment. A total of 371 police raids were carried out with the participation of the Russian offices of the IFPI. These

resulted in the seizure of: 413,200 CDs, 43,800 cassettes, 6,000 CD-ROMs, 24,100 DVDs, 5,100 stampers, 53 units of recording equipment (plus 7,300 blank cassettes), and 316,000 CD inlays (the printed material for the jewel boxes); the total value of the material seized was US\$5.4 million.

In 2003, the business software industries focused their enforcement activities on the prevention of hard disc loading and the illegal use of software by corporate end users. There were 36 raids on hard disc loading operations, and 34 end-user raids conducted in various parts of Russia in 2003. Unfortunately, to date, only a small number of the hard disc loading cases, and none of the end-user cases, resulted in criminal convictions. The hard disc loading cases take more time and likely won't be heard until some time in 2004. In the end-user prosecutions, ongoing problems persist, including the necessity to prove intent, and the absence in Russian law of a way to impart criminal liability onto corporations, meaning that natural defendants must be selected and tried in these cases. As a result, most end-user matters are disposed of as administrative misdemeanors.

RASPA, a Russian anti-piracy organization, continues to conduct raids on behalf of some Entertainment Software Association (ESA) member companies, but these are mostly seizures of street market inventory. ESA believes that the Russian government must take action against the organized criminal syndicates that run these piracy operations. The massive overproduction is destroying not only the Russian market, but also markets in many other countries. These organized criminal syndicates are believed to control distribution of pirate entertainment software products in Russia, as well as in much of Eastern Europe. One example of the ease of shipment of the material is the fact that almost all of the pirate cartridge material in Russia is imported from China, and of the console game material, half of certain manufacturer's material is imported from Malaysia.

Continued High Piracy Levels and Other Problems

Very high estimated piracy levels in all copyright sectors accompany massive losses as noted in the chart above. These high piracy levels cost the Russian economy millions of dollars in lost jobs and lost taxes. For example, the motion picture industry alone estimates lost tax revenues on DVDs and videos in Russia was \$130 million last year. In another study undertaken by the software industry, it was 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.

The only way to bring down these piracy levels and losses is for Russian authorities to use deterrent criminal penalties against the crime syndicates. Instead, Russia continues to mete out low penalties and only a small number of jail sentences for piracy.

The recording industry reports that the closure of the former Gorbushka market resulted in the migration of illegal sales to the nearby building of the Rubin Trade Center (La-La Park), where most of the dealers sell pirate audio products. Audiocassette piracy levels remain very high (at about 57.3%) despite major raiding activity and the expenditure of major resources by IFPI. Overall losses in the recording industry were \$405 million in 2003.

The level of piracy for entertainment software is at 80% of the market. Russian syndicates control 100% of the production in Russia of PlayStation® video and personal computer games. About half of certain PlayStation® games (such as PlayStation2® games), come from Malaysia, while for other materials such as PlayStation1® and certain personal

computer games, 90% of the illegal material is made in Russia with the rest imported from Ukraine. Cartridge-based video games (like 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 use licensed entertainment software products. The retail markets in St. Petersburg and Vladivostok are all full of pirate videogame product.

One example of the failure of the Russian enforcement regime to work effectively is the control that criminal syndicates have over entertainment software piracy in Russia. It is believed that there are now four such groups operating in the country. These syndicates attach “logos” or “brand” names to their illegal product and localize the illegal copies they produce even before legitimate product is released into the market. These same groups control not only illegal distribution networks in Russia, but also in surrounding countries. It is widely believed that the Russian groups control piracy operations in much of Eastern Europe, particularly the Polish market, where entertainment software products are actually localized into Polish by Russian distributors. Given these circumstances, it becomes imperative that the criminal code is utilized against organized criminal syndicates, and that the Interministerial Committee focuses its attention on a course of action to fight piracy by the criminal syndicates.

Book piracy continues to flourish in Russia. Although a few years ago, increased licensing of legitimate product resulted in some improvement in the piracy rates, those rates have remained static since that time. 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 2003 were \$40 million.

Criminal Enforcement

The criminal enforcement system in Russia remains the weakest link in the Russian copyright regime resulting in the extraordinarily high piracy levels and trade losses. At the retail level, there is no practical alternative for running anti-piracy actions other than using the municipal authorities (even though the criminal police have the authority—they just do not use it), and in these cases pirates are subject to administrative, not criminal, remedies that have proven ineffective. In 2003, there were legislative efforts undertaken to “fix” the Criminal Code, but as noted, implementation of these provisions remains troubling.

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 entertainment software industries.

In the last five years, only one-third of the criminal cases were even heard by the courts, with the other two-thirds of cases dismissed for a variety of reasons. In only 20% of the criminal cases were the offenders punished at all (often with suspended sentences).

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, business software, and motion picture industries report that administrative raids have been positive. However, it was also reported that these matters were less effective than in prior years because the new administrative code is more complicated, requiring the involvement of attorneys. In 2003 the IFPI reported that 362 raids against audio pirates were undertaken and 605 administrative cases were initiated. In 564 cases, fines were imposed (for a total of US\$26,466). This averages only US\$47 per case, which is obviously not a deterrent penalty. RAPO reported that it is able to average nearly 10 administrative court decisions a week against pirate retailers that order illegal product to be confiscated and the imposition of small fines (on average less than US\$200). Market seizures continue to involve the employment of huge resources, since administrative penalties remain totally inadequate to deter over the long term. The recording industry reported that although the law makes liable those who distribute material, the sources and channels of illegal material are rarely pursued. In lieu of this, most administrative actions against shop owners and sellers require payment of on average US\$200.

Civil Enforcement

Again in 2003, the business software industry filed 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.

In 2003, the recording industry (IFPI) commenced its first civil claim against an optical disc plant in Russia, claiming damages of over \$1.3 million, a prohibition against production of the pirate CD titles named in the suit, and seeking confiscation of the machinery and equipment used by the plant. This was the first time that a civil cause of action was commenced in Russia against an optical disc plant.

Russia judges have repeatedly voiced 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.

Border Enforcement

Russia must significantly improve the lax border enforcement that permits the easy trafficking of illegal material into and out of Russia. The government of Russia should instruct

Russian customs officials to address this issue and to provide them with the necessary resources to allow effective enforcement.

Russian Government Efforts to Address Piracy

The government of Russia took an important step in October 2002 to address the growing piracy problem by establishing an interministerial commission to combat piracy. The commission meets quarterly and is headed by the Prime Minister; the acting chair is Press and Information Minister Lesin. To date, the commission has taken small steps to address legislative reform, retail piracy, and optical disc production. However, the pace and level of reform have not yet been sufficient to make a dent in the massive piracy problem. The commission has set a number of important goals for 2004, including: consideration of a comprehensive optical media law; identifying a solution to the problem of optical disc plants situated on government property; curtailing piracy by street vendors and kiosks; and revisiting the question of a federal stamp for optical disc products.

GENERALIZED SYSTEM OF PREFERENCES (GSP) PROGRAM

Even with piracy rates and losses among the highest in the world, Russia continues to receive trade benefits from the U.S. government. As such, 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 October 2003 (to supplement those in March 2001). The U.S. government now must decide whether to fully or partially suspend GSP benefits for Russia. In 2002, \$380.1 million worth of Russia's imports to the United States benefited from the GSP program, accounting for 5.7% of its total exports to the U.S. During the first 11 months of 2003, \$376.6 million worth of Russian goods (or 4.9% of Russia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code. While Russia was receiving these benefits, losses to U.S. industries from copyright piracy in Russia in 2003 amounted to well over \$700 million dollars. The IIPA recommends that, absent compliance with the suggested benchmarks by July 1, these GSP benefits should be suspended until Russia improves its copyright enforcement regime.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

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.⁵ 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;

⁵ A more 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, discussed in this section, can be found in previous filings, available on the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf> at page 13.

- Amendments to the copyright law to fix a number of deficiencies and to make it WTO TRIPS and WIPO digital treaty compatible (as well as to accede to these treaties)—in particular to ensure the protection for preexisting foreign works and sound recordings;
- Amendments to the criminal procedure code to provide proper *ex officio* authority;
- Amendments to strengthen the implementation of the code on administrative misdemeanors;
- Amendments to the customs code (to provide *ex officio* seizure authority).

Further amendments to the criminal code may be needed if the new Article 146, when implemented, remains a problem.

The criminal code was amended in 2003 to provide *ex officio* authority to allow prosecutors, but not the police, to commence and investigate certain IPR criminal cases.

A new customs code went into force on January 1, 2004, providing for measures to prevent the trade of counterfeit goods across borders. Unfortunately, the law fails to expressly provide for *ex officio* enforcement authority. Thus, even if customs officers discover shipments of obviously infringing products, they may not be able to act on their own authority, acting as now, only in those cases where rightsholders have filed written applications to suspend the release of suspect goods. A proposal to fix the *ex officio* authority problem was rejected by a key Russian Duma committee in April 2003.

The threat of deleterious amendments in the Russian civil code pertaining to IPR protection remains, with the possibility of the latest draft being considered by the Duma in April 2004. In addition, there is at present a separate law on the protection of computer programs and databases, which are also protected in the copyright law. Amendments added in the Computer Program Law of 2002 weakened enforcement for computer programs; the software industry would like to see the 2002 law repealed and all software-related provisions consolidated into the copyright law. The Russian government must not allow any amendments to be adopted that would weaken or interfere with the implementation of the copyright law.

Optical Media Regulations

To address the problem of the unlicensed optical disc plants in Russia in a comprehensive manner, effective laws must be enacted and utilized. Two relatively minor licensing laws, and one set of regulations, have been enacted in this area of law in the past few years. But neither law nor the regulations resulted in effective action undertaken against the illegal plants. In short, regulations are needed to: (1) close plants that are caught illegally producing copyrighted material; (2) seize infringing product and machinery; (3) introduce criminal liability for infringing these regulations; (4) monitor the importation of raw materials (optical grade polycarbonate) used in the production of optical disc media; and (5) require plants to adopt source identification (SID) codes so that the source of illegally produced discs can be traced. Finally, the proper authority must be delegated to agencies and officials to undertake effective enforcement and to implement these regulations. Details of the laws and of IIPA's proposal for addressing the problem in a comprehensive fashion can be found at the IIPA website, <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf>, at page 14.

In the immediate term, the government of Russia must use its existing authority to withdraw the licenses of illegal plants and stop their production, especially of those plants operating on government soil.

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 essential that in the first half of 2004, these efforts will prove successful, after attempts failed to consider the amendments at the second and third readings scheduled in November 2003.

The draft copyright amendments that passed the first reading in 2002 include provisions to correct the problem pertaining to the protection for pre-existing works and sound recordings. The draft law is also intended to add provisions directed at implementing the WIPO digital treaties.

Criminal Procedure and Criminal Code Amendments

Five years after pledging to do so, the Russian Criminal Code Article 146 (pertaining to infringement of copyright and neighboring rights), was finally amended in 2003 to fix the previously ambiguous "grave harm" standard. The amendments, effective December 11, 2003, added a fixed threshold amount of harm. Some of the copyright industries remain concerned that in its implementation, this threshold amount will be too high to trigger a criminal case, and as a result, will be used too infrequently. In addition, the amendments replaced the minimum fines previously triggered to multiples of the minimum wage with fixed amounts.

Article 146 provides for fines of up to 200,000 rubles (or US\$7000), or up to 18 months of the defendant's income, or correctional labor (from 180 to 240 hours), or imprisonment of up to five years for unlawful acts that cause "significant damage." The November 2003 amendments (replacing amendments adopted in April) define "significant damage" as a fixed threshold rather than scaled to the minimum daily wages. The fixed thresholds are as follows: 50,000 for the lowest level criminal violation (about US\$1750), and 250,000 rubles for the most serious criminal violation (about US\$8800). This means that any activity below US\$1750 cannot be treated as a criminal matter. The amendments unfortunately weakened the provisions pertaining to aggravated (i.e., organized crime) activities.

Some of the copyright industries remain concerned that the threshold in the newly adopted Article 146 is still too high in its definition of "significant damage" and will fail to give the police the necessary tools when they are conducting initial raids and must determine whether a case should be brought under the criminal code or the administrative code. There was, in years past, a proposal to lower the threshold to 50 times the minimum wage, or US\$150, but what was adopted was a significantly higher threshold. The implementation of Article 146 will be closely monitored by IIPA to see whether further amendments are needed.

There are several 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. The current Criminal Code (Art. 146) *does* clearly apply to the confiscation and destruction of pirate and counterfeit goods—that is, to the illegal copies themselves. However, it does *not* explicitly provide for the confiscation and destruction of the "machinery" used in the making of illegal

copies. Local counsel advises that the criminal code theoretically could be read to apply to the “tools of the crime” such as illegal machinery, but experience shows that Russian courts have not yet applied the criminal code in this manner. Thus, as a practical matter there is no application under the criminal enforcement provisions to the “machinery” used to create illegal copies. A provision in the Copyright Law (Art. 49.4) provides civil remedies for the confiscation and destruction of “materials and equipment,” but it is not effective and is, in any case, limited to civil cases.

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.

Third, some of the copyright industries remain concerned that the criminal procedure code does not give jurisdiction over criminal violations to the police authorities, as it does for the prosecutors. It is our understanding that the 2003 amendments did fix one problem by revising the 1996 CPC amendments so that it is no longer necessary to file a formal complaint for public crimes, including copyright offenses. Also as IIPA understands, prosecutors are entitled to supervise investigations conducted by the police (Article 126 of the CPC) in all cases including IPR investigations. IIPA will continue to monitor the implementation of these provisions to make certain they result in effective enforcement for all of the copyright industries.

Other Legal Reform Issues

Civil Procedure Code Amendments

A new civil procedure code took effect February 1, 2003, setting the rules for initiating and examining civil cases, including disputes pertaining to copyright and neighboring rights infringements, but unfortunately, it does not contain the necessary civil *ex parte* search procedures (required by the WTO TRIPS Agreement). These are essential tools for effective enforcement in the software industry. In 2002, an amended arbitration procedures code in Article 72 introduced civil *ex parte* search provisions in a more limited context. The software industry reports that these provisions have only been tried one time in actual practice, and that the overall procedure remains a difficult and onerous proposition. A major contributor to the problem is the lack of experience by the judges who must impose it, and the overall inefficiencies of the court-mandated bailiff system.

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 C.I.S. with production capacity (i.e., Ukraine), and from Asia.

Code of Administrative Misdemeanors

In 2002, a new code on administrative misdemeanors went into force that allows administrative cases against legal entities and the imposition of fines on them in the amount from US\$900 to US\$1,200 for copyright infringements. Since its enactment, effective implementation of this law has been very limited because it falls under the competence of under

qualified municipal police. The Code on Administrative Misdemeanors also effectively limits the time period for the investigation of copyright infringements by several days even when a much longer time is necessary to investigate such cases. The code needs to be amended to provide for at least a one-month period for the investigation of copyright infringing cases, as it does so in other cases of administrative misdemeanors.

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 11 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 or its implementation. Last, any revision of the civil code should not be used to delay in any way the speedy adoption of the copyright law amendments.

Stamp Tax and the Tax on Video Rental Profits

Effective in 2001, the Moscow city government replaced its requirements that all video and audio cassettes, optical discs and computerized information carriers have a “protective identification mark” (i.e., a stamp) tax, with another law (Ordinance No. 73) that abolished the stamps but created a registration stamp/mark in lieu. Several alternative systems, including a federal stamp, and a self-regulating system have since been under consideration. The copyright industries strongly recommend that anti-piracy systems, whether in the form of stamps or otherwise, be voluntary and left to the individual rightsholders. Mandatory systems have been shown to slow the development of legitimate markets and alternately help the pirates. The entertainment software industry reports that the current registration stamp system is causing many retail establishments to stop the sales of legitimate product for fear of running afoul of the law, while pirates continue to operate in open markets.

Also interfering with the development of legitimate markets is the high taxation system on video rentals. Since 2002, a 24% profit tax on revenue from video rentals, along with other “vice” activities such as gambling has been in effect. This tax is very high (although an improvement from the previous 70% rate). The GOR felt that lowering the tax to 24% would help the video market’s growth in Russia, but the lingering high rate combined with the growth of DVD piracy has, for the most part, overwhelmed the legitimate market for rentals.

WIPO Treaties; Electronic Commerce; Notice and Takedown Procedures

In 2002, Russia considered but decided not to accede to the WIPO digital treaties (WCT and WPPT). The copyright law amendments, postponed again in November 2003, would have moved Russia toward implementation of these treaties. It is hoped that in 2004, 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. Implementation of these treaties, whether as a part of the copyright law amendments or through another revision, is critical to Russia’s effective protection of creative content.

IIPA also understands that a federal draft law “On Electronic Trade” first submitted to the Duma in 2000 (and which had a first reading in 2001) may be considered in 2004. 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 rightsholders can properly and effectively enforce their rights.

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

Russia acceded to the Rome Convention on May 26, 2003. 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 shortsighted decision by the government of Russia and one that IIPA hopes will be reversed.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY¹

Special 301 recommendation: IIPA recommends that South Korea remain on the Priority Watch List for 2004.

Overview of key problems/achievements: 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. Piracy levels are excessively high across the board. Korea modernized its laws in 2003, but big gaps remain, especially in legal tools for fighting online music piracy and circumvention of technical protection measures. Treatment of temporary copies and exceptions for libraries are other main problem areas. Korea acknowledged resurgent piracy of audio-visual materials based on false licensing documentation, and enacted a framework for restoring an effective response to it, but the new system must be quickly and completely implemented. 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. Progress was made against piracy of business software applications by corporate and institutional end-users; these enforcement efforts should be sustained. Anachronistic screen quotas still constrain access of U.S. movie producers and distributors into the Korean market.

Actions to be taken in 2004

- Amend Copyright Act to give producers control over all digital dissemination of their sound recordings, and align Korean law with global minimum standards contained in the WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT), as well as TRIPS.
- Implement reforms empowering the Korean Media Review Board to deny applications from those who lack rights to distribute audio-visual titles in Korea and to revoke previous approvals procured by fraud, in a transparent system that is easier for foreign right holders to use.
- Crack down on widespread book piracy, enlist university leadership in the campaign, and impose deterrent sentences on book pirates.
- Continue and increase enforcement efforts against audio-visual piracy, with special emphasis on a nationwide crackdown on street vendors.
- Step up enforcement against online piracy.
- Building on recent progress, improve transparency in enforcement against end-user business software piracy.
- Phase out screen quotas.

¹ For more details on Korea's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

SOUTH KOREA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003²

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	20%	27.0	25%	25.0	25%	20.0	20%	20.0	20%
Records & Music	3.5	20%	6.9	20%	4.0	14%	7.0	19%	10.0	20%
Business Software Applications ³	NA	NA	285.9	50%	100.4	48%	177.2	56%	118.9	50%
Entertainment Software ⁴	248.4	36%	381.0	36%	487.7	63%	157.0	90%	119.0	63%
Books	38.0	NA	36.0	NA	35.0	NA	39.0	NA	39.0	NA
TOTALS ⁵	NA		736.8		652.1		400.2		306.9	

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 26 million Koreans—some 59 percent of the total population—regularly access the Internet.⁶ 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 entertainment and business software, sound recordings and audio-visual material. Broadband access, unknown in Korea until 1998, is now enjoyed by over 70% of Korean households, more than 10 million in all.⁷ This is more than double the comparable penetration figure for the United States.⁸ 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.⁹ In addition, the number of Koreans with wireless Internet access probably exceeds the number with fixed line access.¹⁰ Furthermore, as a rule Koreans use their Internet access to consume copyrighted

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will be finalized in mid-2004 and also posted on the IIPA website. BSA's statistics for 2002 were finalized in mid-2003, and revised figures are reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁵ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in 2002 in South Korea were \$572.3 million. IIPA's revised loss figures for 2002 are reflected above.

⁶ National Computerization Agency, Ministry of Information and Communication, *White Paper Internet Korea 2003*, at 25.

⁷ *Id.*, at 20. A more recent estimate puts broadband penetration at 75% of all Korean households. Russell, "Korean Labels Target Individual Downloaders," in *Billboard*, Dec. 20, 2003, at 74 (citing "U.K.-based online research company Point-Topic").

⁸ Russell, "High-Speed Internet Has Advantages for Korea," *Billboard*, Aug. 2, 2003, at AP-1 (35.9% of U.S. web surfers have broadband access).

⁹ "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.*

¹⁰ *White Paper Internet Korea 2003*, *supra*, at 27.

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.¹¹

Based on these statistics, Korea should be leading the way as an online marketplace for materials protected by copyright. Unfortunately, the reality is too often otherwise. Much 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, roughly one-sixth of the entire Korean population.¹² 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) and DVD-Recordable (DVD-R). Piracy of analog formats—especially 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. If it cannot do so more effectively than it has done in the past, then its national strategy to promote the growth of legitimate “digital content/software solutions” as one of its “10 Next-Generation Growth Engines” will be jeopardized.¹³

The experience of the recording industry may be instructive. Audiocassette piracy remains a huge problem: Over 650,000 pirate cassettes were seized in 2003, 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 70,000 units seized in digital formats: conventional CD and CD-R. 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.

However, the online environment is no longer simply a source of material for pirate physical product. Cyberspace has become the main locus of the piracy problem plaguing the music industry in Korea, far overtaking physical product. Pirate online sites of all kinds continue to proliferate, even after the 2002 shutdown of Soribada (which itself re-opened in a new, more decentralized format.)¹⁴ Indeed, the most successful online music site, Bugs Music, boasted some 14 million subscribers (over one-quarter of the entire Korean population!) and streamed recorded music without authorization until finally partially enjoined from doing so in October 2003.¹⁵ Many of the sites that make infringing MP3 recordings available for download and/or

¹¹ 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. Conversely, while 94% of online Americans use the Internet for e-mail, the comparable figure for Koreans is 12%.

¹² Russell, note 7 supra.

¹³ See “Korea Focuses on 10 Next-Generation Growth Engine,” in Korea International Trade Association, *Bridging the Pacific*, Issue XXVII (Oct. 2003), at 1.

¹⁴ 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).

¹⁵ Seo Jee-yeon, “Online Music Provider Denied Access to Latest Scores,” *The Korea Times*, October 2, 2003.

streaming 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. The criminal prosecution of Soribada is a case in point. After 22 months and hearings before three different judges, the case was dismissed in May 2003 on the grounds that the charges were defective (an appeal of the dismissal is pending). Private enforcement is similarly hampered. In 2003, the international recording industry group IFPI sent over 350 cease and desist notices to sites offering infringing music files, but less than half of these were taken down.

RIAA's estimated piracy rate in Korea of 20%, and its estimate of \$3.5 million in trade losses to the U.S. recording industry, present only a small part of the piracy picture. These estimates do *not* include losses due to online piracy, since the estimation methodology currently in use does not capture these losses. Indeed, the reduced loss estimate compared to 2002 results from the shrinkage of the entire market for physical product, which is being overwhelmed by online piracy. The full impact of online and offline piracy may be gauged from the dire state of the Korean recorded music industry generally: Overall, annual sales value declined nearly 45% between 2001 and 2003.

The entertainment software sector provides further evidence of these piracy trends. There is a strong market for legitimate product for the PC format, including through legitimate online delivery. However, there is also a significant level of illegal downloading and P2P trading of PC games, and of entertainment software in other formats. Pirate games are accessed online via broadband connections and downloaded, including for use as masters for "burn-to-order" operations using CD-R writers. These "burn-to-order" operations, usually carried out by small businesses, are a continuing problem. Factory-produced pirate products are rarely found in the PC game sector nowadays, although they are still a predominant factor in products designed to play on videogame consoles. Piracy of cartridge-based entertainment software remains high, primarily imports of counterfeit and pirate Game Boy products from China, with piracy rates in this format at about 80% in South Korea. The unauthorized use of entertainment software by some Internet cafes (called "PC baanngs") remains a significant problem. Finally, while there is a growing legitimate market for online gaming in Korea, there is also significant non-licensed activity relating to online games. Overall, the Entertainment Software Association (ESA) estimates the value of pirate product in the market (valued at pirate retail prices) at \$248.4 million, based on an estimated piracy rate of 36%.¹⁶

The motion picture industry is also adversely affected by the proliferation of online piracy, especially as carried out through file sharing. In 2003, MPAA identified over 6000 Korean online sites engaged in audio-visual piracy, a 67% increase over 2002.

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 2003, with more

¹⁶ This piracy rate figure is a composite across multiple formats for entertainment software. The piracy rate for hand-held games alone is estimated at 80%. The decline in estimated losses, although composite piracy rates remain unchanged, is due to adjustments in estimates of market penetration of various platforms for entertainment software.

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

Under Korea's unusual bifurcated statutory system, both the Copyright Act of Korea (CAK) and the Computer Program Protection Act (CPPA) must be updated to meet the challenge of digital and Internet piracy. In 2003, Korea continued to modernize both statutes, but fell well short of what is needed, particularly with regard to the CAK. The most glaring omission was the failure to accord to the producers of sound recordings exclusive rights over the online dissemination of their recorded music.

As the world's leader in broadband penetration, and having 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 in music. It also remains in violation of its April 2002 pledge to the U.S. government to "submit legislation providing for the full right of transmission for sound recordings."¹⁷

On the eve of the out-of-cycle review announcement, MOCT asked for public comment on proposed legislation on the rights of performers and producers of sound recordings. The proposed legislation would clearly extend to producers the right to control the making available of their recordings through means such as posting copies on websites for downloading on demand. However, it does not address the numerous other methods by which sound recordings may be digitally disseminated to the public, methods which are already in widespread use by pirates in Korea who exploit the country's advanced broadband network. These other means, such as webcasting, streaming, and digital broadcasting must be brought within the scope of the producer's exclusive rights, and must be made available to all producers, regardless of nationality. Only when these legal tools are clearly and comprehensively established in law will it be possible for Korea to begin to convert its current pirate Internet music bazaar into a legitimate marketplace for electronic commerce in sound recordings. The proposed legislation will breed further uncertainty about the scope of exclusive rights; this uncertainty must be dispelled before the National Assembly acts on this legislation. Plugging this huge gap in Korea's legal framework for e-commerce must be a top priority in 2004.

The lack of comprehensive 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 actions in this area that worry U.S. record labels. It has designated as the collective management agency for the

¹⁷ See USTR Press Release 04-01, at <http://www.ustr.gov/releases/2004/01/04-01.pdf>. See also <http://www.ustr.gov/reports/2003/special301-wl.htm> - korea

licensing of online music services an association in which foreign producers do not currently participate (since the association currently handles remuneration from broadcasters, which U.S. producers are excluded from receiving under Korea's discriminatory laws). The nature and scope of this designation must be clarified, to rule out any possibility that it amounts to imposition of a compulsory license for use of recorded music on the Internet (which would violate international legal norms). This situation also increases the urgency of establishing by law the producer's exclusive right to control online dissemination of sound recordings, free of any requirement for compulsory licensing or collective management, and of stepping up enforcement efforts against Korea's pervasive online music piracy.

Although the sound recording issue was not addressed, the amendments to the CAK that were adopted in April 2003 (and that took effect in July 2003) included several important features. First, a new prohibition was imposed on the production of, or trafficking in, devices aimed at circumventing copy control technology used by rights owners. Second, a new Article 77-2 provides a 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 welcome steps toward a legal regime more conducive to enforcement against online and digital piracy. However, more needs to be done in both areas.

With regard to technological protection measures (TPMs), the 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 left many critical details to be resolved in an Enforcement Decree, which was issued just before the CAK amendments took effect on July 1. The Enforcement Decree's approach to the mechanics of "notice and takedown" may be too complex and formalistic to accommodate the reality of Korea's pervasive online piracy. In such an environment, a high-volume and highly automated system for sending and responding to notifications of infringement is essential. It remains to be seen whether, in practice, the Enforcement Decree is implemented in a way that accommodates the routine delivery of notifications by e-mail, for example, and how it will be applied to pirate sites offering copies of thousands or tens of thousands of works simultaneously. While the early indications are encouraging,¹⁸ IIPA urges that developments in this area be closely monitored in the year ahead.

IIPA was dismayed to learn how last year's CAK amendments handled the library exceptions contained in Art. 28 of the CAK, which had already been substantially (and in our view, unjustifiably) broadened in 2000. Although draft versions of the amendments would have

¹⁸ For instance, MPAA reported a 98% compliance rate with informal "takedown" notices it sent about Korean pirate sites in the first half of 2003. However, as noted above, the recording industry's experience has been much less positive.

closed some of the loopholes which were introduced by the 2000 amendments to Art. 28, the legislation as enacted actually re-opened some of these gaps, notably in Art. 28(3), which allows Korean libraries to digitize and to transmit to other libraries throughout the country, without permission, any material in their collections that was published more than five years ago and that is not otherwise “sold in digital format.” Some provisions of (and some gaps in) the Enforcement Decree compound this problem and make it more likely that amended Art. 28 will not pass muster under the applicable legal standards contained in the TRIPS Agreement.

For instance, the Enforcement Decree appears to expand the number of libraries in Korea that can take advantage of the exception. The Decree also fails to make the implementation of technological safeguards a meaningful pre-condition for exercise of the Art. 28 exception, and does not clarify what works are subject to the Art. 28(3) exception; how to apply the limitation that the material not be otherwise “sold in digital format”; or when the clock starts running on the requirement that the material have been published more than five years ago.¹⁹ While these shortcomings should all be fixed as quickly as possible, it remains highly questionable whether, even with these administrative corrections, Art. 28 in its current form could satisfy the TRIPS criteria for permissible exceptions to the exclusive rights of copyright owners. Many of the works most clearly targeted by Article 28(3)—including textbooks, English language instructional material, and scientific, technical and medical journals—are actively sold in the market far more than five years after first publication. Article 28(3) could cripple those markets. Korea should be urged to re-examine the expanded Article 28 exception as rapidly as possible, and to scale it back to conform to international standards.

Finally, the 2003 CAK amendments did not address other key shortcomings of the law. IIPA urges that further amendments be adopted, including but not limited to the following²⁰:

- 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. Korean law, which stands nearly alone in the world in its rejection of protection for temporary copies, must spell out that this right is encompassed within the copyright owner’s exclusive control over reproduction.
- In line with the recent international trend, 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

¹⁹ For example, because of translation delays, many U.S. texts are not even made available in Korea until well after they are first published. Depending on how it is administered, the “five-year rule” could sharply diminish or even eliminate the time window within which the publisher could hope to sell that title to the Korean library market, before Article 28 becomes applicable.

²⁰ In addition to the issues listed in the text, Korea should amend the CAK to clarify the availability of injunctive relief in copyright infringement cases; make *ex parte* relief available on an expeditious basis; provide fully compensatory and deterrent damages; and make the private copying exception inapplicable to digital copying. Continued inaction on these issues has troubling implications for TRIPS compliance.

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 by authors who 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 1954-56, and to other works from WTO member countries whose authors died in 1954-56. These steps should be taken without excessive transition periods, and without disturbing other, noncopyright laws and regulations that are used to combat piracy of this older subject matter.²¹

CPPA Amendments

On July 1, 2003, new amendments to the CPPA took effect. An Enforcement Decree with the same effective date implemented new CPPA provisions (Articles 34-2 and 34-3) on service provider liability for infringement of copyright in computer programs taking place over their networks. Like the corresponding provisions of the CAK Enforcement Decree, the CPPA implementing regulations raise questions about how the statutory “notice and takedown” regime will work in practice, and whether it can accommodate a high volume of notices and responses by e-mail. Developments in this area should be closely monitored during 2004.

While the drafters of the CPPA have been more proactive than their counterparts for the CAK in modernizing the law, some key issues presented by advancing digital network technology still have not been adequately addressed. For example, although the CPPA has included since 1999 some provisions on protection of technological protection measures (TPMs) used in connection with computer programs, these provisions 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.

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

²¹ 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.

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. Temporary copying must be included within the scope of the exclusive reproduction right in order 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");
- Pre-set 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 2004, 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

Recent years have seen 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 millions of dollars of losses in licensing revenues to U.S. audio-visual producers and the disruption of the legitimate Korean audio-visual market. During 2003, the Korean government acknowledged the seriousness of

the problem and put in place some stop-gap measures to ameliorate it, but failed to implement the changes necessary to bring this form of piracy back under control.

Fraudulent licensing of 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 English language 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. Rights owners victimized by this practice were told they would have to initiate costly and protracted litigation to seek redress.

Not surprisingly, this change led to a brazen resurgence of this form of audio-visual piracy in the Korean market. Numerous U.S. titles were submitted to the KMRB for classification by parties having no legitimate rights to distribute them in Korea, and the KMRB has classified them as requested, enabling the pirate product to enter the Korean retail market as if it were legitimate. 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. Repeat offenders are becoming more common in this area of piracy. One of the more recent examples involves a company (Star Media) that falsely registered one AFMA member title in 2002, a second in July 2003, a third in October 2003, and applied to register four more titles in December 2003.²²

After urgent consultations with the U.S. government beginning in 2002, the KMRB has instituted some interim reforms, such as making data on submissions of audio-visual titles available online in English 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

²² Other recidivists with multiple unfounded applications include Shine Pictures and Playstation Korea (no connection to Sony PlayStation®).

licenses. IIPA urges the U.S. government to continue to monitor the situation closely and to insist on the full and timely implementation of these interim measures.²³ More significantly, however, the Korean government acknowledged that the system needs to be fixed and committed to introducing legislation by mid-2003 to make the necessary changes. In order to bring this problem under control, the new system must 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.

Korea's failure to fulfill its commitments on reforming the KMRB system to crack down on audio-visual piracy was a major reason why the U.S. government decided, on January 8, 2004, to elevate Korea to the Priority Watch List. Just days before that announcement, Korea's National Assembly finally passed amendatory legislation; but, at best, this legislation provides only the framework upon which a system meeting the four criteria listed above can be constructed through implementing regulations, which are due to be issued by late April. IIPA urges the U.S. government to continue its unrelenting efforts to ensure that such a system is put in place as quickly as possible, both by seeking to clarify some ambiguities in the enacted legislation, and by pressing for implementing regulations that establish transparent and effective procedures to prevent further abuse of the classification system by pirates. Only in this fashion can the Korean government remedy a serious piracy problem that results from a clear and unjustified violation of its 1986 bilateral obligation to the U.S.

BOOK PIRACY: GOVERNMENT LEADERSHIP NEEDED TO PREVENT FURTHER MARKET DETERIORATION

The deteriorating piracy situation faced by U.S. book publishers over the past few years continued in 2003. Although it appears that major local publishers no longer engage in widespread piracy, illegal photocopying has seriously increased. The losses to U.S. publishers inflicted by book piracy in the Korean market in 2003 are estimated by the Association of American Publishers (AAP) to have increased to \$38 million.

The typical target of Korean book piracy today 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

²³ For example, it is critical that a legitimate distributor be able to obtain a rating, and thus enter the market, even if the same title has been previously rated on the application of someone falsely claiming to have rights.

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. reference books, encyclopedias, and scientific, technical and medical works appear in university bookshops in the Seoul area within a few months of their authorized publication, and are routinely sold door-to-door. 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 sporadic and 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. For example, in raids carried out in March 2003, pirate copy shops were found in active operation within the campuses of Korea University (Science and Engineering Campus); AJOU University in Suwon City; and Sung Kyun Kwan University, also in Suwon City. Other pirate copy shops were in operation in the vicinity of Seoul National University of Technology and the University of Seoul. Faculty as well as students patronize the copy shops, which copy teacher's guides as well as textbooks for students. Titles seized in the March 2003 raids included many that textbook publishers had already heavily discounted for the Korean market.

The universities named (and others where pirate photocopying is rampant) do nothing to stop or even to discourage these illegal activities; nor does the Ministry of Education. Indeed, university administrators show no interest at all in stopping on-campus infringements, and police are reluctant to enter due to fear of violent reactions from student demonstrators. 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.

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. For example, the Korea University raids of March 2003, in which multiple copies of more than one hundred different titles from at least seven different publishers were seized, resulted in fines totaling only KRW 10 million (US\$8600).²⁴ If any jail terms are imposed in book piracy cases, they are routinely suspended, and no effort is made to supervise the activities of convicted defendants. Convicted pirates need only transfer formal ownership of their enterprises to relatives or friends in order to evade Korea's system for identifying repeat offenders, thus avoiding the consequences of being treated as a recidivist.

²⁴ Even though not enough to provide deterrence, this is the largest fine levied for book piracy in Korea in recent years.

In February 2003, the Publication and Printing Business Promotion Act came into force. 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\$2600) for disobedience of such an order. The law also provides for the involvement of private sector entities in the enforcement process. The MOCT, however, appears to have simply passed the role of enforcement over to the KRTRC, a private entity. The KRTRC, in turn, only conducts occasional raids for titles from local publishers, and sometimes sends warning letters to University officials; it takes absolutely no action on behalf of foreign publishers. Because of its limited penalties, this law has relatively little potential to form part of an effective enforcement regime against book piracy, and even that small potential is not being realized.

In short, Korean authorities—including university officials, 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. Enforcement efforts must be stepped up, and deterrent penalties imposed, if further deterioration of the Korean book market is to be avoided. In addition, 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 proactively against book piracy.

Video Piracy: Sustained Enforcement, but Persistent Piracy

Despite active enforcement efforts, video piracy in Korea continues at unacceptable levels. Overall, annual losses to the U.S. motion picture industry due to piracy in South Korea during 2003 are estimated by the Motion Picture Association (MPA) to have increased to \$40 million, reflecting the growth and maturation of the DVD market in Korea. The video piracy rate is estimated at 20%.

Optical disc piracy has now clearly established itself as the dominant form of piracy of audio-visual materials in Korea, although videocassette piracy persists as well. To evade detection and minimize the impact of equipment seizures by law enforcement, pirate optical discs are increasingly produced in dispersed facilities where a few DVD-R burners are in operation, although at least one larger lab containing more than 50 DVD-R burners and 24 CD-R burners has been discovered. High-quality unauthorized copies of U.S. motion pictures appear on the market within days after the legitimate video release of the titles in Korea.

While some pirate product from these labs vies for retail shelf space with the legitimate product, pirate DVD-R's are increasingly distributed through less conventional channels. Of particular concern are mobile vendors, which sometimes advertise with fliers, and then make home deliveries. A troubling recent trend is the alarming growth of pirate sales through itinerant street vendors, who congregate in hot spots in Seoul such as the Yong Sang Electronics Market, and who are also found in other cities such as Pusan and Taegu. As more vendors appear on the streets, the price of pirate DVD-Rs is falling to as little as US\$4 per disc. Thus far, enforcement efforts have had little impact on street vendors, since authorities appear to view retail piracy as a low priority. A high-visibility nationwide crackdown, followed by continuous raiding, may be needed to deal with street vendors. Only a sustained effort will break the organized criminal rings that supply and run these vendor operations. Such tactics have proven effective in the past against VHS retail piracy.

In general, Korean authorities continue their aggressive enforcement of the laws against video piracy. Police and prosecutors react quickly to complaints from MPA. There is little delay in the judicial process and no appreciable backlog in the court system. However, while Korean courts often issue appropriate sentences for video piracy offenses, including imprisonment for recidivists, distributors, and manufacturers, many infringers are simply assessed administrative fines, which lacks the necessary deterrent effect.

The bottom line is that enforcement efforts in Korea have not 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.

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

For 38 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 has happened: Korean titles generate five times the box office sales, and claim twice the share of the market—approaching 50%—that they did in 1996.²⁵ 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.

²⁵ See Park, “Coming to a Theater Near You?,” *Wall Street Journal*, Oct. 31, 2003, at A10.

The time to begin sharply reducing the screen quota is now, so that U.S. motion picture producers will finally 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 categories of content 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 air time, with subquotas that effectively limit U.S. programming to 45% of all air time 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.

BUSINESS SOFTWARE ENFORCEMENT: PROGRESS NEEDS TO BE SUSTAINED AND TRANSPARENCY IMPROVED

The Business Software Alliance (BSA) estimates that most of the losses inflicted by piracy of business software applications in Korea 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.

Although Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years, 2003 was a year of significant forward steps. The enactment in mid-year of legislation to provide police powers to the Standing Inspection Team (SIT) of the Ministry of Information and Communications (MOIC) has provided Korean authorities with a new tool with potential to make the enforcement effort more consistent, sustained, and effective. More needs to be done, however, to realize that potential. In particular, the SIT should more consistently use its authority to include private sector experts in their inspection activities. It is also important that SIT maintain its current practice of conducting inspections without advance notice.

The SIT mechanism is only part of the enforcement picture, however. The efforts of police and prosecutors remain essential if Korea is to further reduce end-user software piracy. There was significant progress on this front as well in 2003, with a satisfactory volume of raids, many of them based on industry leads. We understand that a memorandum was issued by the Supreme Prosecutor's Office in June 2003 mandating greater responsiveness to and better communication with right holders (including about raids that do not result in prosecution); it is important that this directive be fully implemented to improve transparency. IIPA believes it is essential that the USTR continue to stress to the Korean government that sustained and comprehensive enforcement efforts against end-user software piracy are needed to reduce the rate of software piracy, and that it is essential to continue to act on leads from industry and to keep industry informed about enforcement activities.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Taiwan remain on the Priority Watch List with an out-of-cycle review at an appropriate point to review (a) Taiwan's adoption of legislation correcting the deficiencies in the copyright amendments adopted in July 2003 and (b) to assess whether its improved enforcement against OD factories, CD-R and DVD-R labs, wholesale distributors, retailers/night markets, copyshops and against growing Internet piracy has continued at a high level of success and become more institutionalized, with concomitant reductions in the high piracy rates in Taiwan.¹

Overview of key problems in Taiwan: Over the last 5 years, with the exception of piracy rates for business software, piracy rates have increased to the point of severely threatening the economic health of other local and international copyright-based businesses. This has been due to OD factory piracy spinning out of control, the ongoing presence of organized criminal elements involved in pirate production, and enforcement against piracy in the distribution chain not being effective and deterrent. Taiwan continues to be world's largest supplier of blank recordable media to pirate operations globally. However, with the adoption of new copyright amendments in July 2003 (which made piracy a public crime), the copyright industries have so far witnessed welcome improvements in the overall enforcement climate in Taiwan, though gaps and deficiencies persist throughout the system. As a result, pirates have moved their operations increasingly to CD-R and DVD-R burning and to the Internet and in turn Taiwan has been somewhat successful in moving its enforcement activities to match this shift, but much more needs to be done. Enforcement against OD factory piracy has improved significantly and so has enforcement against the wholesale and retail pirate trade through *ex officio* actions permitted under the new amendments. Enforcement against copyshops has improved significantly, but takes place only at the request of the copyright owner. Enforcement against end user piracy has also improved and piracy rates have declined by 10% from 2002 to 2003 and the government has taken laudable action against organized crime syndicates engaged in software counterfeiting. While the copyright amendments made many salutary changes in the level of protection and made possible more effective protection, the law must be further amended and deterrent enforcement, including against growing Internet infringements and on-campus photocopying, must be significantly strengthened for Taiwan to return the place it had achieved in the late '90s.

Actions to be taken by the Government of Taiwan: In order to lower the high piracy rates which still persist in most copyright industries, 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

¹ For more details on Taiwan's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

deal with Internet piracy and growing on-campus photocopying, the government needs to take the following actions immediately:

- Adopt the EY-approved amendments to the copyright law that the LY refused to adopt when the law was amended in 2003. This must include more effective and deterrent enforcement tools, including protection against circumvention of technological protection measures, clear liability for secondary infringements online and an effective notice and takedown system to fight all traditional, digital and Internet piracy. This must be done immediately after the election;
- Continue a sustained copyright enforcement campaign throughout 2004 against all pirates, particularly against the organized criminal syndicates that control piracy in the manufacturing, distribution, and retail sectors, and impose truly deterrent penalties;
- Bring effective enforcement against Internet piracy generally and make significant enforcement inroads against peer-to-peer piracy, beginning with closing the notorious P2P pirate services, Kuro and EzPeer;
- Make permanent the now temporary IPR Special Task Force;
- Increase enforcement against illegal photocopying on and around university campuses, including government-initiated actions;
- Continue the effective enforcement against corporate end user piracy of business software and against software counterfeiting by organized criminals;
- Amend the 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.

TAIWAN
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003²

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	42.0	44%	42.0	44%	35.0	30%	30.0	30%	20.0	20%
Records & Music	58.0	42%	98.6	47%	51.7	48%	60.5	44%	60.0	35%
Business Software Applications ³	NA	NA	91.2	43%	106.8	53%	123.9	53%	97.6	54%
Entertainment Software ⁴	261.8	42%	596.1	56%	119.4	70%	319.3	90%	115.7	68%
Books	20.0	NA	20.0	NA	20.0	NA	20.0	NA	21.0	NA
TOTALS	NA		847.9		332.9		553.7		314.3	

Copyright Enforcement in Taiwan

Despite enforcement improvements, Taiwan's market continues to be plagued by optical media piracy of all kinds, including growing CD-R and DVD-R "burning" in operations run by organized criminal syndicates, by wholesale and retail piracy, and by increasing Internet piracy.

In its 2003 submission, IIPA again noted that pirate optical disc production in Taiwan remained among the highest in Asia. Pressed by industry and the USG to take more effective action against this problem, Taiwan has to date done a much better job of inspecting suspected plants, closing down lines and reducing overall factory production of pirate product which now must be sustained. The enforcement authorities have also undertaken numerous *ex officio* raids, now permitted under the new copyright amendments, against wholesalers, retailers and night markets, making a significant dent in piracy in this sector. Unfortunately, IIPA members report that this has forced piracy underground and onto the Internet, with the result that piracy rates have as yet not begun to come down in all sectors. At the same time, enforcement against corporate end user piracy has been singularly effective, with the result that Taiwan had

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

the biggest drop in this piracy rate in all of Asia. Similarly, there appears to have been a drop in the piracy rate for PC entertainment software products as compared to prior years. Piracy of console entertainment software, however, remains very high as does piracy at Internet cafés, where the use of pirated entertainment software is prevalent.

In 2003 there were reportedly 61 (same as in 2002) known optical disc plants in Taiwan (not including underground plants) engaged in the manufacture of finished optical disc products, including CDs, CD-ROMs, VCDs, and DVDs. There are 12 dedicated DVD lines. Taiwan now has 310 production lines producing OD product containing copyrighted content with an estimated production capacity of 1.085 billion units (990.5 million in 2002). IIPA members report a decrease in the production of pirate product in the factories, due principally to more aggressive enforcement by JODE (the Joint Optical Disc Enforcement Taskforce), including increased night raids (reportedly up from 33 in 2002 to 385 in 2003—a significant and welcome gain), increased seizures of lines and continued arrests and seizures of pirate product. While these gains are significant and IIPA hopes this positive trend continues, more needs to be done. In addition, Taiwan continues to be the world's largest supplier of blank OD media product to pirate syndicates worldwide. There is anecdotal evidence that organized crime operators and factory owners intentionally sell blank CD-Rs/DVD-Rs to known and affiliated criminal organizations in Latin America and other regions throughout the world. IIPA and its members have regularly asked Taiwan authorities to use its investigative machinery to wiretap suspects and bring conspiracy or similar actions against those knowingly selling to pirates.

Pressure on the factories producing pirate disks has led to a major growth in CD-R “burning,” much of it carefully organized and managed from the production through ultimate sale cycle. MPA reports that 98% of the seizures in 2003 of pirate OD product was of “burned” CD-Rs. This “burned” pirate product, including movies, compilations of music (including MP3 audio files), computer programs, console-based entertainment software, etc., continue to flood the domestic markets in Taiwan. We continue to receive reports of some pirate CD-Rs emanating from licensed factories as well.

As a result of the production and sale of pirate OD product in Taiwan, sales of legitimate U.S. and local audio and video product have decreased substantially over the last 5 years, which has threatened the viability of Taiwan as a vibrant market. RIAA/IFPI reports that sales have dropped off 18% in the first 9 months of 2003 (and fell 13.4% in the first 6 months of 2002) with revenues dropping from \$306 million in 1999, to US\$170 million in 2001 and to US\$81.5 million in the first 9 months of 2003. As of 2002, Taiwan had dropped from the second largest music market in Asia in 1999 to the fourth largest today, after Japan, South Korea and India.⁵ Taiwan's status as the creative center of Chinese music has been threatened; it has been the source of 80% of Mandarin music worldwide. 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 the availability of pirate PC product has declined in the past several years, pirate console and cartridge-based entertainment software products continue to dominate the market. Much of the console product is made in factories in locations such as Malaysia, but controlled by syndicates with operations in Taiwan and easily imported into the country. Some production also appears to be taking place in Taiwan. Pirated console product is sold in regular retail shops, where it is made available to a customer who inquires after “cheaper” products. Catalogues are then furnished and the product is either pulled from a back room, under the table, or burned to order and

⁵ 2003 data are not yet available.

delivered shortly thereafter. China continues to be the primary source of pirate videogame cartridges coming into the Taiwan market.

Because the July amendments to the copyright law permitted *ex officio* actions against retailers and street vendors, particularly in night markets,⁶ it has become more difficult for the syndicates and these vendors to successfully ply their illegal trade. IIPA reported in last year's submission that in 2002 various techniques were used to avoid being raided and prosecuted, including using the "Conscience Vending Box" tactic (used by 90% of night markets in that year). Fortunately, increased pressure through these *ex officio* raids has made it more difficult to sell product in this way and sale is now more "to order" and over the Internet. The use of juveniles continues. Mail order and Internet advertising of hard goods for sale has now taken over in the pirate video and audio marketplace. 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.⁷ 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. While these techniques have continued in 2003, increasingly the Internet, where enforcement remains difficult, has been used for the sale of pirate product, as hard goods, or through downloading and streaming.

Hard goods piracy over the Internet affects particularly the video, music, entertainment software and business software sectors, and has become far more prevalent and serious in 2003. The absence of clear secondary liability of Internet service providers has severely hampered enforcement in this area as well as Internet downloading, primarily of music but other products as well. MPA has found that in the last quarter of 2003 there has been a significant move to the Internet as a means of distributing pirate product: Advertising inserts in newspapers have decreased, the number of mobile phone disconnections has dropped precipitously (used by couriers of pirate product) and the number of pirate sites detected has increased from 3 in August 2003 to 18 in November 2003.

But perhaps even more dangerous is the explosive growth of Internet downloading, and particularly peer-to-peer file sharing by Taiwan operations such as Kuro and EzPeer. Both these services charge their customers—Kuro charges a monthly fee of NT\$99 and EzPeer NT\$100 (about US\$3). In December 2003, in a much-praised development, both were indicted for copyright infringement. Unfortunately, two events transpired which are causing grave concern. First, while both these P2P software and download services were indicted, they continue to operate openly, to advertise publicly and to continue to generate huge profits from their illegal conduct. Secondly in an action that defies explanation, the Industrial Development Bureau of the MOEA awarded Kuro its "Digital Content Creative Software Award of 2003" even though, reportedly, the IDB actually knew that Kuro was about to be indicted. The recording industry and the U.S. government protested this inexplicable action vigorously. RIAA/IFPI

⁶ There remains a legal question whether the *ex officio* authority under the new amendments can be used where a sale is not witnessed. The Taiwan Intellectual Property Office issued "interpretations" that it could and reportedly one court has upheld this interpretation. This remains an issue, however, and should be resolved finally by adopting the EY-approved amendments as urged in this submission and by the U.S. government.

⁷ Last year, 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. On February 14, 2003, the police arrested the owner of a courier company. On December 9, 2003, he was sentenced to one year's imprisonment with a probation period of five years.

reports⁸ that together Kuro and EzPeer generated estimated income of close to NT\$1 billion (US\$30 million) in 2003, 90% of which is generated by these monthly charges permitting unlimited downloads of illicit MP3 music files. Kuro reports that its users have increased from 50,000 in 2001 to 500,000; EzPeer now has 300,000 users. Total users of both these services increased even after they were indicted. The local legitimate market in Taiwan in 2002 was only NT\$4.9 billion (US\$148 million) (down precipitously from NT\$12 billion (US\$362 million in 1997, when piracy rates were under 15%): These two illegal services alone earn 20% of the income earned by the entire legitimate music industry in Taiwan. Because a large percentage of this downloading activity occurs at universities, in addition to aggressive criminal enforcement, it is critical for the Ministry of Education to respond quickly with policies preventing their servers from being used for illegal activities.

In addition, there are a number of sites that continue to deal in infringing files that have been traced to the servers of Taiwan educational institutions or government agencies. Another version of this phenomenon occurs at “cyber-café,” of which there are 3,000 throughout Taiwan. Entertainment software is particularly hard hit at these cyber-café. Some ESA member companies suspect that a large number is operated by criminal syndicates and obtain their pirate product from local optical disc factories or burning operations.

Piracy of business software by corporate end users continues as a serious problem, but the piracy rate has dropped significantly in 2003 due to improved enforcement. Taiwan continues to be a hub for software counterfeiting.

In June 2003, BSA reported that the piracy rate for business software showed the second largest drop in Asia, from 53% to 43%. While this drop is due to the effectiveness of enforcement by the Taiwan authorities and to a government-backed, high profile public education campaign, the use of unlicensed software in companies remains unrelenting. BSA remains pleased with the cooperation it is getting with Taiwan enforcement authorities and that the prosecutors have successfully convicted corporate end use infringers. BSA has also praised the government for its reward program and for the significant number of seminars (15) held to train police, prosecutors and the judiciary in 2003. BSA continued its own enforcement and educational activities in 2003 to promote the legal use of software.

The counterfeiting of software, controlled to a large extent by Taiwan-based syndicates involved on a worldwide basis, remains a serious problem. Two key actions were taken against major Taiwan counterfeiters in 2003, which are discussed in more detail in the enforcement sections below. Dismantling these sophisticated criminal syndicates must be a key objective of the Taiwan government in 2004 and will require the long-term investment of enforcement resources to halt it permanently.

Illegal photocopying of textbooks continues as a major problem.

Illegal photocopying of entire books and journals, primarily academic textbooks and journals, English language materials and professional reference books, is the biggest piracy problem facing the publishing industry in Taiwan. This type of piracy, occurring primarily on and around

⁸ Interview with IFPI Taiwan’s Secretary General, Robin Lee, *Taipei Times*, October 27, 2003, p. 11; <http://www.taipeitimes.com/News/biz/archives/2003/10/27/2003073603>.

university campuses, is decimating the market for legitimate publishers. Profit-based photocopy shops, located on the perimeters of all major college campuses actively carry out photocopying and binding services both for students and teachers. While the authorities have been extremely helpful in running raids against these commercial photocopy shops at copyright owners' requests, self-initiated action by the government remains rare. In addition, government authorities have shown strong reluctance to enter the campuses to raid university bookstores where such illegal conduct is now rampant.

Commercial photocopying affects both local and foreign publishers. The local and foreign publishing industry, represented by the Taiwan Book Publishers Association, has been particularly concerned about the government's unwillingness to deal with on-campus infringements. The Ministry of Education should adopt policies prohibiting this kind of illegal conduct, backed with internal sanctions for violations. Furthermore, the government must create the political will not to permit this blatant illegality going on at its educational institutions by being willing to run raids and commence prosecutions.

In both on-campus and off-campus scenarios, the government must be willing to adapt to the nature of the infringers' business. While the government often relies on large stockpiles of infringing product to guarantee effective prosecution, this approach does not reflect the realities faced by publishers. Infringers of books and journals rarely keep large amounts of infringing stock. In fact, publishers are seeing pirates shift to "made to order" business models, in which infringers wait for an order before making infringing product. The orders are then distributed as soon as they are completed, often away from storefronts by means of delivery vans or cars on campus. Thus, it is extremely important for government authorities to maintain vigilance in tracking these increasingly secretive and underground operations, to make sure enforcement actions keep up with the ever-evolving nature of pirate operations.

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. In addition, the evidentiary burden imposed on publishers in proving copyright ownership remains onerous. For instance, recent raids have resulted in court cases involving over 500 different titles, from various publishing companies and bearing a number of different imprints. Finally, it is important that penalties serve to deter would-be infringers, and that cases be brought to a timely conclusion. U.S. publishers currently have 33 cases pending in the courts as a result of actions commenced in 2002 and 2003, and the government should take immediate action to bring these cases to completion in an expeditious manner.

Finally, public and business misunderstanding of the limits of fair use and other exemptions in the copyright law have continued through 2003 and 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, publishers report that pharmaceutical companies are increasingly photocopying medical textbooks and clinical reference works for client doctors, without appropriate permission. IIPA and AAP again 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.

Piracy of cartridge-based entertainment software

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 several years, Nintendo has been investigating and pursuing a major Taiwanese counterfeiter who has been involved in the manufacture of over 35 million counterfeit semiconductor chips—components which usually find their way to factories in China where the assembly of counterfeit cartridge-based entertainment software takes place. Through Nintendo's joint efforts with Taiwanese law enforcement authorities, this notorious counterfeiter has been indicted on copyright and trademark violations. If convicted, the defendant could face up to six years in prison. The company continues to work closely with the prosecutor to further support the government's prosecution.

COPYRIGHT ENFORCEMENT IN TAIWAN

Taiwan must significantly increase the number of actions, prosecutions and convictions for OD pirate production, distribution and sale (including burning activities) and for commercial photocopy operations.

Taiwan must fully use the tools provided by the 2001 Optical Media Management Statute to continue to raid, particularly at night, optical disc factories, both licensed and unlicensed. While this law remains deficient in many respects, in comparison to the laws on the books in other jurisdictions, the government has promised to use it effectively. 2003 saw some improvements in factory raiding, and convictions were obtained, some with welcome deterrent sentences. But many cases remain pending and these must be concluded if the syndicates are to full respond to the message (by legalizing their business or getting out of the business) that piracy will be punished severely.

The Digi-Gold convictions at the beginning of 2003 were a first step in the right direction. MPA reports that 11 of its factory cases (down slightly from 12 at the beginning of 2003) remain pending in the courts, and five of these from 2000-2001 have either not been filed nor had a first instance decision. In 2003, MPA conducted 13 factory raids with 4 reported as "successful," including the sealing of lines. Four unlicensed plants were closed down; 1,719 stampers were seized along with 300,849 pirate discs; eight VCD production lines and 11 printing/packaging machines were sealed. JODE reported 1,088 inspections through December 2003, with 385 of these at night, a welcome tenfold increase over 2002. IIPA reported few seizures of replicating equipment in 2002 but the addition of three new warehouses in 2003 resulted in a reported seizure of 11 lines through December. MPA recently reported on a joint raid with JODE on a factory "Lead Data" in which 2 DVD lines were sealed, 2 persons arrested, and 152 stampers seized.

RIAA/IFPI reports that it was involved in 16 raids against factories and large CD-R labs in 2003 and received a total of 671 convictions (including guilty pleas) involving pirate music product. MPA reports 3 factory convictions in 2003.⁹ MPA reports 11 factory cases still pending

⁹ The three were underground plants located in Tainan, Chung-Ho and Chang-Hua.

following the recent Digi-Gold conviction. While not yet satisfactory, the record is certainly improving. This must continue in 2004.

The recording industry ran a total of 485 raids against night markets, street vendors, mail order centers, distribution centers, retail shops and OD factories and CD burning labs in 2003; 464 raids were against retail piracy and 21 against such factories and labs. In 2003, as in 2002, and as noted above, the number of juvenile offenders far exceeded the number of adult offenders, continuing a very disturbing trend: Out of the 485 cases brought by the recording industry in 2003, 159 involved juveniles and only 326 involved adults. Because juveniles are below the statutory age for criminal responsibility, judges cannot impose criminal penalties on them.

MPA conducted 655 raids (vs. 698 raids in 2002), and initiated 607 cases, 485 of which were street vendor cases, 31 were retail shops cases, 27 against distributors, 4 against factories, 27 against CD-R labs and 31 Internet cases. The authorities seized 40 stampers, 3,431 VCDs, 766 DVDs, 95 DVD-R and 232,817 CD-R pirate copies.

AAP and the Taiwan Book Publishers Association initiated two large raids against hundreds of commercial photocopy shops in 2003. These raids resulted in 36 cases against copyshop owners (of which 15 are still pending) and the seizure of 597 different titles, sometimes with multiple copies of each title.

Criminal and civil enforcement against corporate end-user software piracy has succeeded in reducing the piracy rate for 2003 but more needs to be done. Enforcement against software counterfeiting is improving but must be strengthened and accompanied by deterrent penalties.

The Taiwan authorities continued their successful campaign against enterprise end user software piracy in 2003. The many criminal raids made in 2003, combined with a few convictions with fines resulted in sufficient deterrence to cause the significant reduction in the piracy rate noted in the discussion above. All in all, 10 convictions were rung up in 2003 for software piracy, for of which four were for enterprise end user piracy. Fines were meted out of from NT\$80,000-100,000 and the salutary results in the end user cases went a long way to convincing businesses to legalize their software use. Though jail sentences of 7-9 months were imposed, unfortunately, in no case were any jail terms actually served.

The software industry also reported a number of successful actions by the Taiwan enforcement officials against Taiwan-based criminal syndicates involved in global production and distribution of high-quality counterfeit software. A series of raids were conducted by the Criminal Investigation Bureau of the national police and targeted a criminal organization comprising Arex E & J Technology/ATX International and affiliated individuals and companies (E & J) and by the Investigation Bureau, Ministry of Justice against Maximus Technology and related individuals and companies (Maximus). Information obtained indicates that both the E & J and Maximus organizations were responsible for the production and global distribution of high-quality counterfeit software valued in the millions of dollars. Given the scope of the activities of these criminal organizations, these actions will hopefully have a major impact on global software counterfeiting. It is vital, however, that these actions be followed by effective prosecutions and deterrent criminal penalties. While the industry is pleased by this step in Taiwan's larger effort

to enhance protection for IPR, it will require the sustained investment of enforcement resources in addition to deterrent penalties.

BSA and business software companies also filed civil actions against pirates in 2003, many in connection with accompanying criminal actions. BSA reports that damages totaling \$648,000 were assessed in all the actions concluded in 2003. Statistics for civil cases in 2003 appear below.

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	0	9 ¹⁰
Post Search Action	0	20 ¹¹
Cases Pending	0	10
Cases Dropped	0	0
Cases Settled or Adjudicated	0	10
Value of loss as determined by rightholder (\$USD)	0	2,956,631 ¹²
Judgment Amount (\$USD)	0	648,000 ¹³

Taiwan must significantly increase enforcement against Internet piracy, which is growing to be a significant percentage of the pirate market in Taiwan.

As reported in the 2002 and 2003 submissions, the Taiwan enforcement authorities began taking action against Internet piracy in 2001. Since that time, Internet piracy has grown precipitously. That effort has continued in 2003. The motion picture industry conducted 36 raids in 2003 vs. 31 raids in 2002 against pirates distributing infringing works via the Internet, resulting in the seizure of 107 pirate DVDs, 4,597 pirated CD-Rs, 57 CDR-burners, 6 DVD-R burners, 23 computers, and the arrest of 34 pirates in 2003. Prosecutions resulted in 7 convictions in 2003 vs. 16 convictions in 2002. MPA also reports an increase in Internet takedown actions by eBay and Yahoo on source piracy posting—up to 18,059 in December 2003 compared with none in 2002.

The Kuro and EzPeer cases are now at the center of the recording industry's enforcement efforts. Last year we reported no prosecutions for Internet piracy of music through February 2003. In 2003, the recording industry issued a total of 149 warning letters that were sent to infringing FTP sites and websites, as well as 25 letters to related ISPs. As a result, 176 sites were closed down compared to 63 sites in 2002.

BSA reports assisting the Taipei police in obtaining a search warrant in April 2003 against a website (<http://arts888.tripod.com>) selling illegal software. One computer, website advertisement and more than 400 illegal CD-Rs, containing BSA members' software. Many more actions such as this one will be needed to deal with this growing problem.

Other industries report more trouble getting the cooperation of Internet service providers in taking down infringing sites.¹⁴ For example, BSA sent 2,154 cease-and-desist letters to ISPs in 2003 but achieved only some success in getting takedowns.

¹⁰ Represents the number of civil complaints filed during 2003.

¹¹ Represents the number of post actions in 2003 regardless of when such cases were commenced.

¹² Represents the figure of the total losses (not actual losses) as stated in the civil complaints filed in 2003.

¹³ Represents the total amount for which judgments were rendered in the year 2003, regardless of when the cases were commenced.

Effective criminal enforcement continues to be 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;¹⁵ continued challenges to powers of attorney (POAs) of U.S. right holders in court cases (though this situation has improved for some industries) and in raids;¹⁶ raiding authorities' failure to seize all pirate product and tools and implements used in piracy;¹⁷ and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids. And last and most important, 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.

¹⁴ 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.

¹⁵ 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.

¹⁶ 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 rightholder 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.

¹⁷ 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.

TAIWAN CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	BOOK PUBLISHING	TOTALS
Number of raids conducted	655	4	485	2	1,146
Number of VCDs seized	3,431		632	N/A	4,063
Number of DVDs seized	766		39	N/A	805
Number of CDs and CD-Rs seized	232,817		697,095	N/A	929,912
Number of book titles seized				597	597
Number of investigations	1,222		NA	N/A	1,222
Number of VCD/CD lab/factory raids	13		16	N/A	29
Number of cases commenced	607	7	359	36	1,009
Number of Indictments	469		255	27	751
Number of defendants convicted (including guilty pleas)	435	10	671	37	1,153
Acquittals and dismissals	3		15		18
Number of cases Pending	253	26	126	15	420
Number of factory (and CD-R lab) cases pending	11		8	N/A	19
Total number of cases resulting in jail time	132	5	226	20	383
Suspended prison terms	69	5	74	19	167
Maximum 6 months	0	0	35	0	35
Over 6 months	0	5	5	0	10
Over 1 year	69	0	34	19	122
Total suspended prison terms	2424mths	39 months	915 months		3378 months
Prison terms served (not suspended)	201	0	152	1	354
Maximum 6 months	108	0	89	1	198
Over 6 months	18	0	13	0	31
Over 1 year	75	0	15	0	90
Total prison terms served (not suspended)	455mths		1431	0	1886 months
Number of cases resulting in criminal fines	10	5	18	0	33
Up to \$1,000	0	1	2	N/A	3
\$1,000 to \$5,000	8	4	14	N/A	26
Over \$5,000	2	0	2	N/A	4
Total amount of fines levied (in US\$)	US\$37,056	US\$12,286	US\$66,285	N/A	US\$115,627

THE COPYRIGHT LAW MUST BE IMMEDIATELY AMENDED, FOLLOWED BY AMENDMENTS TO THE OPTICAL MEDIA LAW

The deficient copyright amendments adopted by the Legislative Yuan in July must be rectified by immediate adoption of the original amendments proposed by the Executive Yuan.

Taiwan's effort to modernize its copyright law began in 2001 and was the subject of many bilateral consultations between the U.S. and Taiwan governments and much exchange of correspondence between IIPA and its members (and the U.S. government) and the Taiwan government. On March 26, 2003, these discussions essentially came to an end when the Executive Yuan agreed on a set of amendments which came close to adopting most (though not all) of the recommendations of IIPA and the U.S. Government. On June 6, 2003, the Legislative Yuan, at the last minute and with little notice, adopted a different set of amendments that failed to adopt some of the key recommendations of its own government. These amendments became effective in July 2003. From that day the U.S. government and IIPA and its members

have been clear that Taiwan must further amend its law to reflect, at the very least, the EY approved amendments. Efforts were made by various legislators to do this but the election season has so far stood in the way of securing these corrective amendments. IIPA and its members' position is clear: The EY approved amendments must be adopted as soon as possible after the election in March 2004.

While the LY amendments contain many of the improvements made by the EY, such as making many serious infringements a “public” crime without the need for a formal complaint to the authorities and adopting some, but not all, of the critical amendments necessary to ready Taiwan for the Internet (provisions contained in the two WIPO “Internet” treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), the amendments remain seriously deficient in a number of key respects. These include:

- The LY amendments divided criminal offenses into those “for profit” and those not for profit creating a number of serious difficulties. Among these is the creation of an ambiguous “threshold” of 5 copies/NT\$30,000 (US\$904) before “not for profit” offenses are not criminalized. This creates difficulties for enforcement of Internet offenses, photocopying and other areas. TIPO has since issued formal interpretations of the law stating that photocopying by copyshops, even at the instance of students, is a for-profit crime;¹⁸
- A provision prohibiting circumvention of technological protection measures, per the WIPO treaties, was deleted. These provisions must be restored for Taiwan to provide adequate protection for e-commerce and content on the Internet;
- Minimum penalties were deleted, thereby significantly reducing deterrence. These must be restored and the prosecutors must issue guidelines preventing “buy-outs” of six-month jail sentences in cases of more than *de minimis* acts of piracy. Maximum penalties were also reduced in certain cases, and, most critical, the LY changed the wording of the EY amendments ensuring that virtually no jail term would be mandatory—again severely reducing the deterrence so important to reducing the escalating piracy rates in Taiwan;
- The LY amendment left ambiguous whether the authorities could treat acts by street vendors and others as public crimes even where the infringer was not caught in the act of selling pirate product. This was initially viewed as one of the most serious deficiencies in the amendments. Fortunately, TIPO issued an interpretation denying this narrow reading, the authorities have followed this line and conducted *ex officio* raids in all cases, and it has been reported to IIPA that this reading has been upheld by a lower court in Kiaoshung District;
- The LY dropped the amendment giving Customs formal *ex officio* authority. While the Customs and TIPO have argued that Customs has been exercising such authority, the amendment clarifying this important enforcement tool should still be made;
- Parallel importing was decriminalized, again reducing deterrence and harming the local distribution of authorized product;
- The LY made a further change in the retroactivity provisions—already TRIPS incompatible, exempting the rental of copies of works which will come under

¹⁸ However, recent cases suggest that judges may interpret the new amendments differently, and it is critical that the EY approved amendments be adopted.

copyright protection. This further exacerbates the TRIPS violations and must be eliminated in returning to the EY version.

Making these further changes to the copyright law is critical for IIPA and its members. We have stated unequivocally that the copyright industries would oppose any commencement of TIFA or FTA discussions with Taiwan until, at least, the EY amendments were adopted.

Taiwan must also immediately begin consideration of further amendments that would clearly establish secondary liability of service providers and other intermediaries in the Internet, as well as other environments. An amendment providing for an exemption from any such liability was fortunately deleted from an earlier version of the EY proposed amendments. Taiwan's law is now unclear on this topic. Given the increasing threat of Internet piracy in Taiwan, clear liability plus a quick and efficient notice and takedown system, backed by the potential of clear liability for failing to takedown infringing material is a necessity in the Internet world.

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). 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 "pre-recorded 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. Failure to obtain a permit, the unauthorized manufacture of "pre-recorded 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 pre-recorded 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 "pre-recorded" 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),¹⁹ 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:

¹⁹ For example, even after a third offense, 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 offense 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.

- **“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 “pre-recorded optical discs” to merely apply for a permit within six months of the promulgation date (Art. 26) (and requires producers of such discs as well as stampers/masters who have been separately allocated identification code “by an agency other than” MOEA to report such to MOEA (Art. 27)). 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 offenses 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, have 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

THAILAND

EXECUTIVE SUMMARY

Special 301 Recommendation: Thailand should be elevated to the Priority Watch List.

Overview of Key Achievements/Problems: 2003 was an eventful year in Thailand, culminating with the announcement in October by USTR that the U.S. would enter into negotiations with Thailand to conclude a Free Trade Agreement (the USTR subsequently formally notified Congress of its intent to enter into negotiations with Thailand on February 12, 2004). IIPA has urged that those negotiations should not commence until the Thai recognize the severity of the optical disc piracy problem and take substantial steps toward addressing it, starting with adopting an effective regulation on optical disc production. While an OD Bill passed its first reading in Parliament in September, the proposed Bill fails to meet the basic requirements of an effective optical disc law. Meanwhile, throughout 2003, optical disc pirate production remained rampant in the country. While the Thai government undertook several months of stepped-up enforcement efforts that resulted in some impressive progress toward cleaning up key pirate retail markets prior to the APEC Ministerial in October, since then, enforcement efforts have dropped off and the pirates have returned.

Actions to be taken in the first quarter of 2004

- Take swift action against several pirate optical disc factories, confiscate pirate materials and equipment used, and arrest owners/managers of pirate operations (and investigate organized crime); follow the pledge by APEC Leaders to take concrete steps to “stop optical disk piracy.”
- Clean up street markets and malls and keep them clean, with raids and seizures followed by arrests and prosecutions, and where warranted, shop closures. Upstream suppliers should also be targeted and strict border enforcement undertaken to intercept the flow of pirate products into, out of, and transshipped through Thailand (e.g., from Cambodia).
- Pass an effective optical disc law and implementing regulations that make changes to the 2002 Bill needed to make it effective. The law should comport with the set of “effective practices” for optical disc regulations that were endorsed by Thailand’s Ministers at the APEC Ministerial.

Assuming that negotiations do commence with Thailand toward conclusion of a Free Trade Agreement in 2004, the IPR chapter of that Agreement must: (a) be TRIPS-plus; (b) include in specific terms obligations which would meet the requirements of implementing the WIPO “Internet” treaties, the WCT and WPPT; (c) include modern and effective enforcement provisions, including those to respond to the threats of digital and Internet piracy (as well as traditional forms of piracy, including book piracy);¹ and (d) contain specific commitments with

¹ For example, for book publishers, a regulation or order is needed to stop the wholesale copying of printed materials for educational purposes and to clarify the nature of fair use as to educational materials; then commercial copyshops

regard to combating optical disc piracy through regulations on production and strict enforcement. A Free Trade Agreement with Thailand could be an effective tool for promoting greater foreign direct investment in Thailand from the copyright industries,² but if rampant piracy is not addressed first, such benefits cannot possibly accrue to Thailand's economy.

For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing,³ as well as the previous years' country reports.⁴

THAILAND
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003⁵

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	28.0	60%	26.0	70%	24.0	65%	24.0	60%	21.0	55%
Records & Music	26.8	41%	30.0	42%	16.6	45%	15.6	45%	6.0	40%
Business Software⁶	NA	NA	57.3	77%	32.6	77%	42.7	79%	66.5	81%
Entertainment Software⁷	NA	82%	47.3	86%	29.1	93%	130.5	98%	116.3	95%
Books	28.0	NA	28.0	NA	28.0	NA	33.0	NA	33.0	NA
TOTALS⁸	NA		188.6		130.3		245.8		242.8	

COPYRIGHT PIRACY IN AND FROM THAILAND

Optical Disc Piracy Remains Major Problem in Thailand

The most serious problem the U.S. copyright industries face in Thailand remains piratical optical disc piracy (audio compact disc, video compact disc (VCD), Digital Versatile Disc (DVD),

must cease wholesale copying of published materials.

² For example, motion picture companies based overseas currently maintain local offices and employ local staff to market and distribute filmed entertainment. These offices use Thai film laboratories for replication of theatrical prints, Thai production facilities for manufacture of videocassettes and VCDs, and local advertising agencies that spend billions of Thai Baht to promote films. In addition, increasingly, movies are being filmed partially or entirely in Thailand, with location production revenues from foreign studios alone providing the government with more than one billion baht (approximately US\$25.7 million) annually. See Bamrung Amnatcharoenrit, *Foreign Movie Makers Set to Increase Spending*, Bangkok Post, January 8, 2003. The director of the Thai Film Board, Sidichai Jayant, expects revenues from foreign film shoots in Thailand to top five billion baht (approximately US\$128.4 million) by 2006. Nine hundred foreign film units used Thailand as a location in 2001 and 2002.

³ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

⁴ <http://www.iipa.com/countryreports.html>.

⁵ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁶ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁷ ESA reports that the increase in the value of pirated videogame products in Thailand in 2002 (which is carried over into 2003) is primarily due to methodological refinements which allowed it to more comprehensively evaluate the levels of piracy in the personal computer (PC) market.

⁸ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Thailand in 2002 were \$160.0 million. IIPA's revised figures are reflected above.

and CD-ROMs, as well as DVD-Rs). Product manufactured in or imported into Thailand of copyrighted materials, including entertainment software and videogame products, audiovisual works, recorded music, and literary materials, continues to harm the local markets. Notwithstanding several raids on pirate optical disc factories in 2002 and 2003,⁹ Thailand continues to experience a rise in production capacity for optical discs. There are currently 39 registered optical disc plants in Thailand, with another two-line facility having come on line in early February. Currently there are a total of 126 replication lines (116 operational) with a potential annual capacity of 441 million discs,¹⁰ while legitimate domestic demand, excluding CD-R, is estimated to be at least 60 million discs.¹¹ Many of these plants operate in or near Bangkok, while others operate in more remote areas, particularly near the frontiers with Laos, Cambodia, and Burma which is an increasing concern. The plants can produce any format, including audio CD, VCD, or DVD, by employing kits to change formats (even from a blank CD-R or DVD-R line).¹² Disturbingly, optical disc pirates in Thailand now regularly engage in “disc gouging,” namely, scratching off or tampering with codes which must be present on optical discs to identify the source of production of a disc (disc gouging must be prohibited under the Thai OD law). CD-R “burning” of entertainment software also remains a serious problem.

Domestic hotspots for piracy¹³ were subject to a government crackdown on piratical activities beginning on May 1, 2003, and lasting through the APEC Ministerial in Bangkok in October. This crackdown largely succeeded in eradicating the most blatant and open retail piracy. Unfortunately, once the APEC leaders filed out of the city, the pirates were permitted to return, and the stalls are once again replete with pirated product.¹⁴ Exports of pirate optical discs from Thailand remain a concern for the copyright industries.¹⁵ Pirated optical discs have shown up all over the world, including in Italy, Germany, Sweden, South Africa, the United Kingdom (where Thailand-sourced optical discs ranked 5th in the world in numbers in 2003), Belgium, and the United States. IIPA notes, as Thai government officials have acknowledged, the involvement of organized criminal syndicates relocating to Thailand following crackdowns in other regional jurisdictions. Foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China, and Malaysia.¹⁶

⁹ For example, the motion picture industry reports that from 2002 to July 2003, it was involved in raids on a total of four DVD factories and five VCD factories; since 1997, the industry reports a total of 58 pirate factory raids.

¹⁰ The production capacity is derived by multiplying the number of lines by 3.5 million; this is by all accounts a conservative estimate.

¹¹ Legitimate domestic demand for audio only is at least 19 million discs. One reason demand may be up in 2003 is the decreased cost of VCD and DVD machines.

¹² The Motion Picture Association has compiled the following chart regarding number of production facilities in Thailand, which also breaks down the list by factories and lines capable of producing DVDs:

Number of Production Plants and Audiovisual Rental and Retail Shops in Thailand							
	1997	1998	1999	2000	2001	2002	2003
DVD Factories	NA	NA	0	1	9	13	8
DVD Lines	NA	NA	0	1	14	16	11
Total Factories	NA	NA	20	43	46	51	38
Total Lines	NA	NA	36	56	78	102	124
Rental and Retail shops	2300	2200	2100	1900	1708 (est.)	1586 (est.)	1350 (est.)

¹³ Domestic piracy locales include Bangkok, Chiang Mai, Phuket, and Pattaya, in markets such as the notorious Pantip Plaza, Fortune Town, Tawana Plaza, Mahboonkrang, Seacon Square, Zeer Rangsit, Patpong Road, Sukhumvit Road, Klongtom, Banmore, Nondhaburi Pier, Bangkok, World Trade Centre, Pata Tiklao, and IT Zeer.

¹⁴ For example, pirated entertainment software is everywhere, including console-based entertainment software mostly imported from Malaysia, Cambodia, or domestically produced.

¹⁵ Customs statistics from the European Union indicate that in 2003, Thailand ranked second behind Malaysia in the world for seizures of pirated “CD (audio, games, software) DVD, cassettes,” with 22% of the 24.6 million pirated products seized, or 5.4 million discs, being seized. More discs were seized from Thailand than from China, Taiwan, or Pakistan.

¹⁶ There appears to be increasing involvement of organized crime in piracy in Thailand. On September 6, 2003, the

Cartridge-Based Entertainment Software Piracy

Cartridge-based entertainment software is also being heavily pirated in Thailand. In the last year, the country has seen a dramatic increase in the number of infringing cartridge-based video game products either being manufactured or transshipped through Thailand to the surrounding countries and to Europe. While the majority of pirate and counterfeit cartridge-based products are manufactured in China, there also appear to be significant assembly facilities in Thailand.¹⁷

Book Piracy

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 university campuses.¹⁸ The Thai government has been extraordinarily reluctant to intervene and to demand copyright compliance by university employees and officials, citing security-related concerns as an excuse for inaction.¹⁹ Photocopying and print piracy is rampant in primary and secondary schools as well. Illegal photocopying is tacitly, and sometimes actively, supported by lecturers, and reflects a broad misinterpretation about the scope of permissible copying by teachers under the current copyright law.²⁰ This law must be clarified to ensure that it does not conflict with international standards regarding permissible uses of a work.

Plagiarism and unauthorized translations on the part of the lecturers is an increasing problem, due in part to the Thai government's urging of lecturers to develop their own materials but failing to equip them to do so.²¹ Furthermore, commercial copyshops providing illegal texts to customers have made the bogus argument that they are not engaged in illegal copying but, rather, simply provide a "service" to customers and are not responsible for resulting infringement.²² These shops have also learned to avoid stockpiling of infringing goods by moving to a "made to order" system, in which requested copies are made and immediately distributed. The publishing industry needs the Thai government's help in bringing these infringers to justice even when large stockpiles are not found.

motion picture industry's representatives raided a warehouse and found approximately 400,000 pirate optical discs, 1 million covers, and 300 stampers. The police arrested 4 Thai and 1 Singaporean national. Several Malaysian nationals have been arrested trying to transport pirate optical discs from Malaysia to Thailand.

¹⁷ One member of the Entertainment Software Association conducted a raid in Taiwan against an infringer of its product, resulting in the seizure of documents indicating that the same company was operating a manufacturing plant in Thailand.

¹⁸ The Association of American Publishers members would like to see increased Thai government involvement in 2004 in educational efforts regarding copyright, and the scope of fair use and educational exemptions, targeting the general public, grade schools, and universities.

¹⁹ University campuses where piracy of published materials is prevalent include Chulalongkorn University, Assumption University, Sripatum University, and Mahanakorn University.

²⁰ Article 32(6) of the Copyright Law – a narrow educational exemption – is very poorly defined and has been completely misinterpreted by teachers and universities in Thailand.

²¹ Lecturers routinely include significant excerpts from English-language books in their own materials without giving proper credit. In addition, unauthorized translation of educational materials by lecturers is rampant, as lecturers market direct translations of foreign publishers' works as their own.

²² It appears that a proposed amendment to the copyright law will close this loophole.

Business Software End-User Piracy

Thailand has one of the highest end-user piracy rates in Asia. The raids conducted in 2003 all found flagrant evidence of the use of pirated software in corporations. The majority of educational institutions still use pirated software or software without licenses.

Internet Piracy

Thailand witnessed substantial growth in Internet usage in 2003, which unfortunately has been accompanied by the growth of Internet-based piracy (including direct downloads of copyrighted materials as well as Internet orders for pirate CDs, CD-ROMs and VCDs). It is now estimated that more than 3.5 million Thais use the Internet, and that nearly 1.5 million users engage in the downloading of music from the Internet.²³ The industries have been successful in certain cases involving direct-download piracy.²⁴ Piracy at Internet cafés, however, continues to be a significant problem. Only a small fraction of the thousands of Internet cafes in business use licensed or legitimate entertainment software products in their establishments and Internet orders for pirate software.

Cable Piracy and Unauthorized Public Performances of Audiovisual Materials

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. 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 remained unchanged in 2003 at an estimated 35%.

²³ *Piracy on Internet Seen as Latest Threat*, Bangkok Post, February 21, 2003, at 10. In 2003, National Electronics and Computer Technology Centre estimated that more than 3.5 million people used the Internet in Thailand, of whom 42% (1.47 million) downloaded music.

²⁴ The record industry was successful in 2003 in working with ISPs to close down 24 web sites that were providing free downloading of music. The business software industry group, BSA, in conjunction with the police, was able to successfully raid one Internet pirate in 2003.

COPYRIGHT ENFORCEMENT IN THAILAND

THAILAND CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE (End User)	BUSINESS SOFTWARE (Retail)	SOUND RECORDINGS
Number of raids conducted	275	5 ²⁵		350
Number of VCDs seized	215,392	-	-	28,533
Number of DVDs seized	616,494	-	-	-
Number of CD-Rs seized	1,940	-	-	14,769
Number of investigations	407	-	-	-
Number of VCD lab/factory raids	4	-	-	2
Number of cases commenced	66	-	-	129
Number of Indictments	66	-	-	129
Number of defendants convicted (incl. guilty pleas)	72	1 ²⁶	-	377
Acquittals and dismissals		0	-	4
Number of cases Pending		0	19 ²⁷	111
Number of factory cases pending	10	0		2
Total number of cases resulting in jail time		0	4	24 ²⁸
Suspended prison terms		0	4	12
Maximum 6 months	46	0	1	10
Over 6 months	15	0	3	2
Over 1 year	2	0	0	-
Total suspended prison terms	63	0	2 yrs 9 months	4 yrs 7 months
Prison terms served (not suspended)		0	0	-
Maximum 6 months	2	0	0	-
Over 6 months	1	0	0	-
Over 1 year		0	0	-
Total prison terms served (not suspended)	3	0	0	-
Number of cases resulting in criminal fines		1	5	7
Up to \$1,000	4	0	4	-
\$1,000 to \$5,000	50	1	0	5 ²⁹
Over \$5,000	16	0	0	2 ³⁰
Total amount of fines levied (in US\$)	US\$ 257,821	US\$ 1,905	US\$10,075	US\$245,075 ³¹

May 2003 Crackdown Cleans Pirate Markets – Temporarily

The Thai government enforcement campaign against piracy, starting on May 1, 2003, featured some significant raiding against retail establishments in some of the most notorious pirate retail markets.³² It is estimated that for a time, retail piracy had dropped by upwards of 70 percent in the most notorious markets and malls. The unfortunate fact, however, is that the

²⁵ Four of these cases were settled successfully in 2003. The fifth case is very recent and has not been filed in court yet.

²⁶ Resulted from a 2001 raid against an end-user called Well-Established Co., Ltd. and its authorized director. The fine shown is the amount the IP&IT Court rendered after it reduced the total fines by half (the defendant pled guilty).

²⁷ Nineteen retail cases from 2000 and 2001 are still pending prosecution: no offenders were arrested or absconded. These cases are unlikely to proceed to trial.

²⁸ Supreme Court Judgments in 2003 for prosecution of retail infringers, cases commenced in 2000 & 2001.

²⁹ Fines resulting after commuting prisoners' sentences

³⁰ Id.

³¹ Id.

³² The campaign in 2003 is by no means unprecedented. For example, the following chart demonstrates raiding activity carried out on behalf of the motion picture industry through 2003:

Number of Enforcement Actions Against Audiovisual Piracy							
	1997	1998	1999	2000	2001	2002	2003
Investigations	1237	541	499	308	318	630	407
Raids	311	286	289	216	277	343	275
VCDs seized	16,906	119,783	431,065	846,639	493,059	299,234	215,392
DVDs seized	0	0	0	40	24,031	37,070	616,494
Legal Actions Initiated	89	183	136	89	79	79	66

enforcement campaign was not sustained, and as a result, piracy returned after the October APEC Ministerial. Indeed, in recent raids since the conclusion of the Ministerial, the police are reportedly seizing only token quantities of pirated CDs.³³ Such raids have no deterrent effect. In order to follow through on promises made to “clean up CD piracy in three months,” 38 then-existing optical disc factories were visited (during regular business hours only) by teams comprised of officials from the Department of Intellectual Property, the Thai Police, and copyright owner representatives.³⁴ In some plant visits where piratical production was discovered, equipment was seized, which has been stored in government warehouses pending the outcomes of trials.³⁵ Unfortunately, the “visitors” are not empowered to ascertain production, such as collecting exemplars, determining amounts of polycarbonate, or verifying copyright licenses, so the plants generally view such visits as nothing more than a nuisance.

Efforts Toward Enforcement Coordination Remain Elusive

IIPA has consistently reported a lack of overall enforcement coordination, and the sporadic nature of enforcement campaigns, in Thailand. For example, we noted that in late 2001, General Pol. Noppadol Soomboonsupt, former head of the “Special Investigation Department” (SID), had successfully curtailed piracy from retail markets, but with a cabinet reshuffle in February 2002, piracy had returned in full force.³⁶ The Cabinet just approved General Sombat Amornvivat (previously a Deputy Commissioner-General) to be the Director of SID to replace General Noppadol. Unfortunately, at present, we understand that while SID has a building and a skeletal staff, enabling legislation has not been passed by Parliament, preventing SID from acting against piracy. To make matters worse, the Thai Economic Crimes Divisions (ECID) now reportedly has stopped conducting anti-piracy raids and has informed right holders that this responsibility will be transferred back to SID. This creates a “Catch 22” situation for right holders.

On December 20, 2002, 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.³⁷ While the government met in April 2003 to reinforce the goals of the MOU,³⁸ it

³³ For example, recently the police seized 14 CDs at a stall that had 400 to 500 pirate CDs for sale. At another stall only 70 CDs were seized. A warehouse was raided containing thousands of CDs and only 300-400 were seized. In the first week of February, DIP decided to run some new raids, upon complaints by copyright owners that not enough was being done to reduce piracy once again in the markets.

³⁴ The factories visited are registered with the Ministry of Industry under the Thai Factory Act, under which optical disc plants apply for a business license to produce; the Ministry of Commerce issued a Regulation requiring all CD plants to report the quantity of raw material consumed and the number of CDs produced on monthly basis.

³⁵ See Phusadee Arunmas, *Two CD-Stamping Machines Snatched: Licensed producer exceeds output limit*, Bangkok Post, May 20, 2003 (in which the government seized two stamping machines from a factory in Nonthaburi worth about 30 million baht, or approximately US\$770,400).

³⁶ From October 2002 until early 2004, General Noppadol headed SID but without funding and staff, so it was impossible for him to act. General Noppadol was removed from SID in early 2004 and is now Legal Advisor of the Office of Legal Advisory Lawyers of the Thai Police.

³⁷ The departments participating in the signing of the MOU 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.

³⁸ The “IP Summit,” chaired by Deputy Minister of Commerce Watana, set out the following goals for 2004-2007:

- Educating the public on IP issues to increase competition in the world market.
- Developing better IPR protection systems in Thailand, by increasing capabilities of the relevant personnel, and by fostering greater cooperation (networking) between government agencies and the private sector.
- Suppressing IPR infringements by creating efficient enforcement mechanisms and expanding target areas.

was not until September 12, 2003 that further Memoranda of Understanding on “Cooperation for the Prevention and Suppression of Pirated/Counterfeit Products” and “Border Control” were signed.³⁹ Initially, there were many enforcement activities launched under these two MOUs; however, efforts dropped off significantly after the first month. Industry is generally supportive of Minister Watana Muangsook who initiated the two MOUs, and we look to his leadership to demonstrate that the Thai government can make progress in reducing piracy levels.⁴⁰ Also, the MOU on Border Control will be far more effective if it is used to monitor both imports and exports and to crack down on false documentation. To date, there is little sign of any improvement with respect to border measures.

In addition to the MOUs, in 2003, the Thai government also launched a reward scheme in conjunction with copyright owners to combat pirate manufacturers. The scheme rewards enforcement officers for significant seizures: 1,000,000 Baht, or US\$25,700 per machine, up to a maximum of 2,000,000 Baht, or US\$51,400; and three Baht (US\$0.08) per disc provided that the amount of discs seized exceed 300 and consist of titles no more than one year old.

Steps Taken Against Institutional End-User Piracy

In 2003, the business software industry continued to pursue cases against the unauthorized use of business software in a commercial setting, so-called “end-user piracy” of business software. BSA and business software companies conducted several raids against institutions making multiple unauthorized copies of business software for their internal operations. Each raid was successful, finding that the vast majority used pirated software or unlicensed software; in one case, the value of illegal software use by one company amounted to nearly US\$1 million. With respect to enforcement against pirate end users of business software, *ex parte* searches and seizure orders are being granted in criminal cases (under the Criminal Procedure Code), and while no *ex parte* search and seizure order exists for civil cases, under the Rules of the Establishment of the IP&IT Court, the court can seize or attach, and examine evidence if any party fears that evidence of the case might be lost or become difficult to obtain in the future. The business software industry has found the existing law to be effective in supporting enforcement actions in Thailand. To address the use of pirated or unlicensed software by the majority of educational institutions, the Department of Education should take a lead in sending a strong message for those educational institutions to legalize software usage.

Post-Raid Problems and Procedural Hurdles at the IP&IT Court Lead to Delays and Non-Deterrent Results

IIPA has long noted post-raid enforcement difficulties that cause delays, loss of evidence, and overall lack of effective follow-through after a successful raid. Problems include leaks to potential raid targets (who then destroy or dispose of pirated materials and equipment/tools), destruction or loss of evidence in or after a raid, and failure to follow piracy to the key perpetrators (such as the owner or director of an establishment). As cases advance toward the courts, IIPA notes the lack of adequate training and retention of prosecutors handling copyright cases before the IP&IT Court. Some prosecutors have been found to be unfamiliar

³⁹ The MOU on piracy was carried out through Thai Police and industry representative presence in pirate malls, and the MOU on Border Control was carried out through the establishment a special task force of Customs officials and copyright owner representatives to monitor high-risk shipments and customs houses.

⁴⁰ The new Minister of Commerce, Watana Muangsook, issued a public call earlier in 2003 for copyright owners to assist the government in combating piracy. An entertainment software company offered training for law enforcement, and provided specific information regarding known or suspected exporters of pirate product. The Thai government has never responded back, despite repeated follow-up by the company.

with copyright law, and by the time they become familiar, they are often transferred to other posts.

Even in the IP&IT Court, which in general, remains one of the true success stories in the entire region, some procedural hurdles have emerged which should be addressed through judicial training and reform. For example, the process of obtaining a search warrant in Thailand can take more than a half day, which is unusually lengthy, especially when egregious piracy occurs, and there is a lack of consistency among judges. Courts have also been extremely reluctant to issue warrants for nighttime searches, notwithstanding that most perpetrators commit piracy at night. The Court also continues to impose burdensome requirements with respect to presumptions of subsistence of copyright and copyright ownership, which may place Thailand in violation of its international commitments. The Court imposes other documentary requirements, such as notarization and “legalization,” which are extremely burdensome; notarization and legalization are still being required of all documents executed outside of Thailand.⁴¹

Finally, while many copyright cases continue to result in convictions in Thailand in the IP&IT Court, this does not ensure that cases still on appeal will result in lower courts’ imposition of prison sentences that have 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 forfeiture of optical disc production equipment used to make pirate product, and should extend that forfeiture policy to other cases.

COPYRIGHT LAW AND RELATED ISSUES

Government Must Pass and Swiftly Implement an Effective Optical Disc Law

On September 17, 2003, the Royal Thai government presented a “Draft Act on Production of CD Products” to the Parliament, which overwhelmingly passed its first reading. Unfortunately, as it stands, this Bill fails to meet the basic requirements of an effective optical disc law.⁴² IIPA understands that there may be further drafts, including draft implementing regulations, which resolve some difficulties, but essentially, the major weaknesses remaining in the draft are:

- **No License Regime:** Effective OD laws establish a “license” system for plants wishing to engage in OD production (so that plants failing to meet certain criteria can be denied the ability to produce). The Thai Bill requires only “notification,” not approval, for a plant to begin producing optical discs. There also appears to be no provision governing renewal (which would allow the government to approve or refuse the plant’s continued operations). The Bill should be amended to require “approval” (i.e., plants should be obligated to “notify and

⁴¹ 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.

⁴² Other stop-gap measures and statutes cannot substitute for a comprehensive optical disc law. For example, IIPA understands that some enforcement against optical disc piracy has occurred under the Prices of Goods and Services Act B.E. 2542 (A.D. 1999) (in which products like “compact discs” and “computer-program software” are placed on a Thai government “controlled-products” list, subjecting those products to regulation and enforcement against anyone dealing in them without government authorization), which has resulted in seizure of pirate product and optical disc inlay sleeves. We also understand 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), regulating the importation of equipment that could potentially be used to infringe copyright.

obtain approval” to engage in OD production), and/or the implementing regulations should set forth that “notification” involves an approval process. Implementing regulations should also set forth the requirements to obtain an approval (including, e.g., demonstrating that the plant has rights in any work it intends to replicate).

- **No Identification Code Requirement for Stampers/Masters:** The Thai Bill defines stampers and masters as machines, which means there is no requirement that an identification code be applied to stampers/masters, or that equipment to produce discs or stampers/masters to be adapted to use such codes.
- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Thai Bill contains after-the-fact “notification” requirements (with lengthy grace periods), and there is no provision for monitoring dealing in stampers/masters. Prompt and transparent automatic approvals are essential to effectively enforce against unauthorized production and to track the movement of machinery and raw materials, key ingredients of optical disc piracy. The notification requirements in the current draft must be altered to allow for pre-notification and should also provide for automatic approvals.
- **No Inspection Without Notice at Any Time and Possible Forcible Entry:** The Thai Bill fails to, but must, allow for inspections of plants without notice and at any time and for forcible entry in cases in which a plant obstructs entry to authorized officials. The phrase “from the sunrise to the sunset or during the Production hours of such Business Operation Place” should be deleted, and regulations released simultaneously with the law should confirm that inspection authority includes those occurring without notice and that forcible entry is possible when those associated with a plant obstruct entry.
- **No Express Seizure, Forfeiture, and/or Destruction of ODs, Stampers/Masters, and Machinery:** The Thai Bill fails to, but must, provide expressly for seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found as a result of an inspection to be in violation of the statute or found to be infringing copyright or trademark. Regulations released simultaneously with the law could provide for this.
- **Inadequate Criminal Penalties:** The Thai Bill contains inadequate criminal penalties with no mandatory minimum fines and no mandatory imprisonment, and no provision strengthening penalties against recidivists. Most offenses, like failing to affix an identification code, result only in the imposition of non-deterrent fines (in that case, the fine is a non-deterrent US\$2,500, with no express possibility of revocation or plant closure). Penalties in the Bill must be raised to deterrent levels.

The new DIP Director General Kanissorn Navanugraha appears to recognize that there is a large production overcapacity for optical discs, and recognizes the value of having an effective optical disc law as an additional tool to fight optical disc piracy in Thailand. DG Kanissorn has also pointed out the tools presently available to the Thai government to address OD piracy (aside of course from criminal penalties for copyright infringement), including the requirements that an entity: (1) obtain an import license for the machinery; (2) notify DIP of any change in the ownership of the machinery; (3) obtain a copyright certificate (one time) from DIP by demonstrating a legitimate use of the machinery; and (4) report the actual production on a monthly basis. Unfortunately, as noted, these measures do not provide the type of robust system that is required to curtail unauthorized production of optical discs. It would be helpful if the Thai government could immediately (and until a new optical disc law is put in place) use its current administrative authority to start, on a monthly basis, cross checking production accounts with polycarbonate supply, and to ask the plants to supply records and samples of each of the products they manufacture.

Thai Parliament Should Modernize the Copyright Law

In May 2003, Thailand's Intellectual Property Department released for public comment draft amendments to the Copyright Act, B.E. 2537 (A.D. 1994) (last revised in 1995). These draft amendments would make some important improvements to copyright protection in Thailand.⁴³ At the same time, there are certain areas which may be ambiguous or in need of clarification,⁴⁴ and other areas in which the draft may actually weaken protection already provided in the current law (most notably, the draft weakens criminal penalties in several significant ways, including by removing mandatory statutory minimum fines and imprisonment, and by lowering maximum fines). There are yet other areas in which we urge the Thai government to follow international trends, such as extending term of protection to life of the author plus 70 years (Section 19, paras. 1 and 2), or where applicable, 95 years from publication (e.g., Sections 19, para. 4, 20, 21, 23). Finally, we note that the draft attempts to implement important protections needed to provide an adequate legal framework for electronic commerce, and in particular, to implement the provisions of two WIPO "Internet" treaties, the WCT and WPPT; however, the draft implementation falls short of meeting the requirements of key aspects of these important treaties.⁴⁵ In particular, the draft provisions to prohibit the circumvention of technological protection measures (TPMs) must be tightened further to fully implement this crucial requirement of the WIPO treaties, by:

⁴³ The positive changes include:

- Strengthening civil remedies by allowing courts to award compensatory and punitive damages and lost profits.
- Making it an offense for a photocopy shop to provide infringing copies of works.
- Clarifying that temporary copies are covered as reproductions under the Thai Act
- Distinguishing between "disposal" (sale or other transfer), rental, and "communication to the public."
- Attempting to deal with the WIPO treaties' requirements to prohibit the circumvention of technological protection measures (TPMs), and to prohibit the unlawful tampering with rights management information (RMI).
- Strengthening criminal provisions in certain respects.
- Establishing voluntary collective management of copyright and safeguarding against over-zealous collection of royalties on behalf of performers (or the unlawful collection on behalf of other copyright owners).

⁴⁴ The drafters should clarify or further amend the law to ensure that:

- The exclusive "communication to the public" right includes coverage of "any communication, whether by wire or wireless means."
- The addition of Section 70/2 covers a photocopy shop that may not make but hands over the infringing copy.
- Competent officials have the ability to carry out inspections *ex officio* or upon the request of a right holder, may carry out inspections "at any time of day or night," and may seize infringing or suspected infringing goods, documents, tools, and implements used in commission of the infringement/offense.
- Right holders may participate in inspections of premises and obtain samples of infringing copies and material and have access to equipment and documents seized.
- Forfeiture or destruction of infringing goods/documents/tools/implements is available.
- Leaking information regarding a surprise inspection or entry into a premise is a criminal offense.
- The exception to temporary copy protection is (preferably explicitly) subject to the Berne three-part test, and is made sufficiently narrow to satisfy Thailand's international obligations.
- The prohibition on importation includes the ability to authorize or prohibit the importation of piratical copies of works as well as copies of works without the authorization of the right owner.
- Landlords (e.g., of the pirate markets) are liable for infringing activities of their tenants.
- Educational exceptions, particularly Section 32, are not read incorrectly to permit the wholesale copying of entire textbooks, which would be TRIPS-incompatible.
- The exception in Section 43 is not interpreted in Thailand to permit unauthorized reproductions of computer programs as well as other works.
- Provisions on presumptions of subsistence of copyright and copyright ownership are upheld and not made subject to burdensome proof requirements that are TRIPS-incompatible in practice.

⁴⁵ For example, the provisions on rights management information contains two key offenses needed to make these provisions effective, but should also punish criminally one who 'distributes or imports for distributing, broadcasting, or communicating to the public, rights management information knowing that electronic rights management data has been deleted or changed without authority.' In addition, the draft should include provision for civil or administrative remedies, and most importantly, injunctive relief, is sufficient.

- Fully covering “copy controls” (i.e., controls on the exercise of all rights under copyright) as well as “access controls.”
- Prohibiting the act of circumvention (as well as the business of manufacturing), and extending the prohibition to those who ‘offer to the public or provide’ circumvention services.
- Covering component parts of circumvention devices, circumvention software and code.
- Covering devices/parts etc. whose “primary” purpose is to circumvent (the draft test is whether the device is “specifically designed or adapted” to circumvent).⁴⁶
- Providing for civil, provisional, and administrative remedies, including injunctive relief (in addition to criminal remedies) for circumventing, and provide for at least the same level of criminal penalties for circumventing TPMs as for copyright offenses.

By updating its copyright regime for the digital age and joining the WIPO treaties, Thailand can position itself as a leader within the APEC and ASEAN communities.⁴⁷

One important legal question involves the extent to which Internet service providers can be held liable for infringing activities occurring over their services. A law dealing with ISPs in Thailand has been enacted,⁴⁸ and went into force in early 2000, but the National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of that law, still has not been established after four years. 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. It does not appear that ISPs are at present obligated to immediately remove or take down an infringing website, but 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.

Government Should Address Organized Crime

Thai government officials have acknowledged the involvement of organized criminal syndicates relocating to Thailand following crackdowns in other regional jurisdictions. Foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China, and Malaysia. The Thai government must begin to address organized criminal syndicate involvement in and control of piracy operations in the country. To begin effectively addressing the gravity of this problem, Thailand is urged to look towards adopting an organized crime statute (cf. Hong Kong’s Organized and Serious Crimes Ordinance [OSCO]), which would include intellectual property rights violations as a predicate offense.

⁴⁶ The draft provision also leaves unclear whether other indirect proof, such as whether the circumvention device/part/software is marketed for the purpose of circumvention, or whether the circumvention device/part/software has only limited commercially significant uses other than to circumvent.

⁴⁷ APEC Leaders have agreed to “ratify and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty 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.”

⁴⁸ Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000).

Cable Regulation and Broadcast Legislation Still Not Enacted

Enactment of cable regulatory controls and broadcast legislation 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 will 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, but has stated that it would like to get illegal operators to go legitimate through a regrouping under the auspices of Channel 11 (a state-run TV channel).⁴⁹

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 2 million Thai Baht (US\$51,250). Stronger penalties are needed if this law is to be effective. Unfortunately, the Bill remains pending. Other legislation passed in January 2000 – the Frequencies Management Act – created a National Broadcasting Commission, but selection of its members has been unduly delayed. 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 enormous 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 (in the first 11 months of 2003, \$2.46 billion in duty-free goods entered the U.S. from Thailand duty free under the GSP Program – approximately 17.9% of its total exports to the U.S.). Enjoying the benefit is subject to the requirement that Thailand provide “adequate and effective” copyright protection. Thailand's enforcement system fails to meet the GSP criteria, much less the higher standards of an FTA. Thailand's current performance bodes poorly for its ability to meet the obligations of an FTA. We urge the Government of Thailand to move forward without delay in addressing the critical shortcomings in its legislative and enforcement regime through proper regulation of its optical disc facilities, and by implementing a zero tolerance policy as regards the public sale of piratical materials.

⁴⁹ Under the plan, broadcasters would be allocated a certain amount of channels, some of which would require mandatory carriage of programming, while others would be free for allocation at the discretion of the cable provider following negotiations with content providers. PRD has apparently further offered to act as an intermediary between local operators and content providers.

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WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

BOLIVIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Bolivia be kept in the Special 301 Watch List.

Overview of key problems: Bolivia has shown no progress on copyright reform in the past seven years. 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 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). 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 a major 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 that the government of Bolivia should take: To improve the copyright law and enforcement in Bolivia, we recommend the following actions for 2004—

- TRIPS- and WIPO treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) 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.
- Increase term of protection for copyright and neighboring rights to life plus 70, or to 95 years from publication in the case of neighboring rights and works whose term is measured other than by reference to the life of the author.
- Reform penal code to provide deterrent level penalties for copyright infringement.
- Include in the civil code statutory damages provisions for copyright infringement.

Bolivia is long overdue in meeting its bilateral and multilateral obligations regarding copyright protection and enforcement. In June 2001, the Bilateral Investment Treaty (BIT) between Bolivia and the U.S. entered into force. At the time of the BIT signature in April 1998,

Bolivia was required to have TRIPS-level protection by the end of April 1999, both in terms of its substantive intellectual property law requirements and the requisite enforcement obligations.

Bolivia currently participates in 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.¹

COPYRIGHT PIRACY IN BOLIVIA

Business software piracy by both resellers and end-users is widespread in Bolivia. In addition, music piracy is so rampant in Bolivia that most international companies have no local presence in the country. Bolivian artists and composers have very little chance to record their music and develop a career. For the same reasons, U.S. artists and their music cannot be adequately promoted and commercialized in Bolivia.

COPYRIGHT ENFORCEMENT IN BOLIVIA

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 2002, BSA conducted ten 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 cases. In 2003, BSA conducted only three civil raids and it could not settle any of these cases.

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 a civil search and seizure

¹ During the first 11 months of 2003, \$7.8 million worth of Bolivian goods (or 4.7% 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 74.5% decrease over the same period in the previous year. Another \$85 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2003, representing an increase of 159.3% from the same period in 2002. For more information on the history of Bolivia under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

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 five cases in Bolivia during 2003. 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.² The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).³ 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,⁴ 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 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

² Ley de Derechos de Autor, No. 9610, Article 103.

³ 17 U.S.C § 504 (c).

⁴ Anteproyecto de Código de Propiedad Intelectual, Article 175 I.

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 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 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 "...[d]ecisions 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.

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. 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 to act. 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 in which the evidence seized will probably be destroyed by the time of the trial putting at risk the rightsholder's ability to demonstrate that his copyright has been infringed. In 2003, one of the illegal software resellers prosecuted in 2002 was sentenced to one year imprisonment and to pay damages. Another raid conducted during 2002 resulted in criminal prosecution and a public hearing has been scheduled for 2004. Unfortunately, in this case, the computers that were seized during the raid as evidence of the crime mysteriously disappeared from the police warehouse in which they were stored.

The music industry is not aware of any actions by the local authorities to investigate or raid replication facilities and warehouses dedicated to distribution of pirate product. The same can be said about actions against the network of street vendors offering pirate CDs.

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

Copyright Law of 1992

Bolivia passed a copyright law on April 29, 1992, which replaced its antiquated 1909 law.⁵ 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

⁵ 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.

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 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

The United States has announced its intention to launch FTA negotiations with Bolivia.⁶ IIPA will be looking for an agreement that achieves the same high substantive standards as were achieved in the recently concluded FTA with Central America.

⁶ See Press Release 2003-74, Office of the U.S. Trade Representative, "USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries," November 18, 2003, at <http://www.ustr.gov/releases/2003/11/03-74.pdf>; and President Bush's Letter to Congress, November 18, 2003, at http://www.ustr.gov/new/fta/Andean/2003-11-18-notification_letter.pdf.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

CHILE

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Chile remain on the Watch List for 2004.

Overview of key achievements/problems: The intellectual property rights chapter of the U.S.-Chile Free Trade Agreement (FTA) provides for a high level of copyright and enforcement obligations. On the legislative front, Chile's long-stalled efforts to upgrade its current copyright law got back on track, and Chile adopted two sets of copyright law amendments during 2003 — one to implement TRIPS and the other to implement its immediate obligations under the FTA. More legislative work, however, will still need to be done to implement several FTA provisions (including the entire enforcement subchapter) which are subject to extended transition periods.

Copyright piracy in Chile has increased dramatically in certain sectors in recent years, especially as digital piracy becomes more prevalent. Unfortunately, the Chilean enforcement system fails to meet Chile's existing bilateral and multilateral obligations. 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 do not receive deterrent sentences. Furthermore, Chile's border controls are not effective. In addition, the civil courts are still relatively slow in issuing relief to rightsholders and adequate damages are difficult to achieve in civil cases. Civil *ex parte* searches can be avoided by the defendant, since the granting of civil *ex parte* searches can be tracked in a public electronic register before the provisional measure has been executed, using the "national identity number" of the defendant and/or the plaintiff.

Actions which the Chilean government should take in 2004: The Chilean government should engage in several simultaneous measures to improve copyright protection—

- Take concerted and organized criminal raids. New efforts could include, for example:
 - The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Concepción, and Valparaíso.
 - The police should investigate pirate manufacturing and distribution centers and operations. Similarly, street vendors should be arrested and prosecuted so that this pervasive problem is tackled.
 - The civil police and administrative authorities should also act to prohibit the sale of pirated materials in the streets.
 - The police should coordinate their investigations and actions with customs officials as well as finance ministry officials, given the problems with piratical materials entering Chile and persons avoiding tax collections.
- Actively pursue prosecutions and ensure judges impose deterrent-level criminal sentences;
- Consider bringing more raids and actions under organized crime legislation;

- Begin to develop legislation to implement the remaining elements (including enforcement) for which Chile was granted transition periods in the U.S.-Chile FTA; this would include addressing the industries' longstanding concerns with (for example):
 - Providing an effective civil *ex parte* search remedy;
 - Establishing statutory damages;
 - Increasing the level of criminal sanctions for copyright infringement;
 - Affording express protection of temporary copies;
 - Adopting provisions on technological protection measures and the enforcement of circumvention of such;
- Revise the January 2004 proposed anti-piracy bill which contains several provisions which do not affect the high levels of effective enforcement in either the FTA or TRIPS;
- Improve the speed of civil copyright infringement litigation;
- Take effective actions to improve border enforcement by amending the relevant laws and improving performance by customs officials;
- Have customs establish a system to track blank optical media imports and coordinating with rightsholders to ensure accurate invoices;
- Enhance governmental efforts to take uphold effective software asset management practices in order to implement the 2001 government software legalization decree.

CHILE
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.0	40%	2.0	40%	2.5	25%
Records & Music	21.1	40%	14.0	35%	12.2	35%	5.0	30%	NA	NA
Business Software Applications ²	NA	NA	34.0	51%	46.3	51%	33.1	49%	47.7	51%
Entertainment Software	NA	NA	NA	NA	NA	NA	41.0	80%	NA	78%
Books	1.1	NA	1.1	NA	1.1	NA	1.0	NA	NA	NA
TOTALS ³	NA		51.1		61.6		82.1		50.2	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>. For more information on Chile's history under Special 301, see IIPA's summary in this submission at Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>).

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$59.4 million and levels of 51% were identified as preliminary. BSA's 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 reflect losses to (a) all software publishers in Chile (including U.S. publishers) and (b) losses to local distributors and retailers in Chile.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Chile were \$76.5 million. IIPA's revised loss figures for 2002 are reflected above.

On December 11, 2002, the United States and Chile concluded a Free Trade Agreement (FTA), an agreement designed to facilitate trade and investment between the two countries. This FTA entered into force on January 1, 2004.⁴ The U.S.-Chile FTA incorporates the obligations set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The full implementation of the WCT and WPPT both in Chile and on a global basis at the earliest possible date is a critical goal of the copyright industries. Unfortunately, however, the Chile FTA IPR chapter has extended transition periods (ranging from two years, four years and five years) which delay the significant benefits that immediate implementation of these treaties' obligations would bring to U.S. industry and to both the U.S. and Chilean economies.⁵

COPYRIGHT PIRACY IN CHILE

Copyright piracy in Chile involving hard goods continues to be a serious problem, and more reports of local CD-R burning, optical media piracy and even Internet piracy continue. Over the last three years, IIPA provided public comments to the U.S. government regarding the FTA IPR negotiations with Chile. In a variety of contexts, IIPA has advocated the importance which Chile should place on taking immediate action to combat widespread piracy.⁶

As a result of the growing pirate CD-Rs, estimated losses due to sound recording piracy in Chile more than increased to \$21.1 million in 2003. 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 music piracy has increased over the past year, from 30% in 2000 up to 40% in 2003, mostly due to the shift from cassette piracy to CD-Rs. The *carabineros* (police) are trying to be helpful by concentrating in Santiago; however,

⁴ See Presidential Proclamation to Implement the United States-Chile Free Trade Agreement, December 320, 2003, available at <http://www.whitehouse.gov/news/releases/2003/12/20031230-2.html>. The U.S.-Chile FTA text is posted on USTR's website at <http://www.ustr.gov/new/fta/Chile/final/index.htm> (released April 6, 2003); USTR's summary of the IPR chapter is available at <http://www.ustr.gov/new/fta/Chile/summaries/Chile%20IP%20Summary.PDF>.

⁵ For IIPA's more detailed analysis of the strengths (and weaknesses) in the U.S.-Chile FTA IPR Chapter, see IIPA's Submission to the U.S. International Trade Commission on the U.S.-Chile Free Trade Agreement, May 8, 2003, available at http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf.

⁶ For more historical background on copyright industries' concerns with Chile, please see to IIPA's 2003 Special 301 country report, available at <http://www.iipa.com/rbc/2003/2003SPEC301CHILE.pdf>. Prior to the FTA entry into force, Chile was a beneficiary country under the Generalized System of Preferences (GSP) program, which contains IPR criteria. During the first 11 months of 2003, \$475 million worth of Chilean imports to the United States benefited from the GSP program, or 13.2% of Chile's total exports to the U.S. between January and November; this represented a 2.8% increase over the same period in 2002.

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. As a result, the record industry continues to lose market share, with revenues dropping 9.2% and units sold dropping 18% in 2003.

According to the Business Software Alliance (BSA), the unauthorized use and copying of software by small to medium-sized businesses (multiple installations of a single-product license and other under-licensing or license misuse) is the most economically harmful forms of piracy for the business software industry in Chile, while piracy at the retail level is also prevalent, including hard disk loading and the sale of pirate software in all major cities, especially Santiago. Furthermore, with growing broadband penetration, Internet piracy has already become a matter of concern.

The audiovisual industry confirms that optical disc piracy is steadily increasing in Chile. MPA reports that seizures of optical discs passed VHS seizures in 2003 for the first time, composing 55% of seizures, up from less than one-tenth in 2002. Moreover, optical disc quality is increasing as well, with more high-quality pirate DVD-R available than before. This pirate product is locally produced, although some recorded (burned) product may come from Paraguay. Blank discs enter legally and illegally from Asia. Optical disc piracy is the primary concern of local theatrical executives, because it is increasing in volume and quality and because it encroaches upon the theatrical window. OD piracy is also a huge threat to the home video market. MPA also reports that back-to-back duplication of VHS tapes in video stores continues to be common in Chile. In addition, pirates also sell the materials that facilitate individual back-to-back copying in video stores, such as professionally printed cover sheets. The country's black market, including the Bio-Bio market in Santiago, and the increasing number of street vendors, are of continuing concern. These unregulated distribution points, which are nearly 100% pirate, represent direct competition to the potential legitimate video market, making it even harder for otherwise legitimate retailers to compete. These black markets are increasingly linked to organized crime and other pirate distribution systems. With respect to the internet, Chile has the highest Internet penetration in Latin America (including at least 60,000 dedicated connections with broadband access). Investigation indicates an increasing incidence of both hard goods sales (DVD-R) and downloading via broadband, especially for later conversion to CD-R or DVD-R product for distribution. Estimated annual losses to the U.S. motion picture industry in Chile are placed at \$2 million in 2003.

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. 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 2003.

The Entertainment Software Association (ESA) reports that piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) continues to be a problem.

COPYRIGHT ENFORCEMENT IN CHILE

The U.S.-Chile FTA contains significant enforcement measures which clarify and elaborate on the WTO TRIPS Agreement. Unfortunately, the FTA also contains a two-year transition period to expressly protect temporary copies; a four-year transition period to implement the enforcement obligations (including statutory damages) and a five-year transition period to implement Chile's already existing WCT/WPPT obligation regarding protection against circumvention of technological protection measures. Effective implementation of these provisions should begin now, not later.

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 may check the register to find out whether an *ex parte* search request has been filed against them before the inspection takes place. This notice obliterates the effectiveness of the remedy, because it affords 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 sometimes fail. In 2003, at least two BSA inspections failed for this reason. The U.S.-Chile FTA requires an effective civil *ex parte* remedy.

Police raids taken, but prosecutions are few: The local copyright industries have been active and generally report good cooperation with enforcement officials at the raiding level. Raids carried out by the Federal Civil Police and the Public Ministry can be relatively effective. However, only few prosecutions are brought.⁷ It is very rare indeed for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being adjudicated.

For example, in 2003, the local recording industry (IFPI/Chile) 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. The recording industry's anti-piracy unit cooperated in 281 raids during 2003, which produced 47 indictments and no sentences. This level of activity is not sufficient to combat a 40% piracy rate in Chile.

In 2003, MPA coordinated with police to initiate 182 cases from raids, including 22 reproduction centers (notably, 19 of these were optical disc reproduction), seizing 21,278 pirate VHS videotapes and 22,280 pirate optical discs (DVDs and CD-Rs) as well as other equipment, such as 63 optical disc burners. Raids were conducted against clandestine laboratories, video retailers and street vendors, and accomplished with the cooperation of the *carabineros*. 142

⁷ 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. The new system is operating in the whole country, except for Santiago. Given that many copyright cases take place in Santiago, it is not yet possible to fully assess how efficient this new system is.

people were arrested, and 42 indictments were issued. Nevertheless, these indictments, along with over 700 pending cases, will inevitably lead to little, if any, deterrence since all sentences are minimal (average of three months) and all are immediately suspended. Although prosecution is slow and sentencing is not at deterrent levels, the Chilean Government's effort is, at least, serious, is not corrupt and is open to coordination with MPA and the local anti-piracy association.

For cybercrimes (including intellectual property violations) Chile's civil police created a group of specialized police approximately three years ago who are dedicated to investigating Internet crimes. This unit has generally performed well. The intellectual property cases (no more than 10) that they have investigated have been related to individuals engaged in hard goods sales.

During 2003, BSA filed one criminal action, which was dropped since the target agreed to pay compensation.

Criminal sentences not deterrent: Although distribution of pirated material is theoretically punishable by incarceration up to 540 days (1½ years, a low term compared to the rest of the region), it is difficult to secure prosecutions, convictions or adequate sentencing. In the few cases that do reach judgment, sentences are suspended for an undetermined period of time without ever being effectively applied; consequently, defendants are never incarcerated for copyright infringement.

The criminal process has always been cumbersome, costly, and time-consuming and without deterrent impact on the market for copyrighted products. Sixteen (16) criminal cases against pirate software resellers, some dating back many years, are still unresolved. Consequently, BSA has relied on civil enforcement, given the difficulties with criminal enforcement.

Slow civil process, no statutory damages: Chile's civil courts are relatively slow in issuing relief to copyright holders, with civil copyright infringement cases taking two or more years until judgment in cases of first instance. In 2003, BSA conducted 59 inspections against end-user defendants and settled 27 cases through private negotiation; 26 are under negotiation. However, BSA could not reach agreements with the other six defendants, and consequently resorted to civil actions against them; three of these actions ended with a settlement but the other three have not reached judgment. The Chilean copyright law still does not explicitly 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; the U.S.-Chile FTA requires that Chile soon implement statutory damages in copyright cases.

Ineffective border measures: The increasing amount of optical disc piracy coming from across the border is of great concern. To give an example of the size of the problem, MPA reported that Chilean Customs seized a shipment of 2,500 high-quality DVD-Rs from Paraguay in early 2003. 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. Chile has failed to set up and implement effective, TRIPS-compliant border control mechanisms. The U.S.-Chile FTA contains obligations regarding border measures.

COPYRIGHT LAW AND RELATED ISSUES IN CHILE

Copyright Law Reform in 2003

During 2003, Chile implemented two sets of amendments to its 1970 copyright law (Law No. 17.336); the first to better implement its long-overdue TRIPS obligations and the second to implement those provisions of the U.S.-Chile FTA which would enter into force on January 1, 2004. As a result, these amendments addressed many of the longstanding deficiencies and/or ambiguities in this law which IIPA and its members had identified as not satisfying the thresholds of obligations found in U.S. bilateral programs, the WTO TRIPS Agreement and the two WIPO Internet treaties.⁸

After years of legislative consideration, amendments to implement some of Chile's long overdue TRIPS obligations were adopted in the summer of 2003 (Law No. 19,912 of November 4, 2003). For example, these amendments addressed some basic customs procedures, clarified explicit protection under copyright for computer programs and compilations of data, and redefined several exclusive rights (including distribution, reproduction and communication to the public).

Furthermore, in order to implement its immediate FTA obligations, Chile again amended its copyright law in November 2003 (Law No. 19.914 of November 14, 2003). The copyright-related amendments accomplished the following: added a distribution right; increased the terms of protection; clarified the reach of the law to foreign rightsholders not domiciled in Chile; added the "making available" right; added certain key definitions; established civil and criminal sanctions to protect rights management information; clarified the rental right for computer programs, and removed a formality regarding the protection of photographs. Amendments were not made to those FTA obligations which were permitted transition periods.

New Anti-Piracy Bill Is Contrary to Its Objectives

After years of anticipation, President Lagos introduced Bill No. 228-350 into Congress on January 12, 2004, with the stated purposes of fighting piracy. However, the reality of the bill is at odds with this stated purpose, and arguably may be inconsistent with the high enforcement standards of the U.S.-Chile FTA. The bill only slightly increases fines, but keeps prison sanctions at the same level, and allows judges to choose between these alternatives. Most likely this will result in judges imposing only fines and not imprisonment, thus flouting deterrence. Furthermore, the new bill fails to punish infractions done without financial benefits ("Animo de Lucro"). Reproduction without financial benefits is punished only once the amount of the damages exceeds 150 UTM (approximately US\$7,500) (1 UTM=29,650 Chilean pesos or US\$50). The bill also contains a chapter on copyright enforcement (statutory damages are not included), purportedly to implement TRIPS and FTA provisions on enforcement.

The Chilean copyright sectors also have criticized this proposed legislation.⁹ Clearly this bill will need major improvements in order to make it comply with Chile's FTA and TRIPS obligations.

⁸ For a historical sense of Chilean copyright efforts over the past decade, please refer to IIPA's 2003 Special 301 country report, available pages 372-373 at <http://www.iipa.com/rbc/2003/2003SPEC301CHILE.pdf>.

⁹ Stephan Kueffner, "Chile Private Sector Criticizes Planned 'Anti-Piracy' Law," Dow Jones Newswires, Jan. 23, 2004.

Government Software Management

Governments that make legal software use a priority not only comply with their international obligations to protect software copyrights but also set an example for private industry. In May 2001, President Lagos issued an executive order called “Instructions for the Development of the Electronic Government” (Decree No. 905 of 11 May 2001), which included a guideline for the executive branch to properly license software. In order to confirm that all government agencies use computer software only as authorized, the U.S-Chile FTA requires that the parties adopt appropriate provisions to actively regulate the acquisition and management of software by government agencies (inventories of software present on agencies’ computers and inventories of software licenses). Notwithstanding that this obligation is not subject to transition periods, the Chilean government has not yet fulfilled this commitment, and no steps have yet been taken by the Chilean government to comply. BSA urges the government to implement this commitment at once.

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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

COMMONWEALTH OF INDEPENDENT STATES (C.I.S.)

EXECUTIVE SUMMARY: TEN COUNTRIES OF THE C.I.S.¹

This report includes a brief summary of the common issues in the following ten countries of the Commonwealth of Independent States (C.I.S.): **Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Republic of Moldova, Tajikistan, Turkmenistan and Uzbekistan**, followed by brief individual country reports in this section and in the Special Mention section.² For a more complete report on the common issues of all ten countries, see <http://www.iipa.com/rbc/2003/2003SPEC301CIS.pdf>.

Special 301 recommendation: IIPA recommends that:

- (1) **Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan** be retained on the **Special 301 Watch List** in 2004;
- (2) The U.S. government should continue to monitor the post-WTO accession progress of **Armenia, Georgia, the Kyrgyz Republic and the Republic of Moldova** as noted in the **Special Mention** section of this filing;
- (3) The U.S. government should suspend the duty-free trade benefits under the Generalized System of Preferences (GSP) of **Kazakhstan and Uzbekistan** for the reasons stated in the petitions filed by the IIPA concerning the shortcomings in the legal regimes of these countries and reiterated at the U.S. government hearings in 2003;³ and
- (4) The U.S. government should block accession to the World Trade Organization of **Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan (as well as Russia and Ukraine for the reasons noted in the 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, civil procedure code, and administrative code in each country, and in some

¹ For more details on each country's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please see previous year's reports at <http://www.iipa.com/countryreports.html>.

² IIPA filed separate Special 301 reports on the other two countries in the C.I.S., 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.

³ As noted in the separate IIPA Special 301 reports on Russia and Ukraine, IIPA recommends that Russia's GSP benefits be suspended (based on the IIPA 2000 petition and our testimony at the U.G. government GSP hearing in October 2003), and that the U.S. government continue its suspension of Ukraine's GSP benefits (first suspended in August 2001). Since 2000, Belarus has had its GSP benefits suspended, but for reasons unrelated to intellectual property matters. The U.S. government terminated Armenia's GSP review on September 3, 2003.

cases also need regulation of optical media production facilities; (2) accession to key treaties is 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, and civil procedure code (adding *ex parte* search provisions) to provide a comprehensive and effective legal regime, as well as adding provisions to regulate optical media production facilities and equipment;
- 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.

AZERBAIJAN

As the U.S. Trade Representative noted when Azerbaijan was placed on the Watch List in 2003, there are many steps remaining for Azerbaijan “to fulfill its intellectual property rights commitments under the 1995 U.S.-Azerbaijan Trade Agreement.” In fact, Azerbaijan obligated itself to fix these deficiencies over nine years ago in the bilateral agreement with the United States (after an April 1993 exchange of letters); that agreement entered into force on April 21, 1995. The current Azerbaijani Copyright Law, in force since October 23, 1996, has many deficiencies. Azerbaijan adhered to the Berne Convention (1999) and the Geneva Phonograms Convention (2001). The long delay in the protection of sound recordings allowed unprotected back-catalog material to flow into the marketplace.

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. Also unclear is whether Azerbaijani law provides civil *ex parte* search provisions as required by the WTO TRIPS requirement.

Article 158 of the Azerbaijani Criminal Code (2000) provides liability for copyright and neighboring rights infringements if they result in “significant damage” to the rightholder concerned. The “significant damage” standard creates an unwarranted threshold in the fight against copyright piracy because it sets a vague standard for police and prosecutors to commence action. The law should be amended to include a low and clear threshold to instigate a criminal action, for example, 50 times the minimum daily wage. There have been to date, no known convictions under this law (the criminal code does provide sanctions for copyright and neighboring 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 the authority necessary for effective enforcement. It is not clear that the Azerbaijani Customs Code (last amended in 1997), which in Article 19 contains provisions relevant to the importation or export of intellectual property, provides *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. Last, 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).

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. 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 wage. 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.

Last, the U.S. Embassy in Baku has reported that licensed theater owners continue to complain that Azerbaijani television stations are threatening legitimate theatrical distribution because the stations are exhibiting pirated copies of American films without permission.

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 currently no known optical media plants in Azerbaijan. Most music piracy is in the form of audiocassettes. The level of music piracy is estimated at about 83%; trade losses for 2003 were estimated at \$12.2 million. It is estimated by the recording industry that in total 10.3 million cassettes and 2.6 million CDs were sold in Azerbaijan in 2003 and of these, 8.4 million cassettes and 2.3 million CDs were pirated copies.

BELARUS

In May 2003, the U.S. Trade Representative called enforcement in Belarus “very weak” (in his annual announcement on Special 301 designations) and noted the “extremely high” piracy levels. There were no reports of any legal reform or enforcement successes in 2003. In recent years, Belarus has joined the relevant neighboring rights treaties—the WIPO Performances and Phonograms Treaty and the Geneva Phonograms Convention in 2003—to provide, at long last, for a point of attachment for foreign sound recordings. However, the long delay (of over ten years) in providing this legal protection allowed for a large back-catalog of unprotected material to enter the marketplace, making enforcement that much more difficult.

Even more troubling is the migration of optical media production facilities into Belarus from neighboring countries. One known plant (Armita) located in Brest, Belarus migrated from Ukraine a few years ago; in 2002 the plant was closed and a criminal investigation was commenced. However, the government of Belarus has not yet pushed 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.).

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; that agreement entered into force on February 16, 1993. Belarus enacted a new law on copyright and neighboring rights (in force on June 18, 1996), and amendments in 1998.

Belarus is a member of the Berne Convention (1997) and Geneva Phonograms Convention (2003) (also in 2003, the Rome Convention) as well as the two WIPO digital treaties, which it joined in 1998 as one of the first countries to do so. The 1998 amendments were intended to, among other things, partially implement the digital treaties.

Legal reform deficiencies: The 1998 amendments added 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 effective in 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 provide protection for pre-existing works or sound recordings (for example, only recordings fixed or released on or after April 17, 2003 enjoy protection). Belarus is required by the clear obligation in its bilateral trade agreement, as well as by Berne and the WTO TRIPS Agreement to provide such protection, and should be urged to clarify its law immediately. Belarussian officials insist this protection does currently exist, at least for works. 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; a change in the law to explicitly extend protection for sound recordings (and works) is essential.

There are no known available civil *ex parte* search procedures in Belarussian law; 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. The provisions regarding technological protection measures need further change. In particular, it must cover 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 the required protection against Internet and other digital piracy.

The most important action Belarus can take for effective enforcement in 2004 is to bring the Armita optical disc plant investigation to a successful conclusion by commencing the criminal case and pushing the courts to impose deterrent criminal sentences on the plant operators. In general, 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. In late 2002, Belarussian officials reported 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. 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—the government must take action against these facilities using the criminal law remedies.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are currently no known operating optical media plants in Belarus. The level of music piracy is estimated at about 74%; trade losses for 2003 were estimated at \$22 million. It is estimated by the recording industry that in total 11.4 million cassettes and 4.9 million CDs were sold in Belarus in 2003 and of these, 8.4 million cassettes and 3.6 million CDs were pirated copies. The industry also reported 845 raids and the seizure of US\$688,200 worth of pirate material (60,400 CDs, 1355 DVDs, 10,200 cassettes and 104 recording devices) in 2003 by local enforcement agencies.

KAZAKHSTAN

The U.S. Trade Representative, in his May 2003 Special 301 announcement, noted that Kazakhstan has still 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, which set a “high burden of proof.” After more than 10 years, Kazakhstan has still not fixed these critical deficiencies, which is why IIPA recommends not only the retention of Kazakhstan on the Watch List, but also that the U.S. government block Kazakhstan’s membership in the WTO, as well as the suspension of its GSP benefits, until these deficiencies are corrected.

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; that agreement entered into force on February 18, 1993. The Copyright Law was last amended in 1996 (it entered into force on June 12, 1996).

Kazakhstan joined the Berne Convention (1999) and the Geneva Phonograms Convention (2001), providing a point of attachment for foreign sound recordings, albeit more than seven years after the bilateral trade agreement required such protection. The Kazakh government should be encouraged to ratify and fully implement both WIPO digital treaties.

Legal reform deficiencies: In 2001 and again in 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 preexisting works and sound recordings problem, to accede to the digital treaties and to improve enforcement sanctions. No legislative proposals were introduced in 2003. The copyright industries understand that a Parliamentary Working Group is considering amendments to the copyright law for expected adoption in 2004; also on the agenda are laws pertaining to electronic commerce and Internet technology, E.U. compatible/accession laws and WIPO treaty implementation. IPR reform is imperative; for example, the recording industry considers Kazakhstan the most promising marketplace behind only Russia and Ukraine of the C.I.S. members.

The Kazakh Copyright Law (even after the 1996 “modernization”) contains several deficiencies. 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. 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, nor for sound recordings when it joined the Geneva Phonograms Convention. 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. Copyright law amendments must be adopted this year to remedy these inadequacies and in order for Kazakhstan to enjoy GSP benefits and avoid their suspension.

There are no known civil *ex parte* search procedures under Kazakh law; these are needed to provide effective enforcement against end-user pirates, especially software pirates. It is understood that the current draft copyright law amendments contain provisions to remedy this matter.

In 1997, Kazakhstan adopted criminal code amendments; these amendments went into force on January 1, 1998. 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 of up to five years for repeat offenders. But one major shortcoming still exists: The provisions are limited to actions committed for the purposes of “deriving profits” and which cause “considerable harm.” The imposition of this threshold, especially the considerable harm standard, has been a particular problem for effective enforcement in other countries, notably Russia. The threshold for criminal violations should be clear and it should be a relatively low standard (e.g., harm caused at a level equal to 50 times the minimum wage)—Kazakhstan needs to fix this provision. 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. It is our understanding that administrative and criminal law amendments will be introduced and hopefully adopted in 2004 (some, but not all, of the copyright industries have been solicited by the government to provide comments).

One example of the ineffectiveness of the criminal enforcement system comes from an “enforcement report” issued by the government of Kazakhstan on October 21, 2003. It notes that there were 25 criminal cases in 2003, 20 still under investigation by the courts or prosecutors, four dismissed altogether, and one in which the defendant pleaded guilty and was fined (four times the monthly wage) for trademark infringement. There were no criminal convictions with jail sentences imposed, and the only fines came in a single case at levels that do not serve as a deterrent. Much more needs to be done for effective criminal enforcement. An October 2003 Memorandum of Understanding signed by the government pledging to the copyright industries to do more is a goodwill gesture and a positive first step, but nothing more without actual on-the-ground action.

The Customs Code was amended in April 2003, in force May 1, 2003, replacing 1999 amendments. Unfortunately, the 2003 amendments did not include the necessary *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. Worse, the 2003 amendments adopted a complicated registration system for copyright rightholders seeking enforcement, which will further weaken, not strengthen, border measures. IIPA recommends that this registration system should be repealed and that border officials be given clear *ex officio* authority to seize infringing material and to commence their own criminal investigations.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$145 million in the first 11 months of 2003. The copyright industries have waited ten years for effective change; perhaps the withdrawal of GSP benefits will help spur these necessary changes.

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 governments reported in 2003 that seizures of IPR materials comprised just over 200,000 copies—there were approximately 13 million pirate copies of sound recordings alone sold in 2003—so much more needs to be done by enforcement authorities. A

special IPR department was recently established within the Finance Police (with national authority). In 2003, the Finance Police initiated three criminal raids, resulting in two criminal cases against illegal software resellers. According to a recent initiative, the General Prosecutor's office instructed all regional prosecutors in Kazakhstan and all regional/city departments of the Financial Police to undertake raids against IPR infringers, and to report their results by February 12, 2004. This initiative resulted in five new raids and cases against software pirates that will hopefully result in criminal proceedings.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 70%; trade losses for 2003 were estimated at \$22.7 million. It is estimated by the recording industry that in total 17.4 million cassettes and 5.8 million CDs were sold in Kazakhstan in 2003 and of these, 12.2 million cassettes and 4.1 million CDs were pirated copies. The industry also reported 427 raids and the seizure of US\$325,800 worth of pirate material (27,200 CDs, 46,300 cassettes and 61 recording devices) in 2003 by local enforcement agencies.

Last, 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—and the plant has neither applied for the international SID codes nor is it subject to any optical disc regulation. The lack of effective enforcement and the infrastructure in Kazakhstan makes it ripe for the movement of other plants into Kazakhstan from neighboring countries, such as Russia or Ukraine.

TAJIKISTAN

The U.S. Trade Representative, in his May 2003 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 it providing any protection for U.S. or other foreign sound recordings among its other deficiencies. This is ten years after it was obligated to do so.

Legal reform deficiencies: 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; that agreement entered into force on November 24, 1993. The Tajik Copyright Law was last amended in 1998 (in force on December 17, 1998). Among its deficiencies, the law over-regulates the terms and conditions of authors’ contracts. And, it provides a right of remuneration only for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable. The law should be further amended to provide producers with an exclusive public performance (or making available) right, at a minimum, for digital transmissions. Tajikistan should be encouraged to ratify and then fully implement both the WIPO digital treaties.

Tajikistan is a member of Berne (2000). As noted, it fails to provide any protection or rights to U.S. or any other sound recordings, and is not a member of the Geneva Phonograms Convention—two obligations of the trade agreement. Nor does the Tajik law clearly provide protection for pre-existing works or sound recordings in its copyright law. 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 did not amend its criminal code (as expected following passage of the November 1998 copyright law) to adopt criminal provisions for IPR violations. This failure is a breach of the bilateral agreement’s obligation to provide “adequate and effective” protection and enforcement. 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. Also, 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. A 2002 resolution (No. 185 of the Cabinet of Ministers) established border control rules for goods, including IPR works, and it implemented a customs registry for IPR works requiring a rightholder to file a statement and set of documents for border enforcement, a cumbersome and ineffective tool.

In short, the Tajik copyright regime does not provide “adequate and effective” enforcement as required by the bilateral trade agreement—there is not a single criminal IPR case reported, and none under the administrative code (last revised in 1999 with a new Article 158-2 reportedly provides levies, fines, and seizure of illegal copyright and neighboring rights material).

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.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are currently no known optical media plants in Tajikistan. The level of music piracy is estimated at about 82%; trade losses for 2003 were estimated at \$5.2 million. It is estimated by the recording industry that in total 6.2 million cassettes and 1.1 million CDs were sold in Tajikistan in 2003 and of these, 5 million cassettes and 0.9 million CDs were pirated copies.

TURKMENISTAN

The U.S. Trade Representative, in his May 2003 announcement placing Turkmenistan on the Watch List, noted the many steps that Turkmenistan must take in order to “fulfill its intellectual property rights commitments under the 1993 U.S.-Turkmenistan Trade Agreement.” In fact, Turkmenistan is not providing any protection or rights to U.S. or other foreign works or sound recordings—over ten years after it agreed to make basic changes in its legal and enforcement regimes.

Legal reform deficiencies: 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; 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. 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; the operational copyright laws are those that were last amended by the Civil Code (1961) in 1999. 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 neither a member of the Berne Convention nor the Geneva Phonograms Convention which means that U.S. (and other foreign) works and sound recordings remain completely unprotected. When it does join these treaties, it must also obligate itself to provide protection for pre-existing works and sound recordings. 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 adopt remedies into its criminal code for works and sound recordings (another bilateral agreement obligation). In addition, provisions must be added into the criminal 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 to conduct effective border enforcement. Last, the Turkmen government should be encouraged to ratify and then fully implement both the WIPO digital treaties.

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. After adopting the legal reforms, the Turkmen authorities must, at a minimum, 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 music industry reports that illegal musical cassettes produced in neighboring countries, in particular from Uzbekistan, enter 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.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are currently no known optical media plants in Turkmenistan. The level of music piracy is estimated at about 89%; trade losses for 2003 were estimated at \$7 million. It is estimated by the recording industry that in total 6.5 million cassettes and 1.1 million CDs were sold in Turkmenistan in 2003 and of these, 5.7 million cassettes and 1.0 million CDs were pirated copies.

UZBEKISTAN

The U.S. Trade Representative, in his May 2003 announcement placing Uzbekistan on the Watch List, noted that Uzbekistan has “many remaining steps to fulfill its intellectual property rights commitments under the 1994 U.S.-Uzbekistan Trade Agreement.” In fact, Uzbekistan is neither a member of the Berne Convention nor the Geneva Phonograms Convention and thus does not provide 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.

Legal reform deficiencies: 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. The Copyright Law of Uzbekistan was overhauled in 1996 (in force on September 17, 1996), and two additional amendments were adopted in 2000. However, with the exception of the two relatively minor changes in 2000, there have not been the thorough revisions to the copyright act or to the relevant enforcement laws that Uzbekistan obligated itself to undertake in the bilateral agreement over ten years ago. The December 2000 amendments, while valuable, did not fix the major deficiencies. In January 2004 new amendments were prepared, and the IIPA and Uzbek government held constructive discussions about needed legal reforms and treaty accessions. Unfortunately, the January 2004 drafts are missing key provisions; this is disappointing because the U.S. and Uzbek governments and IIPA lawyers worked extensively on these same issues/drafts in December 2000. As an example, the January 2004 drafts do not provide protection for preexisting works and sound recordings.

Uzbekistan has not acceded to any of the relevant copyright or neighboring rights treaties even after it twice obligated itself to do so. The first instance was in the 1993 bilateral; the second time was in its testimony to the U.S. government during the 2000 GSP hearings, when it said it would join both treaties by no later than the end of 2003. As a result of these ongoing delays (especially with treaty accessions), IIPA recommends the immediate withdrawal of Uzbekistan’s GSP benefits. Such benefits could be restored when Uzbekistan meets its bilateral obligations and joins the Berne Convention and the Geneva Phonograms Convention, and amends its copyright law to provide protection for preexisting works and sound recordings for a minimum of 50 years (and preferably, 70 years). Uzbekistan was not a signatory to either of the two new WIPO treaties. The Uzbek government should also ratify and fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

There are other deficiencies in the Copyright Law including: (1) providing only a right of remuneration 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 an exclusive public performance (or making available) right, at a minimum, for digital transmissions; and (2) onerous provisions that over-regulate the terms and conditions of authors’ contracts. The December 2000 amendments did two things: (1) They added “copying of a record” to the enumerated rights of producers to fix a glaring deficiency; (2) they 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.

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. Drafts were circulated in January 2004 to amend the criminal code. However, the draft provided to the U.S. government and IIPA would weaken, not strengthen, criminal penalties because: (1) no criminal penalties would apply "until one year after administrative penalties are assessed"—providing pirates with a chance to pirate without penalty the first time, and (2) the levels—set at 50 to 100 times the minimum wage—are much too low to be deterrent penalties as are needed. The first provision must be deleted; the second (50 to 100 times) must be raised considerably to at least 500 times the minimum wage.

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. In January 2004, an Uzbek government proposal was circulated to IIPA for the establishment of a complicated registration system for IPR enforcement at the border; IIPA strongly recommends that this plan be dropped because it will prove counterproductive to effective enforcement.

A 2001 resolution (No. 285 of the Cabinet of Ministers) established a licensing system for the production, reproduction and sale of records, cassettes and CDs, according to which only licensed entities could carry out such activities. However, it has not proven to be effective against the pirate production enterprises that are so common in this region.

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 ten years ago, and is woefully insufficient for any future WTO membership. After the Uzbek government adopts the necessary legal reforms, including accession to the relevant treaties to protect foreign works and sound recordings, it must then 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.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 81%; trade losses for 2003 were estimated at \$30.5 million. It is estimated by the recording industry that in total 29.8 million cassettes and 5.3 million CDs were sold in Uzbekistan in 2003 and of these, 23.7 million cassettes and 4.6 million CDs were pirated copies. 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ECUADOR

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Ecuador remain on the Special 301 Watch List.

Overview of key problems: The government of Ecuador continues to be unable to achieve effective copyright enforcement (in administrative, criminal and civil cases). A dangerous provision in a 1999 Education Law which purportedly grants unwarranted licenses for software still remains on the books. In terms of Special 301 placement, Ecuador has fluctuated between no-listing, the Watch List and the Priority Watch List since 1992. The business software industries continue to confront high piracy levels in Ecuador due to insufficient intellectual property rights enforcement in the country. Some of the problems that the business software industries face in Ecuador include:

- Dramatic decreases in IPR enforcement since 2001.
- Practically no enforcement actions directed at pirated music.
- 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 software 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 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 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 2004:

- Create special police anti-piracy task forces in Quito and Guayaquil that will address the problems of pirate street vendors, distributors and manufacturers.

- 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 currently receives preferential trade benefits under two U.S. trade programs, both of which contain IPR standards.¹ 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.² 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 Ecuador'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

Business 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.

The recording industry reports that burned CD-Rs are the preferred format for most pirate music products. Shops produce these CD-Rs for local markets and in some cases also export to Colombia. The industry estimates that piracy represents 95% of the total pirate market

¹ During the first 11 months of 2003, \$44 million worth of Ecuadorian goods (or 1.8% 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 36.9% decrease over the same period in the previous year. In addition, some \$1.4 billion entered under the ATPA during this same 2003 time period, representing a 1,914% increase from the same period in 2002. For more information on the history of Ecuador under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² 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.

in Ecuador with no signs of abating any time soon. As a result, multinational companies have limited their presence in the country to sales offices and local independent companies struggle to stay afloat. This situation prevents recording companies from investing in local acts and jeopardizes the opportunities that Ecuadorian artists have to develop and promote their talents.

COPYRIGHT LAW IN ECUADOR AND RELATED ISSUES

The Intellectual Property Law of 1998

On May 28, 1998, Ecuador enacted an intellectual property law (IPL), which covers all aspects of intellectual property, from copyrights to trademarks to patents, 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 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 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

IEPI's anti-piracy enforcement efforts are extremely 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 since 2002. 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 7 inspections during 2003. BSA expects IEPI to conduct more inspections during the first quarter of 2004. 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.

Music piracy is rampant in the streets of key cities as Guayaquil and Quito. The local authorities have made no efforts to prevent the sale of pirated music, nor have they investigated the duplication and distribution sources for these products.

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 software 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. Based on the experience of the previous year, during 2003 BSA has not filed cases before civil courts.

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

The United States has announced its intention to launch FTA negotiations with Ecuador during 2004.³ IIPA will be looking for an agreement that achieves the same high standards as were achieved in the recently concluded FTA with Central America.

³ See Press Release 2003-74, Office of the U.S. Trade Representative, "USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries," November 18, 2003, at <http://www.ustr.gov/releases/2003/11/03-74.pdf>; and President Bush's Letter to Congress, November 18, 2003, at http://www.ustr.gov/new/fta/Andean/2003-11-18-notification_letter.pdf.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ESTONIA

EXECUTIVE SUMMARY

Special 301 recommendation: Estonia should be added to the Special 301 Watch List in 2004.

Overview of key problems: In Estonia over the past year, there has been virtually no improvement whatsoever with enforcement activities in fighting all forms of piracy. Since the government's swift actions in the notorious Kadaka Market in 2000, law enforcement authorities have failed to take any effective actions against those involved in the continuous large-scale trade in pirate goods in the Tallinn harbor area (Sadamarket and Merkeskus being the best known distribution points) and in the Kadaka Market where pirate traders operate openly, without any fear of police action. Similarly, those involved in hand-to-hand piracy and Internet piracy operate with impunity, especially in FTP (file transfer protocol) servers. Industry reports indicate that a new optical disc plant may have arrived in Estonia. Effective enforcement measures, such as well prepared raids, expeditious prosecution and deterrent sentencing, should be taken. There has been no evidence of any form of effective border enforcement against the vast amounts of pirate products entering the country from the eastern and southern borders. Furthermore, there has been no evidence of basic communication and co-operation with respect to pirate goods between the police and customs which is an essential and basic requirement in any government program that is serious about tackling piracy.

Recent legal reforms have left several critical problems in the copyright law. Although the 2002 amendments to Estonia's 1992 Copyright Law did improve some measures, several key standards for effective copyright protection in the digital age remain missing. Substantive obligations under TRIPS are still missing, such as the failure to provide a civil *ex parte* search remedy. Estonia has the distinction of being the only EU accession country which has not ratified the two 1996 WIPO Internet treaties. Furthermore, U.S. record producers are still not protected equally with Estonian and other international producers, creating a discriminatory situation. The Estonian government is contemplating additional copyright law amendments in early 2004. Copyright developments and additional legislation affecting copyright enforcement (such as the Trade Law, etc.) planned for 2004 should be closely monitored for compliance with Estonia's bilateral and international obligations.

Actions which the Estonian government should take in 2004

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority in co-operation with the right holders organizations;
- Significantly strengthen border enforcement inspections and seizures, to stop the importation and transshipment of pirated goods from Russia and Belarus (via Latvia and Lithuania) to other countries in Eastern Europe (especially into Finland and other Scandinavian countries);

- Improve criminal enforcement by increasing the number of police actions, bringing prosecutions, and issuing deterrent sentences;
- Encourage enforcement authorities to cooperate actively with rights holders when combating copyright piracy;
- Establish system at the borders to track the importation of blank optical media products;

Legislation

- Ratify the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT);
- Fully implement the WIPO treaties' obligations into national law (there is a copyright law reform effort underway);
- Increase the levels of sanctions available in the Misdemeanor Act because they are too low to be deterrent;
- Amend the law to provide for civil *ex parte* searches, as required by TRIPS (this apparently will be introduced as part of a new Civil Procedural Code);
- Amend the law to provide statutory damages, a TRIPS-compatible remedy which assists courts in awarding damages in civil copyright infringement actions;
- Withdraw Estonia's reservation to Article 5 of the Rome Convention.

ESTONIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	6.5	60%	9.0	60%	9.0	60%	9.0	60%	9.0	70%
Motion Pictures	2.0	35%	2.0	30%	1.5	40%	2.0	60%	NA	60%
Business Software Applications ²	NA	NA	4.2	53%	3.3	53%	NA	69%	NA	72%
Entertainment Software	NA	60%	NA	NA	NA	90%	3.7	98%	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS ³	NA		15.2+		13.8+		14.7+		9.0+	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, available at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$5.7 million and levels of 52% were also identified as preliminary; BSA's revised 2002 figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Estonia, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Estonia (including U.S. publishers) and (b) losses to local distributors and retailers in Estonia.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Estonia were \$16.7 million. IIPA's revised 2002 loss figures are reflected above.

In September 2003, the U.S. government welcomed the European Commission's decision which endorses a political understanding preserving the U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Estonia.⁴ This BIT is important, as it provides a broad provision on national treatment.

COPYRIGHT PIRACY IN ESTONIA

Optical disc (OD) piracy: The Estonian market remains flooded with illegal OD product manufactured in other countries, notably Russia, Ukraine and Belarus, imported also through the neighboring Baltic States. EOCP reports that the large-scale import of pirated goods continues. For example, in April 2003, the police found some 22,000 pirate optical discs containing music, films and games in an apartment in Tartu City in southeastern Estonia (see the discussion below). The country's besieged industries face the added problem of a rapid growth of localized/domestic unauthorized reproduction onto CD-Rs. The share between the home-burned CD-Rs and manufactured CDs is estimated to be 55%/45% respectively. BSA reports that CD piracy is still at the "cottage industry" stage in Estonia, and does not appear to be well organized. The failure of police to use their *ex officio* authority and sporadic actions by customs officials has allowed pirate material to flow unimpeded into and out of Estonia by hand-carry, road vehicle and by road.

A startling new development is a reliable report that Estonia may be acquiring a CD line. The recording industry has the information that the Estonian company, Baltic Media Manufacturing, purchased a CD-line from the Swedish plant, and was allocated a mould code in December 2003. However, there is no further information about the number of lines etc available. This fact in itself clearly calls for the need of the regulation of the manufacture and distribution of optical discs.

Estonian customs has not contributed to determining the main smuggling routes of pirate goods and the extent of transshipment of pirated goods through Estonia. Industry reports indicate that there have been a few transit cases in which Russian music repertoire was intercepted in Estonia. 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 European countries. The industries had hoped that the October 2000 promise by customs officials to heighten border measures, especially against the tourist-related "suitcase" piracy in Tallinn's passengers' harbor, would provide effective. Unfortunately, customs raids against "suitcase" piracy are extremely rare and too sporadic to be an effective tool.

Internet piracy: Internet piracy in Estonia during 2003 continued to be a serious and increasing concern to the copyright industries. The most prevalent forms of Internet piracy include: (a) mail order piracy, which involves the Internet as a marketplace and the postal

⁴ See U.S. State Department, "U.S. Welcomes EC Decision on Bilateral Investment Treaties," September 3, 2003 at usinfo.state.gov. Previous IIPA Special 301 country reports on Estonia at <http://www.iipa.com/countryreports.html>. For more information on Estonia's limited history under Special 301, see IIPA's 2004 Special 301 Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>). Estonia participates in the U.S. Generalized System of Preferences (GSP) trade program; during the first 11 months of 2003, \$27.9 million worth of Estonian goods (or 17.7% of Estonia's total exports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 105% increase over the same period in the previous year.

service to deliver illegal goods; (b) direct download piracy from file transfer protocols (FTP) servers; (c) peer-to-peer and file-sharing networks such as KaZaA and StreamCast. EOCP reports that it sent a total of 166 cease-and-desist letters to the websites consisting of illegal material in 2003, all of which were removed by the Internet service providers (ISPs). Information on about 20 illegal websites was sent to other organizations. During 2003, BSA continued to cooperate with a number of Estonian ISPs with regard to the removal of web pages offering infringing material. During the course of 2003, BSA identified 32 sites offering infringing material, and sent 29 warning letters to ISPs, resulting in 15 pages being taken down by ISPs, and a further 14 pages being removed by content providers. However, BSA is concerned with the increasingly prevalent problem caused by the availability of server space on FTP servers, which allows the easy uploading of infringing material for download by third parties, and presents significant enforcement challenges to right holders.

In April 2001, the private sector (including EOCP) concluded a Memorandum of Understanding (MoU) with Estonian Internet Service Providers (ISPs) enabling the effective survey (notice) and removal (takedown) of infringing materials from the Internet. As the 2001 MoU proved useful, especially in the Internet piracy fight, but required updating, the copyright industries groups launched the second set of negotiations with the ISPs to sign another MoU in order to obtain additional cooperation/measures in three areas: (1) free and 24-hour access to all FTP servers, including passwords in protected servers, etc.; (2) the immediate removal of pirated files (the current MoU requires 48 hours' response time); and (3) the identification of FTP users by ISPs. Unfortunately, the negotiations are still pending and the future of the possible new MoU is uncertain. The ISPs have agreed to participate in the round-table organized by EOCP and BSA in the first quarter of 2004.

Piracy levels remain high. Piracy levels for many of the copyright industries in Estonia remain high; there has been no noticeable improvement in the past year. The anti-piracy group EOCP is composed of record, film and entertainment software industries, and works with the business software industry (BSA) in running educational seminars for police and customs officials in Estonia.

Piracy of sound recordings and music remains widespread in Estonia. The continuous in-flow of pre-recorded sound recordings and simultaneous rapid growth of CD-R piracy of music are damaging the legitimate market steadily. Recorded musical works are widely distributed hand-to-hand (mainly on CD-Rs), on the Internet and are still sold in the main markets in Tallinn (the Kadaka Market, Merekeskus and Sadamarket), 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. The estimated level of music piracy was 60% in 2003, with estimated trade losses due to the piracy of sound recordings and musical compositions placed at **\$6.5 million**. The drop in estimated losses between 2002 and 2003 is not due to a drop in piracy levels, but rather by a decrease in legitimate sales.

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. The high piracy level and pirate product production in Russia does have an adverse influence on the Estonian market. Estonia has long been considered by Finnish tourists to be a place where they can stock up on counterfeit goods in the numerous shopping malls located in and around Tallinn. Retail piracy exists, but a growingly prominent sale method by the pirates is to sell their product in shopping malls hand-to-hand, through mail order, and over the Internet. The rate of video piracy in 2003 was placed at approximately 35%. Due to the growth of the market

demand for the DVD format in 2003, the DVD piracy is starting to become a problem. EOCP emphasizes the need of customs control on the borders to be more effective and well organized. 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. 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 2003.

The Business Software Alliance (BSA) reports that business software piracy in Estonia takes various forms, including companies using illegal software, the distribution of pirated software by resellers, hard-disk loading, and infringements on the Internet (both digital downloads and hard-good ordering). In October 2003, BSA launched a month-long information campaign to support legalization of business software applications in small to medium-sized business settings. This campaign was mounted in an effort to reduce the consistently high levels of business-use piracy within Estonia.

The entertainment software industry reports that pirate video games continue to be imported from Russia, and are at times shipped through Poland. Pirate products are routinely available for sale at informal markets in the country. The level of enforcement has dropped considerably compared to the level of cooperation received from law enforcement in the previous year. Piracy is rife at Internet cafés where customers are permitted to download and burn pirate material using the cafés' computers.

COPYRIGHT ENFORCEMENT IN ESTONIA

The Estonian government must express the political will to implement effective IPR law enforcement. Furthermore, Estonian enforcement officials, working with industry, 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. Industry is not aware of any national anti-piracy strategy devised by the government.

Minimal police anti-piracy actions: Anti-piracy actions taken by the Estonian police are few and far between. Two serious problems are the low priority of IPR crimes and the lack of co-operation between different police departments.

The local anti-piracy organization EOCP reports that in 2003 it participated in 31 police raids and prepared 59 expert opinions for the police. According to EOCP data, the total amount of pirate products with music, films and entertainment software seized by the police in 2003 was around 40,000 units (including 28,431 CDs, 3,829 DVDs, and 4240 VHS tapes). The EOCP organized five training seminars for the police and customs officials in 2003. EOCP reports that in April 2003, the police raided a residential apartment in Tartu City and discovered some 22,000 pirate CDs and DVDs containing music, films and games, including the music CD-Rs with Finnish repertoire. The unfurnished apartment, located in a relatively upscale area of the city, was clearly used solely for storage purposes. The seized material was sent to EOCP in autumn 2003 and is currently under examination. The recording industry reports that the limited analysis indicates that the seized CDs originated from Russia, likely to be imported through Latvia.

Sadly, where there is localized interest by the police in tackling piracy, there is an absence of central control, coordination and support. As a result, regional incidents are not investigated for the potential of trans-regional links. Further, EOCP's only recourse for assistance is to the Police Prefecture level, as Central Criminal Police have dissociated themselves from this area.

Ineffective border enforcement: As the copyright industries have explained before, all forms of pirated material regularly move between Estonia and neighboring countries due to poor border enforcement. The pirate material is mostly smuggled and (often coming from optical media production facilities in Russia) usually warehoused in Estonia because of poor on-ground enforcement, and then shipped to other European countries. As already discussed, the "suitcase" problem involves foreign tourists purchasing pirated material in Estonian shops and then exiting the country. The problem is most prevalent in shopping malls for (primarily Finnish) tourists in Merekeskus and Sadamarket in the harbor area 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. However, both the Estonian customs law and the Finnish copyright law have a personal use importation exception, which has the effect of permitting 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.⁵ However, the main problem with Customs is that it has no will to deal with IPR cases and faces the lack of resources as fighting with piracy is not a priority for it. EOCP reports that customs anti-piracy efforts 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. Customs has still not found the smuggling route of the pirate copies into Estonia either over the eastern or southern borders. There is virtually no cooperation with the police in anti-piracy enforcement—customs officials are not informed of the results of the police raids. The co-operation with the recording and film industry is generally poor and without any results, although some regions like the eastern border shows signs of interest to tackle with the piracy problem. Customs officials admit to problems with the detection of illegal material; hopefully, the training sessions held in recent years will improve this situation. The new 2002 Penal Code also affects customs, which has to impose the penalties following the new law. However, the new law does not affect the core enforcement duties of customs officials.

Customs officials must improve their coordination with the police. In addition, the Estonian government should completely implement the October 2000 decision by customs officials to seize parallel import material with effective border enforcement. Given the reports that Estonia may soon have an optical disc plant, it is strongly suggested that a system at the borders be established to track the importation of blank optical media products and polycarbonate (both legitimate products in themselves).

Problems with invalid licenses in customs shipments seem to be diminishing. EOCP has made itself readily available to assist in determining the authenticity of the contracts, and the problem is becoming less common. Most important, these materials are legally regarded as pirated copies according to Article 80 of the Copyright Law, and those cases should be dealt with similarly to the piracy cases. Customs officials report that many shipments of Russian materials enter Estonia, with the Russian distributor claiming the same invalid license

⁵ Estonian customs provisions are included in its law entitled, "The Prevention of Import and Export of Goods Infringing Intellectual Property Rights Act of 2001," which entered into force on September 1, 2001.

to distribute the material there. Like the police, customs officials claim they have no means of verifying the validity of these contracts, and no ability to stop this material.

Insufficient police raids: The illegal open markets first appeared in 1993-1994. In October 2000, the government of Estonia pledged to deal with 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 now operates as one supermarket chain; however, there are still 5-6 kiosks operating and 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. The police inactivity continued in 2003, when only a few raids were conducted in the Kadaka Market and other shopping malls in the harbor area. The 2002 enforcement actions must be repeated in Kadaka, other markets and cities to eliminate the remaining piracy. These markets not only hurt the local copyright market, but also cater to tourists, thus contributing to the "suitcase" piracy.

Inadequate punishment for retail storeowners: Enforcement against the owners of kiosks and stores that sell pirated material is hampered because officials have not used the 2000 Licensing Law to fine the businesses or to revoke their business licenses. The 2000 Licensing Law will be replaced by the Trade Law, the draft of which was discussed by the Parliament in the second reading in January 2004. The draft Trade Law will also amend the Copyright Law [Article 84(1)] prohibiting the trade with the pirate copies in the misdemeanor procedure. Estonian police should be more active in using the new Trade Law by officially requesting the revocation of trade licenses as an additional penalty.

Prosecutorial delays and high evidentiary burdens: Prosecutorial delays by the police and legal roadblocks have so far prevented effective prosecution. For example, false contracts, especially Russian sub-license agreements, 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. BSA has also experienced difficulties in obtaining updates and information from police in relation to prosecutions, including important information such as whether seized pirated CD's have been destroyed or not.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS ESTONIA IN 2003		
ACTIONS	SOUND RECORDINGS, FILMS and ENTERTAINMENT SOFTWARE (EOCP)	BUSINESS APPLICATIONS SOFTWARE (BSA)
Number of Raids conducted	31	37
By Police	31	36
By Customs	N/A	1
Number of cases commenced (including Internet cases)		
Number of defendants convicted (including guilty pleas)	N/A	
Acquittals and Dismissals	N/A	
Number of Cases Pending		
Total number of cases resulting in jail time	N/A	0
Suspended Prison Terms		1

Maximum 6 months		1
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		1
Up to \$1,000		1
\$1,000 to \$5,000		
Over \$5,000		
Total amount of fines levied		US\$560

No civil ex parte search authority and no statutory damages: Civil remedies in Estonia remain weak. Although the Estonian Government is making progress in terms of implementing a civil search remedy, progress is glacial. In the latter part of 2003, the Ministry of Justice prepared a draft civil search and seizure procedural remedy, which has been returned to the Ministry of Justice after consultations with interested parties. The draft has been presented to the Estonian Parliament for further consideration in the spring of 2004, although this apparently will mean that any implementation of the law will be unlikely before autumn 2004. The absence of such a remedy within Estonian law is likely to continue to cause BSA significant enforcement problems throughout 2004, particularly in view of the low level of police activity in relation to end-user piracy. BSA test cases brought in 2002 and 2003 confirmed the absence of the civil search and seizure remedy from Estonian law.

COPYRIGHT AND RELATED REFORM IN ESTONIA

The WIPO treaties: Estonia was a signatory to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 1997. However, Estonia has not yet started the ratification process to officially join these two treaties; it is the only EU accession country which has not yet joined. Estonia should make all efforts to ratify the WCT and the WPPT, and implement the treaties' obligations into national law.

Estonia's plans to amend its copyright law to implement the WIPO treaties were delayed until the mid-2003 in order to combine efforts to implement the two WIPO treaties as well as various EU directives. In summer 2003, the Ministry of Culture prepared the first draft amendments to the Copyright Law and started an active dialogue with local rights holders and other interest groups. The Ministry's draft is due to be sent to the Estonian Government by the second half of February 2004; it is clear that more amendments will be needed to strengthen the proposed legislation (see further discussion below).

Copyright law: Soon after its independence, Estonia adopted a then-modern copyright law which entered into force on December 11, 1992. It also undertook a series of reforms to join the international trade and copyright community.⁶ The Estonian copyright law was amended

⁶ For example, Estonia enacted additional amendments to the Copyright Act, as well as to the Criminal Code, the Code of Administrative Offenses, and the Customs Act, in 1999 partly in anticipation of ratification of the WTO TRIPS Agreement. 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. Also included were increases in criminal sanctions, amendments relating to collective administration, and provisions necessary to implement the European Union Rental

in November 2002 in an effort to harmonize the provisions of the copyright license agreements with the Obligations Law.

However, the 2002 copyright law amendments did not resolve all the outstanding issues the copyright industries had advocated that Estonia address in order to make a first-rate copyright law. Additional recommendations to the copyright (and other) laws included, for example:

- Provide for minimum statutory damages, relieving plaintiffs from proving actual damages in cases involving copyright disputes between all parties, including legal entities
- Expressly afford civil *ex parte* search authority;
- Replace 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.⁷ Presumption of ownership would not be new to Estonia's legislation, as the 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:

- Provide right holders the full reproduction rights in compliance with the WIPO treaties and other international laws;
- Adopt an exclusive right of communication to the public, including a right of making available;
- Allow rights holders to enforce their rights against the circumvention of technological protection measures. 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 right holders to protect "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.

Directive. In 2001, additional amendments were made to enhance anti-piracy efforts, such as prohibiting trade in specific goods if the legal person holding a license trades in pirated products. In 2000, Estonia acceded to the Geneva Phonograms Convention (May 28, 2000) and the Rome Convention (April 28, 2000). New penal code amendments entered into force on September 1, 2002.

⁷ One of the main obstacles to effective enforcement is cumbersome and unnecessary requirements of proof of rights ownership imposed upon 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 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.

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Local copyright industry colleagues inform IIPA that some of the above issues may be corrected in the latest draft copyright amendment proposal (an English translation is not available). IIPA and our colleagues look forward to Estonia's full and effective implementation of the WIPO Internet treaties' obligations.

The Rome Convention reservation must be withdrawn. On November 6, 2002, the Parliament adopted an amendment to change their full reservation to Article 12 of the Rome Convention. The Estonian Ministry of Foreign Affairs deposited the relevant instruments in the U.N. Secretariat on January 9, 2003, and the amendment entered into force on October 9, 2003. However, Estonia did not withdraw the full reservation, but changed it to a "reciprocal treatment reservation," which gives foreign repertoire the same protection as other member states of the convention that 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 protection of U.S. sound recordings, released within 30 days after the first release date in the U.S. in any of the Member States of the Rome Convention.

The 2002 Penal Code and Misdemeanor Act: The Penal Code of 2002 abolished the old administrative procedure and replaced it with a modern misdemeanor procedure for primary offenses of distribution of pirated copies. There is now a distinction between categories of offenses along a "felony/misdemeanor" model. Industry reports indicate that, under Article 14 of the Penal Code, non-natural legal entities (such as companies) will face criminal liability for, among other things, piracy offenses, which will attract fines in the range of 50,000 to 250 million kroons (US\$4,102 to \$20.5 million), with the additional potential penalty of the liquidation of the company concerned. Additionally, the code provides for a maximum of three years' imprisonment. 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\$16 to \$1,477) for living, natural persons, and 50,000 up to 500,000 kroons (US\$4,102 to \$41,018) for legal entities. It should be highlighted that the penalties imposed are far from deterrent and completely disproportional with the damage done.

The recording industry is very dissatisfied with the penalties in the Misdemeanor Act because they are far from deterrent when cases involve large-scale distribution. For example, it is not yet clear whether the pending Tartu case (where 22,000 pirate units were seized) will qualify as a criminal case or a misdemeanor. The criteria for a criminal case involves proof of manufacture of the infringing materials. If reproduction is not proved, then case will be process as a misdemeanor (with a maximum of 18,000 kroons' fine).

Enforcement efforts for the business software industry continue to be hindered by the fact that penalties for software piracy are too low to have any deterrent effect and no statutory damages are available.

Criminal Procedural Code: The Estonian Parliament has adopted a new Criminal Procedure Code which comes into effect on July 1, 2004. The new code enables the legal entity to be a plaintiff in the court proceedings. The Parliament is also discussing the new draft Civil Procedural Code.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

HUNGARY

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Hungary be placed on the Special 301 Watch List in 2004. Hungary has made great strides to modernize its copyright legal regime over the past several years, including extensive legislative revisions and amendments to its criminal code, and it is in the process of finalizing the harmonization of its laws in accordance with its accession duties to the EU. However, copyright owners report persistent prosecutorial delays and problems in a market that could otherwise sustain substantial growth.

Overview of key problems: The main problems adversely affecting the copyright industries in Hungary include:

- Continued prosecutorial delays within the courts;
- Low fines and generally weak sentences that fail to provide sufficient deterrence;
- 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.

Actions which the government of Hungary should take in 2004: Overall, Hungary needs to improve its enforcement of IPR. In order to do that, at a minimum, the Hungarian Government should work to:

- Streamline the court systems to counter delays, and increase the effectiveness of legal investigations;
- Highlight and promote the importance of IPR issues at the prosecutorial level;
- Impose higher penalties and harsher sentences to deter copyright pirates;
- Strengthen the effectiveness of the border police;
- Ensure complete enforcement of the 2001 Act CVIII on Electronic Commerce and Information Society Services and the relevant new provisions in the Criminal Code to effectively combat Internet piracy through new legislation (further to the amendments made by 2003 Act XCVII in compliance with EU Directive 2000/31/EC);
- Adopt optical media regulations to combat and control optical media production and distribution;
- Launch a joint IPR campaign together with the copyright industries targeted to increase the public awareness of the 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 – 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	NA	NA	32.8	45%	21.3	48%	33.3	51%	30.1	52%
Motion Pictures	20.0	30%	18.0	30%	18.0	40%	18.0	40%	22.0	40%
Records & Music	8.0	30%	6.0	30%	4.5	30%	3.0	20%	4.0	20%
Entertainment Software	NA	NA	NA	NA	43.3	90%	9.6	86%	NA	NA
Books	4.0	NA	4.0	NA	4.0	NA	4.0	NA	4.0	NA
TOTALS	32.0+		60.8		91.1		67.9		60.1	

COPYRIGHT PIRACY IN HUNGARY

Piracy remains surprisingly high in Hungary and exacerbates the overall regional piracy problem due to poor border enforcement.

Optical Media Piracy

Hungary continues to be a haven for CD-R piracy—primarily factory produced music CDs (manufactured in and imported from Ukraine) and entertainment software (manufactured in and imported from Russia). Recordable CD (CD-R) pirate materials predominate because of the relatively low prices of CD burners and blank CD-Rs in the Hungarian market. Pirate CDs continue to be illegally imported and smuggled into Hungary from Ukraine, Serbia & Montenegro, and Russia.

Pirate film DVDs, mostly imported from Russia and Ukraine, are another problem, involving primarily pre-release titles sold in flea markets such as Petöfi Hall in Budapest. Locally burned CD-Rs, and DVD-Rs containing audiovisual content, are a persistent problem.

The recording industry reports that there are currently three optical disc plants with a total of 11 lines in Hungary. Two of the three plants are operational (with a total of eight operational lines), and there is a third plant (newly established in 2003) with three lines not yet in operation. The existence of these plants clearly calls for the need to regulate the

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, and is available on the IIPA website at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

manufacture and distribution of optical discs. In order to regulate the production, distribution, and export of optical media, the Hungarian government must set up plant monitoring procedures to regulate the facilities and equipment where optical discs are manufactured.

CD-R Piracy and Internet Piracy

The Internet provides an effective channel for the marketing and distribution of pirate CD-Rs. The Internet is also being used to market technical equipment for circumventing copyright protection technologies. The 1999 copyright act amendments included strong anti-circumvention provisions, as well as sanctions against signal theft, and if implemented properly, could begin to address these problems. The Hungarian government set up a new police unit to help combat Internet crime, including IPR crimes. This unit, however, is relatively small and understaffed.

On the basis of a 2001 cooperation agreement, the recording, audiovisual and business software industries continue to receive good cooperation from Hungarian Internet service providers (ISPs) who respond to notice requests to take down sites or links hosting illegal content. MAHASZ (the recording industry's anti-piracy organization) reports that, in 2003, it sent a total of 243 cease and desist notices to websites with illegal music files and that 223 of these notices resulted in the removal of the material from the Internet by the ISP.

Business Software Piracy

The predominant concerns for the business software industry are: (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 by judges to compute harm (damages) to rightholders at less than the retail value of the products concerned. According to the BSA, the average duration of court proceedings in Hungary is approximately two years for civil and criminal claims. The courts routinely require fact-finding examinations by experts that take two to three months to conduct, even though they are not necessary.

Record and Music Piracy

The recording industry estimates the level of music piracy in Hungary in 2003 was 30% of the market. Trade losses to the music industry in 2003 were \$8 million, the third year of increasing losses. This rise is due to the growth of CD-R piracy in the country, which now reaches as high as 92% of the overall pirate music market. MAHASZ reports that, in 2003, the total number of seized material was 43,000 units, of which 38,000 were CD-Rs. The police conducted 90% of these seizures; customs officials undertook the remaining 10% of seizures.

MAHASZ reports that the local copyright industries (i.e., the record and film producers, performers and authors) are planning to establish a joint anti-piracy organization, beginning operations in May 2004.

Audiovisual Piracy

The import of pirate DVDs from Russia and Ukraine (all Russian-made) is on the increase. Most of these are pre-release titles carried in individuals' luggage that are used to

supply street vendors operating in the largest flea market in Budapest (Petofi Hall). Pirate DVDs have also been found in retail outlets that were not previously known to be pirate and that now offer pirate DVDs to complement to their existing catalogue. Locally burned CD-Rs, and increasingly DVD-Rs, are a persistent problem.

Pirates are increasingly using the Internet to market infringing products. Internet hard copy sales are a growing concern; Hungarian dubbed and subtitled material is offered on web sites located in neighboring countries. Another problem is the downloading of movies from FTP and P2P systems. ASVA, the local motion picture anti-piracy organization, receives good cooperation from the local ISPs, and an agreement signed in May 2002 with the main association of Hungarian ISPs establishing a notice and takedown procedure is working well for the motion picture industry.

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.

Another concern is the high level of back-to-back copying in small rental/retail shops. They tend to offer sophisticated counterfeit products, and they maintain small amounts of stock on site to make identification and collection of evidence difficult.

Entertainment Software Piracy

The entertainment software industry reports a strong legitimate market for their product in the country's large stores, as well as in music and software stores. The availability of pirated entertainment software products also appears to have declined from weekend market venues, as well as from smaller retail shops in particular market districts. Pirate products are, however, readily available at Petofi Stadium, although they are not sold openly. It is likely that organized criminal enterprises control the supply and distribution of material at the stadium (not unlike the problems encountered at Poland's Warsaw Stadium). At the Petofi Stadium, the modus operandi is for "runners" to deliver the merchandise selected by customers from catalogues provided by the vendors. The order is placed by telephone and promptly delivered 15 to 20 minutes later. The customer is instructed to rendezvous with a "runner" to ensure that enforcement actions do not compromise the vendor/supplier or the location of their goods. Prices range from HUF 1000 to 3000 (approximately US\$5 to US\$15), depending on the game product selected. There is little or no stock on hand available at the stalls in order to avoid seizure of the products in the event a raid is conducted. The piracy rate is around 50%.

Piracy of Books and Journals

The book and journal publishing industry reports that the same problems persist—the unauthorized photocopying of printed materials, and of academic textbooks in particular. The book publishing industry estimates losses of \$4 million in 2003.

COPYRIGHT ENFORCEMENT IN HUNGARY

Criminal Enforcement

The ongoing high levels of piracy in Hungary are the result of ineffective criminal enforcement by Hungarian authorities, even though many of the industries report generally good police cooperation. For example, the BSA reports very good police cooperation in conducting raids and seizing infringing product. As a general rule, police take action upon request by the rightholders, but the police have also increased the number of *ex officio* actions in copyright cases as permitted by Article 2 of the Criminal Procedure Law (Basic Principles of Criminal Procedure). BSA reports that in 2003, there were 32 *ex officio* cases handled by the police, although all were directed against small targets. The entertainment software industry also reports good police cooperation. While cases continue to be brought directly by ESA member companies, there have also been several cases initiated by the police. ASVA, the anti-piracy program affiliated with MPA, continues to receive excellent cooperation from the police, who have conducted numerous enforcement actions throughout Hungary.

There are some procedural problems with raids. Searches of suspects' homes are based on "probable cause" and are undertaken according to a very stringent standard requiring testimony from witnesses and documentation establishing that business activity is being carried out on the premises. Evidence of pirate product and duplication equipment has proven insufficient to commence raids in the past (with pirates claiming successfully that such material was for "personal use"). Furthermore, there have been reports of police "tip-offs" in some of the smaller communities.

Prosecutorial and Judicial Delays, No Deterrent Penalties

Prosecutorial delays, and the failure to impose deterrent penalties for those few criminal cases that do reach the judgment stage, are serious problems.

BSA reports 33 criminal law suits against end users in 2003. However, 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 on appeal. As an example, one BSA end user case, involving a substantial number of illegal products came to sentencing at the end of November 2003, even though the case was initiated at the end of June 2001. The software industry reports that prosecutions reaching final judgment generally resulted in probation and small fines, which do not deter piracy. The average sentence was between two and 12 months suspended, with major targets receiving sentences of up to two years suspended. The software industry reported no fine above US\$1,000; in fact, criminal fines ordered by courts generally remain below US\$500 in cases involving software piracy. For example, in one BSA end user case the target was found guilty of 233 separate counts of use of infringing software products. The harm done was estimated to be approximately US\$24,000 to the BSA members (i.e., excluding non-BSA software), but the final sentence involved a fine of only US\$314. BSA noted some progress in 2003. January 2003 was the first time an end-user pirate received a prison sentence for copyright infringement in the absence of any other crime, as well as the required payment of full damages of approximately US\$16,000 prior to the sentencing. More sentences like this would certainly demonstrate that the Hungarian courts are serious about imposing deterrent sanctions.

The entertainment software industry reports that its member companies also experience long delays in the judicial process. Several "current" cases date back to mid-2001 and remain pending. Though sentences and fines imposed have been largely nominal, entertainment software companies have seen some improvement recently. Hungarian courts should be encouraged to continue to impose deterrent sentences.

Despite generally good cooperation from the police, the audiovisual industry reports that Hungarian prosecutors and judges remain reluctant to treat copyright infringements as serious crimes. Securing adequate prosecution and deterrent sentencing from the courts has been difficult. Despite the modern 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). However, the copyright industries remain concerned about its effective enforcement in practice because of the ease with which pirated products pass through Hungary.

Customs authorities have difficulty distinguishing between legal and illegal products; improvements must be made to the quality and efficiency of Hungarian border controls and checks. Since 1997, a governmental decree (No. 128/1997) has been in place to regulate IP related imports by persons without proper licenses. To avoid importation of illegal products, a sole distributor must make an application to the National Customs Authority for a license. However, this appears to have had no significant impact in stopping the illegal importation of IP related products. The Hungarian government must improve border enforcement and impede the flow of pirate products across its borders.

Civil Enforcement

The government has taken steps to try to resolve the issue of effective civil *ex parte* search orders. The 1999 Copyright Act amendments did not introduce new civil *ex parte* provisions because the Hungarian authorities at the time insisted that such provisions already existed in the civil code. 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 provisions did not prove effective following test cases because of procedural complications. An amendment to the copyright act, effective December 12, 2003, permits the courts to order temporary measures to be undertaken, including search orders and seizures, within 15 days after an injured party makes a petition for such measures. For copyright matters, if an injured party establishes sufficient plausibility of the evidence, the courts may, at this party's request, compel the other party to present any documents or other material evidence in their possession to the court or make an inspection order (Articles 95 (5)-(7)).

BSA has three end user cases ongoing in the civil courts, and it filed fourteen end user civil claims in 2003. BSA also reports 21 end user criminal judgments, and settlements in 12 cases with end users during 2003.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS In HUNGARY: 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	452	14	320
Led by Police		14	295
Led by Customs			25
Number of cases commenced	250	105	247
Number of defendants convicted (including guilty pleas)	304	25	270
Acquittals and Dismissals	52	49	60
Number of Cases Pending	208	237	176
Total number of cases resulting in jail time	0	0	5
Suspended Prison Terms	2	0	2
Maximum 6 months	1		1
Over 6 months	1		1
Over 1 year			
Total Suspended Prison Terms			10 months
Prison Terms Served (not suspended)		0	3
Maximum 6 months			2
Over 6 months			1
Over 1 year			
Total Prison Terms Served (not suspended)		0	16 months
Number of cases resulting in criminal fines	2	17	110
Up to \$1,000	2	15	110
\$1,000 to \$5,000	-		-
Over \$5,000	-		-
Total amount of fines levied	NA	US\$6,336	US\$25,000

LEGAL REFORM AND RELATED ISSUES

Copyright Law

Hungary has brought its copyright act (1999) in line with the laws of the European Union and specifically with the Copyright Directive (2001/29/EC). Amendments in Act CII of 2003 update almost all of the Hungarian patent regulations, which will come to force on May 1, 2004, when Hungary becomes a member of the EU; these patent regulations are harmonised with EU law.

However, despite these changes and progress made in earlier amendments to the copyright act, certain issues remain problematic. The Hungarian Government should correct the following deficiencies in its copyright legal regime:

- Civil *ex parte* search procedures must be clearly available and working as a practical matter for Hungary to meet its TRIPS obligations (Article 50). The December 2003 provisions need to be tested, and must prove as reliable and effective as officials have claimed them to be, otherwise further amendments to the law and/or its implementation in the copyright act will be needed to establish an effective and streamlined process.

- At present, cumbersome and unnecessary requirements for proving ownership of rights are imposed upon rightsholders. This burden of proof requirement enables defendants to delay judicial proceedings, and in some cases escape justice, even when it is clear from the outset that the plaintiff owns the copyright or neighboring rights in question. Hungary should introduce into its laws a clear presumption of ownership for rightsholders.
- The copyright act currently does not have provisions for the calculation of damages; the act only refers to general civil law rules on damages that do not help to adequately compensate copyright owners or producers of sound recordings for IPR infringements.
- The scope and reach of obligatory collective management is too broad. 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). 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 Copyright Act.
- The copyright law also requires the obligatory collective management of all exclusive public performance rights in musical works under Articles 25(1) and 25(3). These provisions conflict with the Berne Convention (Article 11(1)(i)), TRIPS, and the WIPO Copyright Treaty. Articles 25(1) and 25(3) must also 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.
- TRIPs-required amendments to the customs and criminal codes to improve border enforcement have not been adopted and should be a priority for the government.

Optical Media Regulations

The Hungarian government should craft and issue optical media regulations to better regulate the manufacture of optical disc products—especially now that there are three plants in Hungary. The global copyright community is in agreement on the key elements of an effective optical disc law that include the licensing of facilities (and equipment) where discs are manufactured along with the export and import of materials used. Additionally, manufacturers should be obliged to use codes to identify genuine product, and to register for certification to be genuine duplicators, and to keep accurate records. Authorities in turn should have the right to inspect facilities and seize products and equipment where appropriate, with the power to penalize offenders under threat of revocation of license, fines, or the closure of the plant. The copyright industries look forward to working with Hungarian authorities to draft, implement and enforce such comprehensive optical disc regulations.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ITALY

EXECUTIVE SUMMARY

Special 301 recommendation: Italy should remain on the Special 301 Watch List.¹

Overview of key problems in Italy: Italy continues to have one of the highest overall piracy rates in Europe. Passage of the Anti-Piracy Law amendments to the Copyright Law in 2000 has led to improvements in enforcement, but incorporating meaningful deterrence into the Italian enforcement system remains the key issue for the copyright industries. The nature of piracy is changing in Italy, with organized criminal syndicates assuming more importance, CD-R and DVD-R burning growing rapidly as a major problem, manufacturing and distribution migrating to smaller, harder-to-detect forms, and Internet piracy significantly increasing. However, more traditional forms of piracy, such as commercial photocopying of books and journals, persist, with devastating effects on the publishing industry. Additionally, courts remain reluctant to take on software end-user piracy cases. Piracy rates in Italy continue to exceed 20% across all copyrighted products. With the new law and higher administrative penalties adopted in 2003, it is hoped that these tougher penalties, if they continue to be imposed at the new levels, will eventually result in a drop in these rates.

The software industry has continued, unsuccessfully, to seek an exemption to an SIAE “stickering” requirement which is extremely burdensome for this type of product. Judicial reform is still needed to speed up criminal and civil enforcement, so that Italy can meet its TRIPS enforcement obligations. It remains an unfortunate cultural fact that many judges, and the public, 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 piracy by organized criminal syndicates, and on all other types of piracy, including Internet piracy and unauthorized commercial photocopying;
- Continue to 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 remove backlogs;
- Eliminate the stickering requirement on computer software;
- Fully implement the provisions of the EU Copyright Directive effective in April 2003.

¹ For more details on Italy's Special 301 history, see IIPA's "History" appendix to filing, at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

ITALY
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003²

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	140.0	20%	140.0	20%	140.0	20%	140.0	20%	160.0	25%
Records & Music	42.0	22%	42.0	23%	40.0	23%	50.0	25%	60.0	25%
Business Software Applications ³	NA	NA	363.4	47%	338.8	45%	327.0	46%	338.4	44%
Entertainment Software ⁴	168.5	47%	215.4	55%	NA	74%	NA	65%	60.9	52%
Books	23.0	NA	23.0	NA	23.5	NA	23.5	NA	23.0	NA
TOTALS	NA		783.8		542.3		540.5		642.3	

COPYRIGHT PIRACY IN ITALY

Piracy levels remain too high across all industry sectors; CD and DVD-R “burning” and Internet piracy grow

While piracy rates in Italy across all industries have remained at 20% or higher for the last 10 years, there was continuing, improved implementation of the 2000 Anti-Piracy (AP) Law in 2003. The result has been more aggressive raiding, more seizures and, most important, the imposition of deterrent penalties by the judicial system. That law made piracy a “serious” crime, subject to higher criminal penalties, clarified the criminality of business end-user piracy, and added administrative sanctions. The level of administrative sanctions was then further increased in 2003. Enforcement actions have increased and stiffer penalties have generally been imposed (see enforcement section, below).

Organized criminal groups, centered primarily in the south of Italy, dominate the optical disc piracy market, from production to distribution, using illegal immigrant networks to sell both factory-produced CDs and DVDs as well as CD-Rs, DVD-Rs and entertainment software product in PC and console formats. Increasingly, this piracy is organized “burning” onto OD formats in primarily smaller venues and less in larger labs. Imported pirated product, including CDs, VCDs and DVDs from China and other countries in Asia and from Eastern Europe, has

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission, available at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA’s statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

also been seized in 2003. As a result of the mid-2003 increase in the administrative fine (imposed on the spot by the police) from €52 (US\$65) up to €154 (US\$193), the mostly immigrant street vendors have increasingly pulled pirate product from plain view and now provide it on order. As a result of this more effective enforcement, distribution has moved increasingly to the Internet.

Internet piracy—of music, movies and entertainment software – particularly as a means to deal in hard goods and circumvention devices, is also increasing, as is Internet downloading, including via peer-to-peer systems. One massive Guardia di Finanza operation – Operation Mouse – resulted in the charging of 181 persons with illegally copying products and selling them using websites and mailing lists. The annual revenue of this criminal ring was estimated at US\$125 million. Another 10,300 persons are under further investigation for similar offenses. While Italy was one of the first countries to implement the EU Copyright Directive and to adopt its prohibitions against trafficking in circumvention devices, a recent lower court decision from the north of Italy held that mod chips used in modified Sony Playstation® consoles (allowing them to play pirate games) were not illegal under Italian law—a decision directly contrary to the Directive. This decision is on appeal and hopefully will be reversed at the earliest opportunity. This decision opens the door to the wholesale trafficking on the Internet in all manner of circumvention devices.

Furthermore, rightholders contemplating legal action against Internet pirates in Italy will face difficulties in identifying infringers due to restrictions imposed by the Privacy Code that came into effect on January 1, 2004. Rightholders will reportedly not be able to obtain from Internet Service Providers, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Rightsholders may, however, be able to secure such information through the police or the courts in criminal actions. There is also concern over a new bill, concerning “Interventions for the Administration of Justice” (AC 4954) which, in Amendment 3.13, appears to prevent, for privacy reasons, access to traffic data, thus undermining online enforcement.

Corporate end user piracy of business software, unauthorized commercial photocopying and broadcast, cable and satellite piracy continue to damage U.S. copyright owners

The level of piracy of business applications software by corporate end-users—the major focus of the business software industry in Italy—remains among the highest in Europe. Prior procedural difficulties in bringing cases against end users in the Italian courts appear to have subsided, but the industry still faces challenges with regard to the SIAE “sticker.” This unfortunate situation did not change with the passage of the amendments implementing the EU Copyright Directive in April 2003. A regulation was adopted in January 2003 providing an option of a “declaration” for software as opposed to stickering, but the industry reports that this process is unduly burdensome and, because the contents of the declarations are not available to police forces when carrying out raids, the system is of little practical use in fighting piracy.

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, which is used by publishers to collect these royalties. Financial arrangements, described in IIPA's 2003 submission,⁵ were arrived at for both educational institutions and copyshops, but these institutions routinely fail to pay royalties due, and the government has taken little or no action to collect. Furthermore, copying beyond that which is compensable in the law persists at high levels, causing, according to the Italian publishers association, AIE, over €300 million (US\$ 376 million) annually in losses to all publishers, which includes U.S. publishers. In October 2003, a major educational campaign was initiated to seek to reduce these losses.

The motion picture industry continues to face broadcast piracy particularly in the south of Italy, but consistent enforcement has reduced this somewhat. However, recent directives issued by the Authority for the Guaranties in Communication prevent the use of video recordings to prove copyright violations, and require a long period of monitoring activity in order to check on possible violations. Such a new procedure undermines the fight against TV piracy and is inconsistent with current practice.

Similarly, unauthorized public performances continue in private clubs that exhibit both first release films as well as pre-release DVDs and rented videos without licensing the public performance. This piracy also exists in hotels, cruise ships, and ferries, especially during the summer months and the tourist season. Again, fortunately, 2003 has seen improvements in these areas. Similarly, satellite signal theft and smart card piracy, discussed in IIPA's 2003 submission,⁶ has been reduced to 2% and appears to be under better control due to the new Seca 2[®] encryption system.

COPYRIGHT ENFORCEMENT IN ITALY

Though piracy levels continue to remain high in Italy, the AP Law has continued to have a positive impact on the attitude of law enforcement toward piracy. More raids are conducted, more pirate product is seized and more prosecutions brought. There has been increased media coverage and greater public awareness of piracy crimes. Judges historically unwilling to impose serious penalties on pirates have begun to impose more significant sentences. Despite these positive signs, the judicial system is still in dire need of reform so that caseloads can be reduced and cases more quickly brought to final judgment. More judges and magistrates must take seriously the need to set deterrent-level fines and impose 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.

Criminal enforcement: The new AP Law raised maximum fines from €1,549.30 (US\$1,967) to €15,493.17 (US\$19,670). 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. However, getting the authorities and judges, in all but the most serious organized crime cases, to take effective and deterrent action remains an ongoing challenge. 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. Once filed, cases can still drag on, often taking two to three years or more,

⁵ See IIPA's 2003 Special 301 country report on Italy, page 503, available at <http://www.iipa.com/rbc/2003/2003SPEC301ITALY.pdf>.

⁶ See IIPA's 2003 Special 301 country report on Italy, page 502, available at <http://www.iipa.com/rbc/2003/2003SPEC301ITALY.pdf>.

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.

The recording industry reported that 2003 was again one of their best years ever with almost 1400 CD-R burners seized -- a 69% increase over 2002. The focus on CD-R production led to a decrease in burned CD-Rs available on the pirate market (down 41% compared to 2002). The industry cooperated in 598 raids and over 1800 individuals have been arrested and/or charged with copyright offenses. In 2003 the Guardia di Finanza seized 496 DVD-R and CD-R burners from an underground facility. This is one of the largest seizures of recordable machines ever. In addition, Customs authorities seized around 5 million blank CD-Rs imported from China and destined for the pirate market.

Most of the actions referred to above were taken by using both the criminal and administrative provisions of the AP Law and have had a positive impact. There was also an increase in arrests followed by immediate fines levied against street vendors; 78% of the arrests in 2003 were of 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 defendants with sentences imposed of more than six months in jail. However, almost all first convictions will be, and have been, suspended.

In a hearing in a Naples Court, a well-known Mafia boss for the first time publicly exposed the role of Italian organised crime gangs in music piracy. The court was given a unique insight into the extent to which crime syndicates exploit piracy in Italy. The hearing resulted from an investigation into the Naples Mafia Giuliano family, who were active in controlling music piracy under the direct control of the court witness. The infamous Camorra boss from Naples was initially arrested two years ago and offered immunity to turn state's evidence, providing information on organized crime activities and strategies in Naples over the past 20 years. He described how the Camorra gang earned millions of dollars each week dealing in drugs, extortion and involvement in the manufacture and distribution of illegal copies of, mainly, sound recordings. He detailed how his organization managed their illegal operations in Naples and how separate gang members controlled the drugs sales, illegal betting, and the massive production of counterfeit CDs in the city's suburbs. The local gangs were allowed to keep part of the illegal income, after depositing money in Camorra gang leaders' accounts. The gangs controlled all aspects of the criminal enterprise and violence was often used to ensure a continuing source of illegal revenue.

MPA reports that in 2003, raids by the police on video stores, laboratories, and street vendors continued to increase. However, while police enforcement of the law has been significantly improved, many Italian judges remain reluctant to impose deterrent sentencing on individuals charged with copyright infringement, especially where the copyright is owned by a large corporation. It can still take months between a raid and the filing of charges to commence a criminal case in court. In addition, once filed, the cases often take two to three years or more before final judgment, significantly reducing the deterrent value of increased raiding activity undertaken by the police. Especially in cases involving immigrant street vendors where the "state of necessity" concept has been invoked, some Italian judges have shown a great deal of indulgence. This may change, however, as a new law on immigration, passed in July 2002,

provides for the expulsion of illegal immigrants convicted of copyright law violations. So far, industry has no experience with this new law's operation.

The business software industry continues to report positive developments on the criminal enforcement front following adoption of the AP Law. In June, Operazione Corsaro took place, the broadest operation against enterprise end user piracy ever conducted in Italy. More than 1,000 officers from the Guardia di Finanza raided 416 companies. The GdF found over 8,000 copies of illegal software and seized over 1,000 PCs. 254 individuals were ultimately charged. Subsequently, in October, the GdF raided a key Southern Italian criminal organization in the black market for illegal software, music and films. More than 60,000 illegal CDs were seized.

The enforcement statistics below display criminal enforcement in Italy in 2003.

ITALY CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
Number of raids conducted	53	613	598	1,264
Number of VCDs seized	32,934			32,934
Number of DVDs and DVD-Rs seized	202,275			202,275
Number of CD-Rs seized	-	8,808	1,282,000	1,290,808
Number of investigations	114			114
Number of VCD lab/factory raids	-		19	19
Number of cases commenced	38	-		38
Number of Indictments	N/A			
Number of defendants convicted (including guilty pleas)	12			12
Acquittals and dismissals	1			1
Number of cases Pending	14	-		14
Number of factory cases pending	N/A			
Total number of cases resulting in jail time	12	NA	858	870
Suspended prison terms	1		80% (estimated)	645 (estimated)
Maximum 6 months	1		5% (estimated)	43 (estimated)
Over 6 months	-		15% (estimated)	130 (estimated)
Over 1 year	-		5% (estimated)	43 (estimated)
Total suspended prison terms	1			1
Prison terms served (not suspended)	11			11
Maximum 6 months	4			4
Over 6 months	4			4
Over 1 year	3			3
Total prison terms served (not suspended)	11			11
Number of cases resulting in criminal fines	12	613	598	1,223
Up to \$1,000	12			12
\$1,000 to \$5,000	-			
Over \$5,000	-			
Total amount of fines levied (in US\$)	6,900			6,900

Civil enforcement needs continued improvement. The new Civil Procedure Code amendments made in 2002—setting strict time limits on civil litigation—have improved the ability of right holders to conclude cases in civil court. However, despite these 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 award civil damages in software cases 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.

In IIPA’s 2003 submission, we reported on the adoption of a Law (Articles 15 and 16 of Law December 12, 2002 n. 273 in the O.J. of December 14, 2002) to create 12 specialized IPR courts under the auspices of the Justice Ministry. While we reported that this development is positive in theory, in practice it would be likely to prove less than useful. To date, that characterization seems accurate. 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. BSA also remains concerned that the location of these courts’ does not reflect the locus of major infringements and that they otherwise do not meet the needs of industry.

Civil case statistics from the business software industry are shown below.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2003	
ACTIONS	BSA
Number of civil raids conducted	3
Post Search Action	3
Cases Pending	9
Cases Dropped	4
Cases Settled or Adjudicated	5
Value of loss as determined by Right holder (\$USD)	US\$220,000
Settlement/Judgment Amount (\$USD)	US\$162,000

COPYRIGHT LAW DEVELOPMENTS

Italy should properly and fully implement the EU Copyright Directive. Legislative Decree of 9 April 2003 n. 68, which entered into force on April 29, 2003, implemented the EU Copyright Directive and for the most part implemented it correctly. However, as noted above, the recent lower court case from Bolzano, Italy, legalizing mod chips and modified videogame consoles, has cast doubt on Italy’s implementation of the prohibition against trafficking in circumvention devices required by the Directive and the WIPO treaties. In contrast to its implementation of the Copyright Directive, however, Italy’s implementation of the E-Commerce Directive was not as salutary and risks hampering online enforcement efforts by requiring a court order before a takedown can occur. This renders impossible the expeditious removal of infringing material from the Internet 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.

Need to eliminate the SIAE sticker requirements for software: As discussed above, the AP Law contains a provision that could 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 become subject to criminal fines. As described above, the Italian police have on a number of occasions seized such legitimate shipments.

The September 2001 regulation implementing the stickering scheme does not resolve these problems. The Italian government had assured industry that business software would be exempted across the board. Instead, the exemption as set out in the regulation is not unconditional and, in practice, remains onerous and unnecessary, given that there is no collective administration system for software.

BSA believes that the stickering regime established in the law and its implementing regulation may violate Articles 9 and 41 of the TRIPS Agreement. 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, associated fee and declaration requirements represent prohibited formalities. 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.

A coalition of high-technology industries has held extensive discussions with representatives of the Italian government and SIAE officials over the past two years to develop a consensus that would implement the exemption contemplated in the AP Law. BSA proposed a compromise designed to minimize the burden of filing a product identification declaration. This compromise was adopted by the government and came into force in January 2003. The compromise does not exempt software across the board, however, and the new 2003 copyright amendments made no change to this system.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

LATVIA

EXECUTIVE SUMMARY

Special 301 recommendation: Latvia should remain on the Special 301 Watch List.

Overview of key problems: Latvian anti-piracy efforts to combat all forms of copyright infringement are inadequate, if not virtually non-existent. As none of the Latvian governments over the past nine years have expressed any serious interest in showing the necessary political will to clear the country from pirate products and to enforce copyright legislation, the on-ground enforcement is reduced to a critical minimum. Piracy levels are growing and now constitute more than half the market in most copyright sectors.

A significant weakness is the lack of effective border enforcement, especially the failures of customs officials to take *ex officio* actions in checking the shipments entering the country and targeting materials transshipped through (and stored in) Latvia for other territories. Another major problem is an extremely low level of activity by the under-resourced and uninterested Economic Police responsible for fighting all IPR crimes. Insufficient financial and human resources for the Latvian authorities to use in conducting effective investigations and seizures are continuously pointed to by the on-ground enforcement agencies as the main reason for their lack of activity. Since 2001, the Municipal Police in Riga have expressed the interest vis-à-vis the IPR crimes by organizing some seminars for its officials. However, there have been no successful raids or administrative cases yet. Furthermore, the few actions taken have been undermined by poor cooperation with prosecutors, onerous evidentiary requirements, and courts reluctant to pursue copyright cases. Other Municipal Police claim that copyright protection does not fall within their jurisdiction, despite the fact that they have the duty to confiscate illegal goods (i.e., pirated goods) and prevent illegal trading. Prosecution priority for copyright cases is extremely low; penalties for copyright infringements are minimal (usually comparable to fines for minor administrative offenses); and the courts tend to return the infringing goods to the pirates. Finally, there is no successful cooperation between the enforcement authorities such as the Economic Police, Municipal Police, State Police, Customs, prosecutors and courts as well as no effective cooperation with rightsholder organizations.

Latvia's 2000 copyright law still contains several key deficiencies, including no provisions on technological protection measures, rights management information or for TRIPS-mandated civil *ex parte* search procedures. The Latvian government had begun internal work to upgrade the copyright law (and other laws) by December 31, 2003, but this deadline has slipped until at least May 1, 2004, which is the date of Latvia's accession to the European Union.

Actions which the Latvian government should take in 2004

Enforcement

- The government must immediately instruct Latvian enforcement agencies to make copyright piracy a priority issue for action;
- The government, specifically the Minister of Interior, must establish a centralized, modern and professional IPR unit within the police;
- Enforcement authorities must increase the number and frequency of criminal raids and prosecutions, and implement administrative actions, including against 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 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.
- Establish a system at the borders to track the importation of blank optical media products.

Legislation

- 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.
- Amend the Civil Procedure Code and the Copyright Law to provide for a civil *ex parte* search order, as required by TRIPS;
- Amend the Criminal Law and Administrative Offenses Code to increase criminal and administrative sanctions to levels which deter piracy.

LATVIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	NA	85%	NA	85%	1.5	NA	1.5	85%	NA	100%
Records & Music	10.0	80%	8.0	67%	NA	NA	4.0	65%	4.0	65%
Business Software Applications ²	NA	NA	7.4	58%	NA	59%	NA	77%	NA	84%
Entertainment Software	NA	95%	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS ³	NA		15.4		1.5		5.5		4.0	

In September 2003, the U.S. government welcomed the European Commission's decision which endorses a political understanding preserving the U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Latvia. ⁴ This BIT is important for copyright purposes as it provides a broad provision on national treatment. Reports suggest that Latvia is interested in terminating this BIT; the copyright industries recommend that Latvia maintain the current U.S. BIT.

COPYRIGHT PIRACY IN LATVIA

Weak border enforcement and transshipment: Weak border control and lack of co-operation between enforcement agencies and the judiciary allows an unimpeded flow of pirated goods into and through Latvia. The copyright industries agree that Latvian customs authorities must take *ex officio* action when they detect border trade and domestic enforcement violations. Customs requires training and resources to address this problem effectively.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, available at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's 2003 Special 301 filing, BSA's 2002 estimated losses of \$7.9 million and levels of 57% were identified as preliminary. BSA's revised, final 2002 figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Latvia, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Latvia (including U.S. publishers) and (b) losses to local distributors and retailers in Latvia.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Latvia were \$15.9 million. IIPA's revised loss figures for 2002 are reflected above.

⁴For more details on Latvia's history under the Special 301 trade program, see Appendix D of IIPA's Special 301 report at <http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>, as well as Appendix E at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf> of this submission. Latvia is a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program, which contains IPR criteria. During the first 11 months of 2003, \$10.2 million worth of Latvian goods (or 2.8% 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 0.7% decrease over the same period in the previous year.

Numerous pirated materials enter the country from Lithuania, Belarus and Russia which are harming the local market for legitimate products. Pirated material, including audio CDs, CD-ROMs containing business software, videos, and audiocassettes, regularly arrive from Lithuania. Most of the illegal prerecorded optical media material containing sound recordings comes from Russia. However, an increase in the numbers of CD-Rs with unauthorized reproduction has been noted, the likely source being local CD-R burning operations. The business software industry estimates that some 99% of illegal software on CD-ROMs found in Latvia has entered from the borders, but Latvian customs have yet to seize a single shipment using its *ex officio* authority. The entertainment software industry reports that all pirated CD and DVD imports come into Latvia from Russia, regardless of where they are manufactured. Much of the product for play on the PC is made in Russia.

The recording industry is investigating transshipment of pirate sound carriers through Latvia (along with its Baltic neighbors) into the European Union by using sea links with Finland and the other Scandinavian countries, which would fit the pattern of transshipment of varying quantities from neighboring Estonia. This transshipment problem indicates the importance of effective border enforcement measures in all of the Baltic countries. It is not sufficiently clear how much of the Russian pirate product is shipped beyond Latvia. However, the Baltic route provides a viable alternative routing of pirate discs to the Finland/Scandinavia route, which has evidenced seizures of Russian discs.

CD-R piracy and Internet piracy: Latvia continues to be a fast-growing Internet piracy source. Many websites illegally host musical material in MP3 format or offer physical discs for sale. The entertainment software industry faces problems with “warez” sites offering pirate videogames for direct download, and “master” copies from which to burn CDs. Some illegal sites operate in government-controlled servers. In 2003, the recording industry identified and sent 56 “cease and desist” notices to 190 infringing sites estimated to contain around 38,000 illegal files; 86 of those sites (45%) were removed from Internet. Despite the increasing figures, several websites have been operating with impunity for over four years without any prosecutorial action to shut them down. To date, there are also no court cases dealing with Internet piracy. The Latvian enforcement authorities have not begun to address Internet piracy. This makes the proper and effective implementation of the WIPO treaties all the more vital.

BSA reports that no Internet-related raids or arrests have taken place in relation to business software in 2003. Latvian ISPs are generally cooperative in terms of taking down sites that are identified to them as hosting infringing material. While BSA members experience problems in Latvia associated with the unauthorized use of FTP servers, an increasingly significant problem concerns the growing use of file sharing technologies in Latvia.

Copyright piracy levels are high across almost all industry sectors: Piracy of sound recordings and music continues to be widespread in Latvia. The local recording industry group, LaMPA, reports that due to the ineffective enforcement the estimated level of music piracy is rising every year, reaching as high as 80% of the market in 2003. Estimated trade losses due to the piracy of sound recordings and musical compositions in Latvia in 2003 were \$10 million. The biggest distribution points are bazaars in Riga, which have 60 to 100 sales points for pirated audio products. The prices of pirated music CDs are approximately US\$4.50 for international repertoire and US\$5.00 for local repertoire. Another significant problem is the parallel importation of legal sound recordings which are for distribution only in Russia; according to Article 148 of the Criminal Code, such distribution of legal copies not authorized by the rightsholders is considered to be a copyright crime in Latvia. One particularly disturbing form of piracy is the hardly detectable “hand-to-hand” piracy, i.e., sales of pirated sound recordings

offered in the catalogue by the physical persons. In general, the recording industry reports that the police have not taken decisive action against the open markets; there are no seizures or raids, much less prosecutions.

The Business Software Alliance (BSA) reports that almost all of the infringing business software in this market comes from Latvia's neighbors. Poor border enforcement and the lack of cooperation between neighboring countries (especially Estonia and Lithuania) are problems that need the most attention. In October 2003, BSA launched a month-long public educational campaign primarily targeted at small- and medium-sized businesses, urging them to ensure that software on their computers is legal.

The Motion Picture Association (MPA) reports that the video piracy rate in Latvia is approximately 85%. Corruption and organized criminal activity are major problems. Although piracy is not as overt as it has been in the past, street traders still solicit customers with pirate catalogues. Pirate copies are available in video rental stores as early as two months before their Latvian theatrical release. Web-based piracy is also starting to appear. Pirate sites marketing hard goods are expected to be a growing problem.

The entertainment software industry (Entertainment Software Association, ESA) concurs that poor border enforcement is the most significant for their industry in Latvia. It must be addressed in order to cut off the flow of material from organized crime syndicates in Russia. Latvian Internet cafes are another problem; only 10% of them use licensed products in their shops. Distribution of pirated games from the Internet, warez sites and CD-burning are other phenomena adversely affecting this industry. Local piracy rates for entertainment software product are approximately 95%.

COPYRIGHT ENFORCEMENT IN LATVIA

Lack of centralized coordination and communication: Under Latvia's National Program for EU Integration, the government agreed to financially support IPR enforcement actions and assigned 185,000 Lats (US\$350,000) from the state budget of 2002 for the establishment of an anti-piracy department within the State Police. However, a dedicated IPR enforcement division of state police was never established. Instead, the State Police spent the finances for "different purposes" and delegated all IPR enforcement to a special department in the Economic Police employing merely three persons. Cooperation between the Economic Police and other enforcement agencies leaves much to be desired.

A working group under the supervision of the Ministry of Justice of Latvian officials and private sector representatives was established in May 2003 for the purpose of developing and introducing legislation to more fully integrate TRIPS-level requirements into Latvian law. As a result, the Cabinet of Ministers accepted a concept for the necessary amendments to the relevant laws. After that on October 2003, the Prime Minister issued a decree to establish another working group in the Ministry of Justice to implement the Action Plan that was prepared and submitted to the Government by the non-governmental organizations (CIPR, BSA, LaMPA and the collecting societies LaIPA and AKKA/LAA). The implementation of the Action Plan includes (a) preparing draft amendments to the different legislative acts such as the Civil Procedure Law and the Copyright Law [including the *ex-parte* provision]; (b) preparing new legislative acts (for example, regulations on destruction of pirated goods); (c) establishment of a Intellectual Property Coordination Council, etc. The drafts prepared by the working group will be

submitted to the Cabinet of Ministers for discussions and consideration. It should be noted that the latest government's decision is that no legislative acts will be accepted if their implementation requires additional financing from the state budget.

Border enforcement remained weak in 2003: Since most of Latvia's piracy problem is due to 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.⁵ In Spring 2002, the Latvian government allocated 20 new customs regional officials and two additional persons to the Customs Head Office solely for IPR protection; unfortunately these officials have not enforced the customs rulings.

Customs officers are not using the *ex officio* even though they have such authority under Government Regulation No. 420. Coordinating customs between Latvia, Estonia and Lithuania would help stem the tide of pirated Russian material entering all three countries. Russian customs officials agreed to cooperate and share cross-border information in 2001. BSA reports that Russian and Baltic Customs officers have co-operated since 2001, although they have not focused on IPR-related seizures.

Low level of police raids and results despite moderate cooperation with industry: Reports indicate that the Economic Police claim that the amount of seized goods is increasing. LaMPA organized some raids with the Economic Police that failed, as the target outlets and market places were informed in advance. Retailers of all pirate goods (music, films, software) feel untouchable because of the high corruption level in the enforcement. There have been no serious raids against the well known and biggest importers, distributors and retailers of pirate goods.

The recording industry group reports further that cooperation with the regional police (for whom LaMPA provides the expert reports on regular basis) is generally good. In contrast, in Riga, the anti-piracy campaign launched by the Minister of Economic Affairs failed, as no support and actions followed from the on-ground enforcement agencies (police) as well as from Riga Council. The only most impressive action in Riga in 2003 was the attempt to close down the biggest market place "Latgalite" trading with all forms of pirate material. This was also supported with a letter from Latvian musicians to the Riga Council. Unfortunately, no action followed and Latgalite continues to trade successfully. In summer 2003, LaMPA conducted a survey for the police of the 20 biggest towns in Latvia. The survey gave a good overview of the situation of the Latvian regional police. Reportedly, the raids in the region take place once in a month or once in every two months. Most popular distribution points for pirate material are markets (34%), streets (21%), music stores and video rentals (21%) and supermarkets (21%). The police officials feel that they need more training on the IPR and do not have enough knowledge and experience. Interestingly, 70% of the regional police officials find the current system for tackling the piracy unsatisfactory and ineffective.

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 23 raids in 2003 with the cooperation of BSA: 12 of these concerned end-users, 11 were of resellers. As a result, seven

⁵ 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.

criminal cases, and seven administrative cases, were initiated. Only three cases resulted in convictions in 2003, all concerning reseller action. Two cases resulted in suspended policy terms of 7-8 months; the third resulted in a fine of US\$400. BSA reports that the IPR Enforcement Division of the State Police has taken action— both on the basis of information supplied and *ex officio* — with respect to end-user piracy. Most notably, the IPR unit conducted a large-scale end-user raid against a well known publishing house in Riga in October 2003.

Prosecutorial delays: Latvian criminal prosecutions take considerable time, anywhere from 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 get the Prosecutor's Office to issue a formal charge. Generally, delays at the prosecution stage accounted for the poor quality of enforcement.

BSA has conducted five training seminars in regional prosecution offices in 2003, and plans to continue this program on a cross-Baltic basis in 2004. The level of expertise among state prosecutors in relation to IPR matters is low, and the software industry plans to provide a certain level of training in order to remedy this issue.

Inadequate administrative penalties: Copyright infringement cases in Latvia are often pursued as administrative offenses, which can take a short amount of time (anywhere from 2 to 4 months). 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 are only fined 50-100 Lats and, in case of repeated infringement, a maximum of 250 Lats (US\$473), which is far from being deterrent (see further discussion under the Copyright Law section, below).

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. 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, which is, for practical and policy reasons, difficult to secure.

BSA has conducted several meetings with Latvian government representatives in 2003 in order to advance the civil search issue. In autumn 2003, the Latvian Ministry of Justice established a working group to examine the issue, the results of which have been the production of a draft implementation proposal. It appears that the implementation proposal is broadly TRIPS compliant. However, progress in relation to the implementation of the proposal is frustratingly slow, and BSA has been advised that it may be autumn 2004 before the proposal is finally incorporated into Latvian substantive law. BSA is concerned that the provisions of the draft EU Enforcement Directive relevant to civil search and seizure provisions may cause further delays in implementation.

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 created its own rules on IPR procedures based on the former Soviet procedural codes. The copyright industries experienced substantial difficulties and delays in securing expert reports that courts require in order to pursue criminal actions against pirates. These delays have the effect of “pushing” criminal cases into the administrative areas, where they can be disposed of quickly, but with much reduced penalties.

COPYRIGHT AND RELATED REFORM IN LATVIA

Five years ago, Latvia accomplished legal reforms in a variety of copyright-related areas in advance of its 1999 accession to the World Trade Organization (WTO). On January 21, 1999, the Latvian Parliament adopted a package of amendments to several laws, including the Code of Administrative Offenses, the Criminal Code, the Consumer Protection Act and the Customs Act.

Latvia has deposited its instruments of accession to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. No doubt implementation of the WIPO treaties' obligations will be part of any Latvian copyright reform efforts. For example, Latvian law must allow rightsholders to enforce their rights against the circumvention of technological protection measures. 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.

The Copyright Law of 2000: Latvia's 2000 copyright law was the result of a series of reforms undertaken in the late 1990s.⁶ The 2000 law does contain some significant improvements over the prior 1993 law, including a right of "making available" and higher penalties for software piracy infringements (both end-user and reseller). Several deficiencies remain in the current law, however:

- Too broad exceptions to the reproduction right: (a) ephemeral copying exception — the scope of the period for keeping the ephemeral copies should be reduced to 28 calendar days [Article 27]; (b) the scope of private copying exception should be limited strictly to the own private purposes and copying with any commercial implications should be strictly excluded [Article 33].
- No exclusive rights for phonogram producers contrary to other rightsholders such as authors and performers [Article 51]. Latvia should give performing artists and phonogram producers an exclusive right of public communication, instead of merely a claim for remuneration. It is essential that rightsholders, like producers of sound recordings, enjoy exclusive rights, and not merely rights to claim remuneration.
- No civil *ex parte* search procedure, a TRIPS-required tool, which is especially critical to enforcement in business software actions.
- Lack of provisions on technological protection measures and right management information.
- Too narrow scope of application of neighboring rights to the foreign rightsholders [Article 56(5)].
- Low administrative penalties that do not deter piracy.
- An objectionable provision regarding the destruction of equipment used to produce illegal copies, which indicates that the equipment (and perhaps the illegal copies) can be given to charity [Article 69(3)].

⁶ 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). 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).

- Cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rightsholders. Latvia should introduce a presumption of ownership for phonogram producers and other rightsholders similar to the presumption in place for authors [Article 8(1) of the Copyright Law].

Reports indicate that copyright reform is currently being contemplated as part of the harmonization effort necessary for Latvia's EU accession this year. (Some locally based copyright industries already have submitted copyright law amendment proposals to the Latvian government.) In fact, draft Amendments to Copyright Act were promulgated in the Meeting of State Secretaries on January 15, 2004, and after the reception of comments from government institutions and public organizations, they will be sent to Committee of Cabinet of Ministers.

Criminal law: Latvia passed a new criminal law in June 1998, which entered into force on April 1, 1999.⁷ The latest amendments to the criminal law regarding protection of copyright and neighboring rights were made at the end of 2001 and 2002, adopted by the Parliament on October 17, 2002, and entered into force on November 11, 2002. Although some provisions were improved, the fines imposed for the infringement of copyright and neighboring rights are disproportionately low. The criminal law provides that for certain type of criminal actions, the judge can apply a penalty up to, for example, 200 minimal monthly salaries, which is about 16,000 Lats (~US\$30,000). Unfortunately, the reality is that courts still impose very low penalties (for example, in one piracy case the fine was only 3 monthly salaries).

The Latvian government started drafting the new Criminal Procedure Law in 2001. There is special Parliament's Under-Committee of Legal Committee established to work on the Draft Criminal Procedure Law. Draft law was passed in the first reading by Parliament on June 19, 2003. There are no special provisions on procedures regarding copyright and neighboring rights cases. Although the draft provides shortened procedures, the efforts of music industry and other rightsovers to include the principle of presumption of ownership were not taken into account.

Administrative Offenses Code and the Civil Law: The most recent amendments to the Administrative Offenses Code were passed by Parliament on June 19, 2003, and came into force on July 24, 2003. The amendments apply administrative penalties only in the cases of the acquirement of pirated goods with the aim of distribution, storage and hiding of pirated goods.⁹ If those actions are accomplished for the second time, then the criminal law is applied. There are no administrative penalties for the distribution of pirated goods as there were before these amendments. In cases of distribution of pirated goods, only criminal liability is provided. The reason for these amendments was to avoid inadequate sanctions for copyright and neighboring rights infringements, but fines are still too low, as mentioned above.

At the end of 2002, the Ministry of Culture proposed authorizing the Municipal Police to take actions against IPR infringements and increase the fines for legal entities infringing

⁷ Several IPR-related provisions in the 1999 criminal code amendments (Articles 148-149) provide: 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\$132), meaning the fines range between US\$6,620 and \$26,480.

copyrights among the amendments package to the Administrative Offenses Act. The proposal concerned Article 155(8) of the act, but was unfortunately rejected by the Parliament. The mentioned article provides penalty only for the use of copyrighted material without license only in the case of public performance of work and neighboring rights objects).

There are no known pending amendments regarding civil penalties. Articles 1770-1792 (Civil Code) and Article 69 (Law on Copyright and Neighboring Rights) do include civil sanctions for copyright infringements.

Government software management: BSA reports that the level of unlicensed use of business software applications within the Latvian government remains at a very high level, but that a series of reviews of software installations and licenses has taken place within the central or municipal government in Latvia. 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

LITHUANIA

EXECUTIVE SUMMARY

Special 301 recommendation: Lithuania should remain on the Watch List in 2004.

Overview of key problems: The most persistent problem confronting the copyright industries in Lithuania is the lack of effective, on-the-ground enforcement, both in-country and at its borders, resulting in high piracy levels. Over the years, no senior Lithuanian politician has expressed any signs of political will and commitment to enforce copyright legislation and halt piracy. Among the three Baltic nations, Lithuania remains most affected by transshipment of pirated materials through its borders. Customs officers still do not fully use their *ex officio* authority to inspect, intercept and seize suspect shipments of pirated product entering the country. Moreover, there has been no evidence of co-operating between customs, police and other enforcement agencies in challenging the organized criminal groups engaged in piracy. Stronger criminal sanctions are necessary, including the commencement of criminal searches and raids. Some industries report concerns with possible piracy ties to organized crime elements in Russia. The courts continue to place hurdles in requiring unnecessary expert reports, which only serve to delay judicial consideration. Criminal penalties and administrative fines remain low, and have not served to deter piracy in Lithuania.

On the legislative front, Lithuania amended its copyright law in 2003 in an effort to further harmonization with the EU, but failed to account for industry input on several key issues, including removing statutory damages, not expanding the scope of exclusive rights for producers of sound recordings, and inserting a private copying exception to the technological measures provision. Furthermore, the new Penal Code and the Penal Procedural Code came into force in 2003. Of significant concern, Article 192 of the new Penal Code blatantly violates the TRIPS Agreement by affording penalties for illegal reproduction and distribution involving only copyrighted works, but omitting sound recordings.

Actions to be taken by the Lithuanian government in 2004

Enforcement

- The Lithuanian Government should immediately express the political will to take radical steps to significantly reduce the massive music, film and software piracy in Lithuania, which has a huge negative impact on the legitimate industries in Lithuania and in other countries in the region.
- Re-establish a central, dedicated and professional IPR Unit within the police structures, that would undertake the systematic elimination of the massive piracy in the country and co-ordinate the anti-piracy activities with other law enforcement agencies.
- 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 mostly smuggled into the country.
- The current cumbersome and complicated procedures in criminal and administrative IPR cases should be simplified and shortened. The judiciary must relax its onerous evidentiary burdens in criminal cases.
- Cooperation between enforcement authorities as well as with right holders' organizations must improve.

Legislation

- The government should draft optical media regulations to regulate the production, distribution and export of optical media.
- Adopt a proposed government order regarding the legal use of business software within state institutions. This would improve the implementation of the 2002 government software legalization decree.
- Acknowledge that the 2003 amendments to the Copyright Act did not fully reflect the necessary reform in the post-TRIPS environment needed to effectively enforce rights and provide effective, deterrent remedies.

LITHUANIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	13.5	85%	12.0	85%	7.0	85%	7.0	85%	5.0	85%
Motion Pictures	NA	NA	NA	90%	1.5	NA	1.5	80%	NA	100%
Business Software Applications ³	NA	NA	4.6	53%	3.9	56%	NA	76%	NA	80%
Entertainment Software	NA	90%	NA	80%	NA	NA	3.5	98%	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS⁴	NA		16.6		12.4		12.0		5.0	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, available at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² The music industry figures represent the piracy level of international repertoire. The losses figure increased due to the increase of consumers demand and the decrease of the US\$ value.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's 2003 Special 301 filing, BSA's 2002 estimated losses of \$4.9 million and levels of 53% were identified as preliminary. BSA's revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Lithuania, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Lithuania (including U.S. publishers) and (b) losses to local distributors and retailers in Lithuania.

⁴ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Lithuania were \$16.9 million. IIPA's revised total loss figures are reflected above.

In September 2003, the U.S. government welcomed the European Commission's decision which endorses a political understanding preserving the U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Lithuania.⁵

COPYRIGHT PIRACY IN LITHUANIA

Lithuania is still the main regional transshipment point for pirated products. Given its pivotal geographical location and 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, home-burned CD-Rs and DVD-Rs, DVDs and videogame cartridges. The main form of pirate imports is smuggling. Of the three Baltic States, Lithuania has the greatest border enforcement challenge, sharing borders with Russia, Belarus and Poland. It is the preferred destination for pirate product from Russia and Belarus, as well as Poland and Ukraine. Products also are shipped through Lithuania to other European countries, principally to Poland but also to Latvia, Estonia, Scandinavia and Germany.

Although Lithuanian customs officials obtained the proper (*ex officio*) authority to do their jobs in January 2001, they have barely used their *ex officio* powers so far (see discussion below). For example, the recording industry reports that the customs took anti-piracy actions in one case in spring 2003, where the intercepted goods turned out to be legitimate. As a result of this, industry information, backed by the numbers and constant availability of newly released pirated discs on the local market, shows that the organized groups involved in the trade are able to operate through border crossings unhindered. 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, Baltic Optical Disc (BOD). In 2002, the plant acquired new and modern equipment. The number of lines is not known; industry believes that production is limited to CDs, not CD-R. Although the company's website (www.infobalt.lt) does refer to DVD production, it is believed that BOD's current production is limited to CDs (BOD is not involved in CD-R production). Industry estimates that the annual optical media manufacturing capacity approximated 3.5 million discs per year. This Lithuanian plant now competes with other regional plants in meeting orders domestically and from rest of the Baltics, Scandinavia and Germany, and is expected to expand and increase its capacity, possibly to include DVD production. IFPI has lodged a criminal complaint against the plant for unauthorized production of numerous titles when in possession of its original equipment, and this is under investigation by the Prosecutor's office. Against this backdrop, the absence of any state control or supervision of the plant's activity is a situation that should be rectified as a matter of urgency.

In order to avoid further illegal CD production, Lithuania should start working with the copyright industries to adopt proper tools to regulate the production, distribution and export of optical media.⁶

⁵ U.S. State Department, "U.S. Welcomes EC Decision on Bilateral Investment Treaties," September 3, 2003 at usinfo.state.gov. For more information on the history of Lithuania under Special 301 review, see IIPA's Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission. Also available are previous IIPA reports on Lithuania at <http://www.iipa.com/countryreports.html>. Lithuania currently participates in the Generalized System of Preferences (GSP) trade program; during the first 11 months of 2003, \$5.5 million worth of Lithuanian goods (or 1.6% of Lithuania's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

Internet piracy and CD-R piracy: Many Lithuanian sites contain web advertising of infringing copyrighted hard goods. Despite the increasing figures, several websites have been operating with impunity since 1999 without any prosecutorial action to shut them down. However, the trend is to transfer illegal websites to the servers outside Lithuania, which has been used as a convenient argument by the enforcement authorities for not taking action. MPAA also reports that there are many amateur websites marketing pirate products and parallel imported DVDs. Cooperation with the ISPs (Internet service providers) has been virtually non-existent.

To date, there are no court cases dealing with Internet piracy. In 2003, IFPI identified and sent 18 “cease and desist” notices to 56 infringing sites estimated to contain around 11,200 illegal files. Nineteen of those sites (i.e., 34%) were removed from Internet. In 2003, the local music industry group FGPA sent to the Economic Police the information of 10 illegal websites, 2 of which the police closed down and 2 of which were closed down in co-operation with FGPA and Internet Service Providers (ISPs). The Economic Police claims that it has no time and resources for tackling with the piracy on Internet. Moreover, the general interpretation of police, prosecutors and courts is that the enforcement actions against Internet piracy should be taken only if the commercial profit of such activity is proved. At the same time, the offer for sale of pirate CDs and CD-Rs is not considered as a proof of commercial activity. Also, the special Internet Crimes Investigation Unit does not consider piracy to be a problem and does not take any actions against piracy on Internet.

Another popular form of music piracy on the Internet in Lithuania is selling pre-recorded CDs as well as recorded CD-Rs by announcing lists available in web pages or via e-mail to a special circle of people or in special announcements sections and then delivering these CD-Rs by mail 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 pirated videogames for download. However, the share of the seized recorded CD-Rs in the pirate market is not substantial, composing currently about 5-10% of the illegal market. Nevertheless, it should be pointed out that the value of the sales of blank sound and other media carriers in 2003 exceeded 20 million Litass (US\$7.3 million), which is about the same level as the legitimate music sales in Lithuania. The local recording industry group FGPA estimates that around 80% of all sold blank sound carriers were used for illegal music copying.

Piracy remains high across all industries. Markets, kiosks and retail outlets in Lithuania remain full of pirated products. The situation has improved a little bit only in the center of Vilnius. The main market places in Vilnius are centrally located Kalvarijos market, and the Garuinai, Antaklnis and Paergale markets, where most of the illegal trading is conducted on the weekends. Hordes of commercial tourists from Latvia visit especially the Garuinai market on Saturdays. Due to the constant international pressure, the form of illegal distribution has started to change more and more to the hand-to-hand piracy (i.e., people illegally offering pirate products for sale in offices and other public places such as cafes, bars, restaurants by carrying the catalogues as well as the products). The most popular is trading with CDs and DVDs with international repertoire.

⁶ The authors’ collection society, LATGA-A, entered into a private contract with Baltic Optical in 2003 in order to ensure the payment of mechanical royalties to the authors of musical compositions. This deal has nothing to do with controls necessary to monitor optical media production.

The recording industry reports that the music piracy situation in Lithuania has continued to worsen. The levels of piracy for sound recordings and music with international repertoire in Lithuania was 85% in 2003. Currently, around 10% of all pirated sound carriers are audiocassettes and 90% are pirated CDs and CD-Rs. The average price of the pirate CD with the most popular international repertoire is 10 Litas (~US\$3.00), sometimes 8 Litas for the "outdated" repertoire as opposed to the 55-60 Litas (~US\$18.00) for the full-priced legitimate CD with international repertoire. The legitimate music industry in Lithuania has been struggling already for years to survive. The recording industry reports that due to the worsening situation a minimum of 5 local record labels and 8 legitimate music shops have been closed down in past 3 years. Organized criminal groups are now heavily involved in pirate CD traffic, with extremely limited enforcement activity by the authorities. Estimated trade losses due to recording and music piracy were \$13.5 million in 2003.

The Entertainment Software Association (ESA) reports that pre-recorded silver discs, distributed by Russian organized crime syndicates (and stamped with their "logos" or "brand names") continue to flow into Lithuania. While there are also CD-burning operations for PC games (so-called gold discs), this represents only about 10% of the pirate product available. Internet piracy, meanwhile, continues to grow. Although enforcement actions are being undertaken by entertainment software companies, market improvement remains flat. Retail piracy is moving to the flea markets, kiosks, and the Internet. The biggest problem for this industry is the flood of Russian-produced pirated software into Lithuania, both for domestic consumption and transshipment. This industry also confirms problems with ineffective enforcement by Lithuanian customs officers. Estimated piracy rate for entertainment software in Lithuania rose to 90% in 2003.

The Business Software Alliance (BSA) reports that the Gariunai flea market in Vilnius (and similar markets across Lithuania) remains a source of pirated materials, although police activities to address this problem have increased. BSA believes that there is steady improvement with regard to central government use of software. Since the 2001 government software management decree, funds have been allocated by Central Government for licenses to procure legal software, although the extent to which this has been applied is unclear. In October 2003, BSA launched a month-long informational campaign to support legalization of business software applications in small to medium-sized business settings.

The audiovisual industry sees Lithuania as the least developed market of the Baltic nations for their products. The Motion Picture Association of America (MPAA) estimates that the video piracy rate in Lithuania remains at the 90% level. Pirate videocassettes and home-burned optical discs are duplicated locally using Russian-language masters. The legitimate video industry is trying to make inroads into this predominately pirate market, and local partners of several MPA members work closely with enforcement officials. Film piracy is quite visible, for example, outside Vilnius; in Kaunas it is difficult to find a legitimate video rental. The price to rent a pirate VHS video is 1 Lita (US\$0.37), a pirate DVD rental is 3-4 Litas (US\$1.10-\$1.47) compared to 5-6 Litas (US\$1.84-2.20) for the rental of a legitimate copy. The legal, local video companies conduct extensive media campaigns, highlighting enforcement actions and legislative initiatives undertaken by the authorities. Internet piracy is becoming more prevalent, with amateur websites 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

For a long time, Lithuanian law enforcement agencies have had the necessary legislative conditions to stop piracy. Despite the satisfactory laws the copyright enforcement remains critically minimal. Therefore, it should be emphasized time and again that all these provisions must urgently be implemented in practice, and judges, customs officials, police and prosecutors must start their actions to stop organized criminal piracy activities within Lithuania.

Poor coordination between the criminal enforcement agencies: In 2002, the Ministry of Finance liquidated the specialized IPR unit in the Tax Police, whose officials had IPR enforcement removed from their portfolio. Since that time, the Economic Police and customs officers remain the only Lithuanian agencies with jurisdiction to pursue copyright infringements. Unfortunately, there is little to no communication or co-operation between these two agencies. On July 31, 2002, the Division of Intellectual Property Protection of three officials was established under the Crime Investigation Service of the Lithuanian Criminal Police (the Economic Police), which has taken only few actions against minor-scale IPR crimes and infringements. The Ministry of Culture reports that the Economic Police seized a total of 61,185 optical discs by initiating 2 criminal cases, 29 pre-trial penal investigations and making 46 administrative protocols during 2003. The regional police departments seized a total of 81,600 pirate optical discs by initiating 54 pre-trial penal investigations and making 125 administrative protocols in 2003.

The Economic Police indicated that they cannot add more specialized IPR investigators due to limited resources. The copyright industries objected strongly to these developments, afraid that the number of effective anti-piracy actions in Lithuania would decrease considerably without a larger, specialized IPR unit. The past two years have only confirmed the industries' concerns; the Economic Police has not achieved any significant results, taking only some demonstrative actions against small traders. There have been no investigations or other enforcement activities against the big pirate businesses. Therefore, the new centralized and professional IPR Unit should be established in the police structures with dedicated resources and clear concentration on anti-piracy activities.

In early 2002, the ministries of Culture, Justice and Interior, along with the Prosecutor's Office, established the Division of Intellectual Property Protection under the Lithuanian Court Expertise Centre, which would provide expert opinions in copyright cases with the approximate annual budget of US\$145,000 (~500,000 Litas). This new State Expertise Centre started to operate late in 2002 and currently employs six persons. The Centre is a "formalizer" of the expert reports, which are continuously provided by the copyright industries. These statutory opinions are contrary to European practice, where the private sector usually provides expert opinions on seized goods. By all accounts, it would have been preferable for these funds to be dedicated to creating an effective IPR police unit (like the liquidated Tax Police). The Ministry of Culture reports that the Centre received 51 requests from the Economic Police to examine a total of 100,000 optical discs in 2003 (excluding the software, where the local BSA continues to provide the expert reports). The Expertise Centre conducted 58 expert reports on 56,438 optical discs in 2003. The local recording industry group FGPA reports that it prepared expert reports in a total of 32 cases and examined 37,592 sound carriers. It should be noted that there is another private organization representing the mixture of local recording, film and entertainment software industries, the Lithuanian Music Industry Association (LMIA), that is also active in the anti-piracy field. LMIA reports that according to the Lithuanian Criminal Police Bureau, the General

Commissar of Lithuanian Police and the Director of Lithuanian Customs signed a co-operation agreement in IPR protection field.

Inadequate and ineffective border enforcement: Much improvement is needed to stem the tide of pirated products entering Lithuania mostly by smuggling and being transshipped to other countries, as discussed above. Despite the adoption of the new customs code in January 2001, which afforded customs officials the authority to make *ex officio* seizures, such *ex officio* actions rarely take place. The Customs Violation Prevention Division and the Customs Criminal Service are the two customs departments responsible for tackling with the import-export of illegal optical discs and smuggling respectively. The Lithuanian Customs Violation Prevention Division reports two detentions of sound carriers: (1) In spring 2003, the CDs with Russian repertoire were intercepted, which turned out to be legitimate but infringed authors' rights, and (2) On 13 September 2003, the smuggling of 400 CDs with international repertoire were discovered on the train from Russia. Lithuanian Customs finds it more difficult and almost impossible to detect the pirate goods as opposed, for example, to counterfeit goods, because the nature of pirate sound and other carriers is very specific and the goods can be easily hidden. At the same time, the Customs Violation Prevention Division does not see the lack of training as a problem and evaluates the level of knowledge of the customs officials as more than satisfactory. Customs officials receive IPR seminars regularly, 2-3 times per year. Customs sees the poor enforcement in the internal EU market as a major contributor to the problem in Lithuania.

Lithuanian customs claims to co-operate with the Economic Police and the Border Police. In 2003, customs organized four joint control operations with the Economic Police in the internal markets to collect intelligence only. Customs cannot take actions inside the country (this is considered to be amended in near future so that customs could act in internal market in certain fields, including the IPR) and has no information whether the Economic Police followed these control visits up. Customs reports that the co-operation with right holders (such as FGPA and LATGA-A) is good and highlights the need for more applications from the right holders. The local recording industry group FGPA reports of one (1) filed application in 2003; however, no follow-up actions were taken by Customs. The major problem for the local struggling recording industry with filing the applications is the high application fee of 500 Litas (US\$184). Furthermore, in spring 2003 FGPA offered its assistance to the Customs Criminal Service but again has not received any follow-up. Finally, the customs reports that there was no co-operation with the State Expertise Centre in 2003. It is crucial that Lithuanian Customs use its *ex officio* authority and take actions against IPR crimes.

Criminal enforcement (police, prosecutors and judges) needed strengthening. A new criminal code and criminal procedure code entered into force in May 2003. However, this authority must now be utilized by prosecutors to engage in effective enforcement action against IPR crimes. So far, the results are disappointing. The overall statistics of the prosecutions and court proceedings is not available. However, the recording industry notes that there were only few court cases in 2003, the applied fines were the average of 300 Litas (US\$110), and no imprisonment sentences were imposed. The recording industry reports that seven criminal cases against pirates were positively settled outside the court by the prosecutors' criminal orders, i.e., the infringers pleaded guilty and were fined with 500-2,000 Litas (US\$184-\$734), and the seized products were confiscated. Unfortunately, reportedly one of the prosecutors (who dealt with four of the seven cases above) has been transferred from the IPR responsibilities.

BSA notes that Lithuanian police do have *ex officio* actions in both end-user and reseller cases across Lithuania which lead to both administrative and criminal actions. However, BSA has received unfavorable decisions from the Lithuanian Supreme Court in connection with criminal liability in respect of end-user piracy. In two cases (*Orana and Amalkera*), the Lithuanian Supreme Court was asked to consider whether or not end-user piracy constituted an act for “commercial purposes.” The Supreme Court has taken a restrictive view of the definition of “commercial purposes,” stating that it covers situations whereby products are distributed/sold, but not used. The absence of an effective criminal remedy for acts of end-user piracy is a potentially serious issue for BSA. BSA intends to reapply to the Supreme Court for a review of the basis upon which these decisions were reached, as well as drawing the issue to the attention of the Lithuanian Copyright Council. BSA also intends to request that the Lithuanian Government specifically consider this issue in its implementation of the EU Copyright Directive, and in particular, Article 8 of the Copyright Directive dealing with appropriate sanctions.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS LITHUANIA IN 2003		
ACTIONS	SOUND RECORDINGS	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	N/A	
By Economic Police		75
By Regional Police		
By Customs	2	--
Amount of infringing product seized during raids (above)	143,185 **	421
By Economic Police	61,185	
By Regional Police	81,600	
By Customs	400	
Number of cases commenced by Economic and Regional Police (including Internet cases)		12
Criminal case	2	
Pre-trial penal investigations	83	
Administrative protocols	171	
Number of defendants convicted (including guilty pleas)		16
Acquittals and Dismissals		6
Number of Cases Pending		17
Total number of cases resulting in jail time		5
Suspended Prison Terms		
Maximum 6 months		1
Over 6 months		-
Over 1 year		4
Total Suspended Prison Terms		5
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		11
Up to \$1,000		7
\$1,000 to \$5,000		4
Over \$5,000		
Total amount of fines levied		US\$10,018

** This 143,185 statistics represents the total number of all pirate goods seized (including music, films, and software) by all on-ground enforcement agencies (economic police, regional police and customs).

Civil actions are moving forward. In 2003, BSA obtained civil judgments in reseller and end-user cases: in total, five judgments at District Court/Court of Appeal level were handed down, resulting in damages awards totaling 131,938 Litas (US\$48,435). BSA has relied heavily on the strong damages laws present in Lithuanian copyright law. BSA entered into 24 settlements with end-users and resellers in 2003, for a total value of 180,000 Litas (US\$66,080). The Lithuanian civil search law was utilized for the first time by BSA in January 2004. Following an application made to the Lithuanian Court for a civil search and seizure order, an order was made allowing BSA to execute a “surprise” search without providing notice to the intended defendant. The search was executed with the assistance of municipality bailiffs, and resulted in the inspection of over 50 PCs held by a private third party organization. The search revealed the use of unlicensed software, and a settlement with respect to the resultant claim was entered into shortly thereafter.

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 rightholders. These fines range between 1,000-2,000 Litas (US\$367-\$734) in copyright piracy cases. In practice, the courts tend to fine 100-200 Litas, sometimes 500 Litas. Courts should stop lowering the fines and impose the statutory amounts. Furthermore, the fines for repeated infringements should be at least 5,000 Litas. Amendments to strengthen these penalties face strong opposition in the Lithuanian Parliament. BSA believes that the level of administrative penalties is too low to constitute a genuine deterrent: In the 28 administrative judgments made in 2003, the average fine was 550 Litas (US\$200); in 2002, the average fine (based on 28 administrative judgments) was approximately 700 Litas (US\$257).

The burdensome problem of “expert opinions”: A burdensome evidentiary problem remains, as Lithuanian courts will not apply a presumption of ownership.⁷ In order to prove that a suspect product is in pirates, 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 not be prosecuted because the police were required to get an expert opinion to determine proof of ownership for each copy seized. Private citizens, even though expert in this area of the law, are often barred from giving opinions; only designated experts in some cases are allowed to serve this function, keeping those cases from moving forward.

The recording industry reports that its rightsholders also have to provide cumbersome expert reports to pursue administrative actions. For example, every single CD must be accounted for and inventoried. Sometimes every single song on every single CD has to be accounted for and listened to. The problem, especially for the recording industry, is that seizures are mostly conducted against the last part of illegal distribution chains, where there are respectively small amounts, but a large variety of titles, making it difficult to account for all of them. Furthermore, the General Prosecutor’s Office has been actively practicing its belief that

⁷ The BSA indicates that this issue is no longer a problem for the business software industry in Lithuania, because a presumption of ownership is applied 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 and retail value.

the titles of all seized international albums and films should be translated into Lithuanian. When the authorities and the industry make a large seizure (in the tens or hundreds of thousands of units), the burden to complete such reports is onerous and counterproductive to efficient enforcement. According to regulations, the plaintiff has six months to prepare an expert report; the recording industry is doing its best to prepare these cases within three months. The judiciary still tends not to accept the opinions of the music industry in some cases. However, due to the years of “pioneering,” this practice is slowly diminishing. The recording industry believes strongly that legislative reform to establish a presumption of ownership is crucial to resolving this enforcement roadblock and expediting case processing.

On December 18, 2003, the Lithuanian Supreme Court declared in a criminal case on copyright piracy that the expert report from the State Expertise Bureau is not sufficiently competent. Reportedly, the report did not answer to the court’s mainly legal questions, which should not be subject to an expert report. The case also involved the second report from the local music industry group FGPA, which was not taken into account by the Appellation Court on the grounds that FGPA is an interested party. Further, the Supreme Court noted that the statutory fines for copyright infringements are too high. The Supreme Court sent the case back to the appellate court. Bearing in mind that this case was commenced on June 18, 2000, when the Tax Police seized 888 music CDs, the above-described incompetence and duration of the court procedures in copyright cases even in high level courts illustrates exactly the lack of effective enforcement.

From the viewpoint of the business software industry, BSA advises that following the introduction of new criminal procedures (as from May 1, 2003) specialist statements with regard to the nature of a pirated copy work are treated as sufficient evidence of copyright infringement in criminal and administrative cases. BSA therefore believes, as a practical proposition, that the position is now satisfactory, although not ideal.

Prohibitively expensive court fees: The new code on civil procedure sets court fees in IPR cases at a maximum level of 3% of the value of the claim. Lithuanian courts were previously inconsistent in their application of court costs, 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 Litās). The application of this rule must be clarified because the application of the 5% civil claim rule imposes an excessive financial burden on rightsholders and may impinge on their ability to bring a case in the first instance. The Ministry of Culture, however, takes the position that the lack of civil measures taken by the recording industry is the major cause of the massive piracy problem. At the same time, the recording industry takes the position that the high court fees are the main reason why the industry has not brought any civil claims, and opposes the imposition of such prohibitive court fees. A flat fee of 100 Litās is a reasonable amount and should be re-applied. From the viewpoint of the business software industry, BSA does not report any problems with the 3% limit being applied in software cases.

COPYRIGHT LAW AND RELATED REFORMS

Criminal Code reform: The new Criminal Code and Criminal Procedures Code entered into force in 2003. However, there is a major problem with this new law in that these penalties apply only to works, not sound recordings. An informal translation of Article 192(1) of the Penal Code provides that: the person who illegally reproduced a literary, scientific, artistic or other work or part of it or imported, exported, distributed, carried or held for commercial purposes illegal copies of such, if the total value of copies by the retail price of legal copies exceeded

amount of 100 MGL (minimum living level, which is likely equivalent to 125 Litas (US\$46) be penalized in a form of public works or fine, or restriction of liberty, or arrest, or imprisonment up to two years.

Sound recordings had the unfortunate fate of being taken out from the draft wording by the Ministry of Justice as a last-minute amendment. The present wording is in blatant violation of the TRIPS Agreement and other international requirements. The courts in Lithuania are already seeing this as a great loophole for the pirates. The Culture Ministry is planning to draft the amendment to cover all objects of copyright and neighboring rights.

Copyright Act: Over the last five years, Lithuania has engaged in a number of copyright legislative reform efforts.⁸ Lithuania took a major step forward in copyright reform by adopting its comprehensive Copyright Act (Act No. VIII-1185), which replaced the antiquated Soviet Civil Code and entered into force on June 9, 1999. While the 1999 copyright law did represent a positive step forward in Lithuania, it did contain some serious deficiencies. Between 1994 and 2002 Lithuania joined many international copyright conventions, including the Berne Convention, the Geneva Phonograms Convention, the Rome Convention, as well as acceding to the two WIPO Internet treaties and becoming a member of the World Trade Organization.

During 2002-2003, the Lithuanian government proposed more amendments to its copyright law and related laws, in order to make them compatible with WTO TRIPS, the WIPO treaties and the various EU directives. The copyright industries expressed serious concern and reservations about several of the proposed amendments, and disappointment at the Ministry of Culture's unwillingness to consider and accept many of the industries' proposed revisions. The industries had urged that it was imperative that the Seimas adopt a package which satisfied Lithuania's bilateral and multilateral copyright obligations.

The amendments to the Copyright Law came into force on March 5, 2003. On a positive note, the new law did mark some progress in reform.⁹ The copyright industries remain concerned that the 2003 amendments neither strengthened copyright protection nor corrected the longstanding deficiencies in the 1999 law. Unfortunately, the list below repeats many of the observations made by the industries prior to the adoption of the 2003 amendments.

- Article 79 amended the position with regard to the recovery of damages in Lithuania. The remedy now follows a model similar to the "pre-established" damages remedy present in U.S. law, namely, that a right holder may recover compensatory damages representing the losses suffered as a result of infringement, or, as an alternative, pre-established damages in a fixed range of US \$35 to 3,500. The main issue to be resolved in relation to this remedy is whether or not the pre-established range relates to each act of infringement, or each work infringed.
- The act still does not specify that the right of reproduction covers direct or indirect, temporary or permanent copying in any manner or in any form.

⁸ To review a more detailed history of Lithuanian copyright law reform efforts between 1999 and 2003, see IIPA's February 2003 Special 301 report at <http://www.iipa.com/rbc/2003/2003SPEC301LITHUANIA.pdf>.

⁹ For example, the 2003 amendments: expanded the scope of infringements (Article 73); included sanctions for the circumvention of technological measures of protection (TPMs) (Article 74) and outlined exceptions to TPMs (Article 75); provided sanctions for violations of Rights Management Information (RMI) (Article 76); expanded remedies available for rightsholders (Article 77); outlined procedures to be taken by collecting societies in their actions to protect rightsholders (Article 78); changed the scheme for the awarding of damages (Article 79) and compensation for infringement of moral rights (Article 80); elaborated on provisional measures available under the Civil Procedure Code (Article 81); specified that administrative and criminal liability is to be applied in accordance with the Administration Code and the Criminal Code (Article 82); and specified that the customs laws are to be applied to materials protected under the Copyright Act (Article 83).

- The act's right of communication to the public was not revised to apply to all disseminations, not just "transmissions" (and there must be no exhaustion of the distribution right by transmission);
- Over the industries' strong objections, the law now contains a rightsholders' obligation to accommodate the private copying exception to technological protection measures; this allows each consumer to make one analog or digital single copy for their private purposes. Digital private copying is likely to be far more widespread and have a much greater negative economic impact on the copyright sector than analog private copying. In fact, such interference is not only disproportionate and untimely, but it would also hamper rightsholders' initiatives to provide a number of attractive services in Lithuania, such as streaming services where music is streamed in real time to users over the Internet. Such services may be offered as an alternative to download services and would not be designed for users to keep copies.
- Producers of sound recordings still are not vested with exclusive rights with respect to broadcasting and communication to the public. (The law should make it clear that the remuneration claim does not substitute for an exclusive right.) Broadcast royalty payment obligations owed to U.S. phonogram producers and performers must be paid.
- The term of protection was not extended such that it would 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 were not made which would 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 was not revised to narrow its breadth.
- The act was not amended to provide that it applies to works or phonograms first or simultaneously published in Lithuania.
- The limitations on exclusive rights of copyright owners and producers of sound recordings were not amended to narrow them to track the scope of the exceptions provided for in TRIPS. For example, such amendments would have included: 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 material; and preserving a meaningful practice of the copyright owner to add copyright protection technology.

Customs Code reform: Amendments to the customs code (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. The problem with Lithuanian customs is predominately one of poor enforcement, not an inadequate customs law.

The need for optical media regulations: The Lithuanian government should draft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include at least 11 elements (which were fully outlined in IIPA 2003 Special 301 report).¹⁰

Government software legalization: In May 2001, the Lithuanian Ministry of the Interior signed an order entitled "A Recommendation on the Use of Software in State Institutions and Bodies." However, the 2003 order was not effectively implemented by the Lithuanian Government. BSA has therefore taken an initiative regarding the option of a new government order on software use within state institutions. This draft order has been prepared, and is scheduled to be approved by the Lithuanian government in February 2004. The scope of the order has been expanded: It will now be addressed to all public administration institutions (both state and municipal), and also provides for new functions of a dedicated Information Society

Development Committee under the control of the Government of Lithuania, which will act as a coordinating institution for the acquisition of hardware and software assets for use by governmental institutions.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

MALAYSIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Malaysia should be maintained on the Watch List. The government of Malaysia has announced that on April 1, 2004, it will impose price controls on music and motion picture optical discs. Subsequent to that announcement, a new Minister of Domestic Trade and Consumer Affairs was appointed. IIPA trusts that the new Minister will examine the utility of imposing price controls and reverse or at least delay the imposition of price controls pending further consideration. In the event price controls are imposed, IIPA recommends that Malaysia be placed on the Priority Watch List. IIPA also recommends that an out-of-cycle review be conducted later in the year, which should evaluate whether Malaysia has made progress in reducing the manufacture and export of pirate optical discs.

Overview of Key Achievements/Problems: In 2003, Malaysia demonstrated that given the proper government will and adequate resources, retail piracy and pirate optical disc over-production can be reduced. An enforcement crackdown beginning in May 2003 succeeded in curtailing domestic retail piracy of most copyrighted materials in Malaysia, and resulted in successful actions against pirate optical disc production facilities. Despite progress, however, Malaysia remains a significant source of production and export of pirated optical discs (CDs, DVDs, VCDs, CD-ROMs, etc.). Malaysia remains the number one producer and exporter of pirate console-based entertainment software in the world. Book piracy remains a serious problem, although the government has supported a campaign to promote legal use of published materials on university campuses and has run some raids against pirate photocopy shops.

Some other problems remain in Malaysia that introduce unnecessary and unhelpful market distortions and threaten to undermine the enforcement efforts taken by the government in 2003. Most serious of these is the threatened imposition of price controls against locally produced audio and video compact discs. IIPA strongly opposes the imposition of price controls on any copyrighted materials in Malaysia. Imposition of price controls is at cross purposes with Malaysia's interests in reducing piracy and providing incentives for investment, would hurt Malaysian creators, performers, and producers, and could have the unintended effect of driving legitimate production outside of Malaysia. Another market distortion/disincentive involves the hologram sticker program (in which copyright owners must purchase hologram stickers and apply them to product sold in Malaysia), which actually imposes greater costs on legitimate copyright businesses. A further problem involves the traditional lack of follow-up to raids, including failure of prosecutors to swiftly handle and courts to swiftly decide an ever-increasing docket of cases (e.g., prosecutions of optical disc pirates have been rare, providing inadequate deterrence).

Actions to be taken in 2004

Enforcement

- Ramp up efforts to defeat optical disc piracy (e.g., through more surprise factory raids and follow up on licensed facilities previously caught pirating).

- Sustain enforcement efforts against retail, and step up enforcement against book, piracy.
- Prosecute high-profile cases against non-compliant or unlicensed optical disc plants, charging factory owners as well as directors/other principal officers personally for offenses, with full investigations of links to other crimes where applicable, for example, money laundering offenses, offenses involving illegal business practices, etc.
- Thoroughly investigate links between piracy and organized crime, including persons and organizations outside of Malaysia that exercise control over pirate operations within Malaysia.
- Instruct Malaysian Customs to work with industry (including freight companies) and U.S. Customs on monitoring exports and seizing optical discs bound for export; take measures to address the problem of false documentation of exporter and export product information.

Prosecutions

- Create a unit of legally qualified, adequately trained prosecutors within the Attorney-General's Chambers to prosecute high profile copyright cases, including cases against organized criminal enterprises.
- Institute charges of copyright violations for non-arrest cases within 30 days after full documentation is received from copyright owners; speed up processes toward convictions.
- Decrease or ease documentary requirements imposed on right holders.

Convictions

- Adhere to the recent Chief Justice's directive (February 3, 2003) to judges to treat copyright cases as "priority cases" and not to postpone cases for frivolous reasons.
- Secure convictions against businesses and business owners/managers/directors that are replicating pirated optical discs, against corporations using unauthorized software, and other commercial pirates (e.g., pirate photocopy shops).
- Assign piracy cases to prosecutors and judges trained and experienced in copyright.
- 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.
- Ensure that all cases taken on appeal have a prosecutor assigned to them to avoid their stagnation in the court process.

For more details on Malaysia's Special 301 history, see IIPA's "History" appendix to filing.¹ Please also see previous years' reports.²

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

MALAYSIA ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	38.0	50%	42.0	75%	40.0	80%	41.0	80%	42.0	85%
Records & Music	40.0	45%	110.2	70%	148.9	70%	15.6 ⁴	65%	5.0	40%
Business Software Applications ⁵	NA	NA	79.2	68%	75.0	70%	75.4	66%	67.8	71%
Entertainment Software	NA	90%	NA	NA	56.4	93%	NA	98%	164.0	99%
Books	9.0	NA	8.3	NA	8.2	NA	8.0	NA	8.0	NA
TOTALS⁶	NA		239.7		328.5		140.0		286.8	

IIPA DEEPLY OPPOSES PRICE CONTROLS IN MALAYSIA

In September 2003, the Ministry of Domestic Trade and Consumer Affairs advised industry representatives that it intended to impose price controls on certain copyrighted materials; the government has further indicated that these controls will enter into effect on April 1, 2004. IIPA deeply opposes the imposition of price controls for copyrighted materials. Such a move would be unprecedented in the world and could set an unacceptable precedent for similar schemes in Asia and other regions. It is no accident that not a single country in the world has ever introduced price controls on optical disc products. Price controls are designed to create consumer safeguards only for essential products in which competition may not be relied upon to achieve a society's goals. Such controls distort markets and do not reflect market realities. They discourage necessary investment in infrastructure, which may be needed for revitalization or growth in a sector. In the case of Malaysia, such controls may also bankrupt local businesses and drive needed investment out of Malaysia, since the controls apply to product manufactured in Malaysia.

There are other compelling political reasons why the Malaysian government should avoid the course of imposing price controls on copyrighted materials. Imposition of government price controls in Malaysia would demonstrate a lack of commitment to a market economy and would make it much more difficult for the United States to finalize a Trade and Investment Framework Agreement (TIFA) with Malaysia. Price controls would make companies less likely to invest in Malaysia's economy and in the development of local Malaysian authors, filmmakers, artists, musicians, programmers, designers, and creators. Such disinvestment would promote the resurgence of piracy in Malaysia and thus price controls would be at cross purposes with

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ Statistics for 1999 and 2000 represent estimated pirate sales revenue in the pirate market (i.e., pirate profits).

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to U.S. copyright-based industries in Malaysia in 2002 were \$243.2 million. IIPA's revised loss figures are reflected above.

Malaysia's enforcement campaign. Indeed, the Malaysian music industry notes a 40% drop in local album releases in 2003, and a 20% drop in revenues;⁷ price controls would only further exacerbate the already-declining market for Malaysian talent. Finally, in setting prices, the Malaysian government would practically take on the thought process of pirates, who base prices of illegal discs on the cost only of materials and manufacture. Simple manufacturing costs do not capture the costs of research and development, development of talent, including local talent, marketing, license fees, taxes, and the value of the intellectual property in copyrighted materials, as well as the costs due to losses resulting from the many legitimate creations that are unprofitable. For example, in the record industry, nine out of every ten releases fail ever to return a profit. No government-ordered price control could do justice to the complicated combination of legitimate costs and risks borne by legitimate right holders.

If the Malaysian government follows through by imposing price controls in April 2004, IIPA recommends that Malaysia be placed on the Priority Watch List.

PIRACY IN MALAYSIA

Enforcement Crackdown Had Positive Impact, But Pirate Optical Disc Production Remains a Serious Problem

In 2003, some major actions against pirate optical disc production dipped into Malaysia's production capacity. Nonetheless, there remain a reported 38 optical disc plants in the country, including at least 86 production lines; there are also some unlicensed underground facilities. The total estimated capacity of the verifiable plants is at least 301 million discs per annum.

Unfortunately, Malaysia also continues to harbor many optical disc (OD) factories having the capacity to over-produce pirated materials. There is also evidence that exports of pirate copyrighted materials, especially of entertainment software (mainly console-based games like Xbox and PlayStation2[®] plus some personal computer games) continue unabated. Such materials reportedly continue to flood the Middle East markets, and have shown up in Latin America, Australia, South Africa, Sweden and the United Kingdom, among other markets. The entertainment software industry is extremely frustrated by the inability of the Malaysian government to address the problem of pirate console game exports.⁸ Ownership of many Malaysian OD production facilities for entertainment software is tied to Greater China syndicates run primarily from Taiwan, Hong Kong and China. OD pirates in Malaysia regularly engage in "disc gouging," namely, tampering with source identifiers used to identify the location of production of a disc. Pirate motion picture DVDs and VCDs from Malaysia are also being intercepted in Australia, the United Kingdom, the U.S., South Africa, and throughout Europe, while pirate music CDs seized in the United Kingdom were destined for Singapore, Nigeria, Cambodia, Europe and the U.S. There have also been some seizures of DVD "stampers" in Malaysia that were imported from Indonesia in 2003.

⁷ Terrina Hussein, Piracy Affecting AIM 2004, *The Malay Mail*, 21 January 2004.

⁸ In particular, the industry has been frustrated by its inability to track and pursue manufacturers and exporters due to false exporter documentation. Pirate exporters are known to hire others to ship pirate entertainment software out of Malaysia using false names and addresses. IIPA is deeply concerned at the ease with which exporters are able to falsify export documents and freely export illegal products from Malaysia to other countries around the world.

Book piracy remains a serious problem in Malaysia, with both pirate photocopy operations and offset publishing stymieing legitimate publishers trying to do business in Malaysia. Particularly stubborn is the piracy of academic materials on university campuses, although the MDTCA just supported the publishers in a campaign to spread the legitimate use of published materials on university campuses. U.S. book publishers also suspect that pirate book exports are emanating from Malaysia, landing in such far-off locations as Southern Africa. Finally, there is some evidence that, despite the recent crackdown on retail piracy, many pirates are simply stockpiling pirate materials awaiting the end of the crackdown before re-entering the market with full vigor.⁹

One recent phenomenon in Malaysia is the rise of Internet cafes. These cafes, in addition to providing Internet access, allow customers to use copyrighted material, including entertainment software. Unfortunately, many of the copyrighted materials used in these cafes are pirate copies, and entertainment software companies do not license to such facilities. Therefore, it is extremely important that Internet cafes be made to license the use of copyrighted materials. Currently, there are roughly 600 to 1,000 unlicensed Internet cafes. In order to prevent crime and establish healthy business practices for Internet cafes, the Malaysian government should ensure that Internet cafes use legitimate copyrighted materials.

ENFORCEMENT AND THE COURTS IN MALAYSIA

Crackdown Curtails Domestic Retail Piracy and Removes Some OD Production Equipment from Operation

The government crackdown in the middle of 2003 was unprecedented and resulted in reductions of retail piracy from the markets in Malaysia for most industry sectors (i.e., the numbers of street vendors has decreased dramatically, and there have even been decreases in the availability of pirate optical discs in notorious Petaling Street markets). Much of the remaining retail trade is carried out underground (i.e., by vendors approaching customers on the street, who then wait for the vendor to bring product from another secret location) or less obviously (i.e., displaying legal product on shelves and bringing out pirate copies only for quick sale or on request). The Malaysian government should be commended for its efforts in taking steps to eradicate retail piracy. The government must be urged to sustain its efforts, as we are very wary that piracy operations will revert to previous levels if enforcement actions decline. IIPA notes that the recent crackdown has had little effect on piracy availability at major shopping complexes like Sg. Wang, Low Yat Plaza and Imbi Plaza in Klang Valley and the Holiday Plaza & City Square in Johor, for example.

We understand that from May 23 to June 16, the government mobilized approximately 800 police officers and 250 officials from the Ministry of Domestic Trade and Consumer Affairs (MDCTA), and other enforcement agencies to conduct a crackdown on all activities of pirate optical disc distributors and retailers and the criminals that support them. In that period, the government conducted almost 2,000 raids, resulting in the seizure of over 3.15 million pirate optical discs and 153,369 pornographic VCDs valued at 16.22 million Malaysian ringgit (US\$4.27 million) and the arrest of 1,046 individuals. Factory raids were carried out on 12

⁹ Pirate DVDs, VCDs and CDs are making a strong comeback, with pirate vendors displaying only the covers of movies for customers to point at; some of these covers have hologram stickers on them, which is meant to deceive enforcement officials into believing that they are selling legitimate copies. Pirates are also using minors/children as peddlers of pirated product.

facilities, including seizure of 18 replicating lines (with the dismantling of 16 lines). Virtually all the factory raids have been carried out by the Malaysian government on its own initiative (except one initiated by the motion picture industry), with much of the information being provided by Malaysian government informants.¹⁰ Finally, the government has procured the resources necessary to seize and hold equipment from unlicensed plants that was used in the illegal manufacture of optical discs, storing that seized equipment in its own government-owned warehouses.¹¹

Book publishers continued to get some raids against pirate photocopy shops, with several high-profile raids near the Universiti Sains Malaysia (USM) following the distribution of the Association of American Publishers' copyright awareness posters which were endorsed by the MDTCA and distributed to all public and private colleges in November. However, publishers report inconsistencies in the raiding processes at the ground level. For instance, while seizure of infringing materials found on the premises is routine, seizure is inconsistent at best of photocopying machines, binding machines and similar implements that are key to the infringement process. Likewise, documentation practices vary widely among officers in different jurisdictions, as some officers fail to document ISBN numbers and authors' names—information crucial to a successful continuation of legal action. Furthermore, officers are in some cases apt to make spontaneous requests of publishers at the site of a raid, such as provision of cameras for documentation or even transport for confiscated materials. Even more seriously, some AAP members have reported instances of defendants tampering with evidence at the site of a raid, with enforcement officers looking on. Finally, a few officers have been all too accommodating to infringers' requests for identification cards from publishing representatives at the site. AAP members would like to see MDTCA's educational efforts for officers stepped up, including issuance of guidelines regarding raid procedure and requirements and clarification of publishers' roles on site.

AAP members also point to vastly improving reproduction technologies such as digital scanners and high-speed photocopiers as a major source of increases in lost revenue. The Malaysian government must be prepared to deal with the increases in volume and quality of pirate product that these technology improvements will continue to generate. In addition, as photocopy shops are increasingly targeted for action, publishers are seeing operations move "underground," toward a system of "made-to-order" production in residential areas, with campus delivery by car or van. It is vital that enforcement authorities adapt to these changes in procedure and venue.

For the business software industry, *ex parte* orders continue to be issued, allowing the government to conduct raids against those suspected to be engaging in the unauthorized use of business software, so-called end-user piracy of software. The entertainment software industry continues to note a significant problem of export of its product in 2003. As for retail, there are indications that the pirate retailers have merely slipped underground, guarding their enormous stockpiles of pirated entertainment software titles, until they perceive that the current campaign has ceased. In addition, there are reports from industry sources that optical disc production lines have largely shifted to console-based entertainment software as the content of choice, which could explain why exports of this product have not abated.

¹⁰ In addition, the government has not hesitated in inspecting or raiding politically well connected targets, indicating a strong government will to tackle this problem.

¹¹ For raids on licensed plants, the machinery is generally sealed, and some equipment has reportedly been released to licensed plants upon payment of a court bond.

Post-Raid Investigations, Prosecutions, and Court Cases Fail to Deter Piracy in Malaysia

Unfortunately, as has long been the case in Malaysia, the cogs of justice seem to slow dramatically after a successful raid, and results have been anything but a deterrent. For the music industry, five defendants were convicted in 2003 and fines of RM1,000 (US\$263) to RM32,000 (US\$8,422) or a jail sentence of one to five months imposed. While the three defendants who failed to pay their fines actually served or are serving their sentences, meanwhile, over 845 cases for all industries lingered on without resolution, many from as far back as 1997; and there has never been a conviction against an end-user pirate of business software.¹² A recent case is cause for great concern. A courier and two criminal associates were caught attempting to smuggle pirate print reels of four major motion pictures—valued at US\$50,000 each—out of the country. While the courier was sentenced on January 4, the penalty under the smuggling statute—1 day in jail and a \$2500 fine—is totally non-deterrent (the other defendants will be tried in September 2004 but were released on bail). While the quick processing of this case is commendable, the outcome is unacceptable. The Malaysian government needs to do more to ensure that these kinds of cases receive top attention and that prosecutors work to achieve maximum sentences attainable under the laws.

The enforcement system falters post-raid largely due to delays in preparing cases for prosecution, lack of investigative or prosecutorial expertise, and an overburdened docket of cases to bring forward. Cases arising out of police raids generally fare better than those arising out of MDTCA raids, since public prosecutors in the Attorney General's Chambers who have law degrees handle the police cases, while MDTCA prosecuting officers, usually legally untrained, and in some cases mere investigating officers or office administrators, handle the MDTCA cases. In preparing a case for prosecution, MDTCA investigators face no strict filing deadline, so cases languish in the preparation of documents, and/or go dormant, in the latter case often because the defendant has absconded or the particular officer handling the case has been transferred.¹³ Representatives of right holders are also not informed of the transfer or of the new officer taking over the files. Even before cases proceed to trial, MDTCA officers find themselves under considerable pressure to settle piracy cases under other statutes (e.g., the Price Control Act, or the Trade Descriptions Act), which avoids complex legal issues but results in purely nominal penalties.

Even in police cases which are handled by legally trained prosecutors, long delays are the norm, as copyright cases are given low priority, subject to numerous postponements, and only rarely result in formal charges being brought (with even fewer resulting in convictions). As can be imagined, such results have had very little deterrent effect on the pirates in Malaysia. There are also unduly burdensome documentary requirements imposed on copyright owners in the bringing of piracy cases. Copyright owners are required to execute statutory declarations, including extensive and detailed information on copyright ownership for the titles infringed upon (such as the date and place of first publication or creation) as well as providing copies of each

¹² The business software industry group, BSA, has brought three contested end-user cases in Malaysia, with all of them failing to result in conviction (the last two in 2003), probably due to the technical and difficult nature of investigation and prosecution of such cases.

¹³ If a defendant has absconded, the case will result in a "discharge not amounting to an acquittal" (DNAA), sending the case into a "dormant" state, unless the defendant can be caught.

title involved in the case.¹⁴ For entertainment software companies that release hundreds of titles each year, providing copies of the work, collecting and transmitting copyright information is not only an undue burden on time, but also proves to be expensive. Malaysia should look to neighboring countries which have simplified documentary requirements for the bringing of cases.

Malaysian Government Must Focus in 2004 on Development of Specially-Trained Prosecutors and Judges to Handle Copyright Cases

The Malaysian government should devote the resources necessary in 2004 to develop a cadre of highly qualified, specialized, well trained 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. Some IIPA members have provided training toward this end in 2003.¹⁵ 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.¹⁶ The judiciary is also in drastic need of reform. Judges presiding over copyright cases are almost always unfamiliar with the copyright law, resulting in numerous problems of interpretation,¹⁷ and ultimately, in delayed and non-deterrent justice (and small, non-deterrent penalties in the few cases that reach judgment).¹⁸ IIPA recommends several corrective steps or actions to begin the process down the road to meaningful judicial reform:

- 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 (and possibly a specialized intellectual property court).¹⁹
- Measures should be taken to ensure that pirates do not get away, and judges should enforce directives intended to speed the process of charging/indicting defendants,²⁰ in line

¹⁴ One potentially positive development in 2003 involved the "corporatizing" of the Intellectual Property Division of the MDTCA, making it a statutory body. MDTCA will now reportedly have the statutory authority to provide proper presumptions and ease current documentary burdens regarding copyright ownership.

¹⁵ In April and July 2003, the local recording industry group participated in prosecution training (mock trials) for MDTCA officers. The group also presented papers at two other seminars organized by the government in 2003. Following the loss of the first end-user software piracy case in 2002, in February 2003, BSA provided training to 18 hand-picked prosecutors from the MDTCA. The training was directed primarily on how to gather evidence during an end-user raid and the steps that need to be taken in order to prosecute the case successfully in court. In consultations with the government in 2003, MDTCA also agreed on the need for stronger awareness within the corporate world of copyright and corporate duties under the Copyright Act 1987. IIPA encourages the Commission of Companies, among others, to get involved in this effort.

¹⁶ Also, criminal investigations and prosecutions should not terminate at the vendor or mid-stream supplier level, but should extend to higher levels of syndicate piracy operations. The skills of legally trained prosecutors from the Attorney General's Chambers would be crucial to such higher level investigations and prosecutions.

¹⁷ For example, with respect to presumptions of ownership and subsistence of copyright, notwithstanding amendments to the Copyright Act in 2000 intended to ensure that presumptions are established in copyright cases, judges often favor defendants' challenges to presumptions, and, for example, require prosecutors to provide documents like 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.

¹⁸ The average fine in the only 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.

¹⁹ 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, Anton Pillar orders, and meting out strong criminal punishment against commercial piracy.

²⁰ In a development in 2002 that was intended to avoid the situation of a defendant running away before being

with the Chief Justice of Malaysia's announcement in April 2003 that copyright piracy cases should be handled as "Priority Cases," meaning fewer postponements and that technically, the judge must hear the case within two months of the case being registered in court and must conclude the trial within three months.²¹ Despite this directive from the Chief Justice, there was no significant decrease in postponements or increased speed of adjudication in 2003. The court should also be empowered to try defendants and convict them *in absentia*. Further, defendants released on bail must be required to report to the nearest police station every day, pending the prosecution of the piracy case, to ensure that they do not abscond.

- Sentencing guidelines should be issued (similar to those in Hong Kong and Singapore, where custodial sentences are handed down without exception and high fines are imposed) and strictly enforced for maximum deterrent effect.
- A systematic review should occur of any acquittals and inadequate sentences, including immediate disclosure in writing 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).

HOLOGRAM STICKER PROGRAM

IIPA has serious concerns regarding the implementation of the Trade Description (Original Label) Order 2002 of the Trade Descriptions Act 1972 (Act 82), which requires all distributors to pay for and apply stickers inside the shrinkwrap of all optical discs of copyrighted materials distributed in Malaysia, including imported discs. The Malaysian government began enforcing this requirement, which raises the costs to the copyright owner to do business in Malaysia, on July 15, 2003. Thus far, the system has not worked very well. The process for obtaining holograms is extremely burdensome, as only one location gives them out; the documentation is lengthy; and the process is time consuming. Very few arrests have been made of pirates. Three cases reported by the record industry arose out of a counterfeiting operation in China, containing fraudulent record industry company logos. The government has also apparently issued holograms to third party importers who are not licensed to produce/distribute copyrighted materials in Malaysia, and has taken no action against an importer using false license information to obtain holograms. We note other serious concerns over the "hologram" program that raise doubts about the overall effectiveness of such a stickering program for anti-piracy purposes.²²

- **The Statutory Declaration/Affidavit Is Overly Burdensome:** The Order requires the filing of a Statutory Declaration/Affidavit, including extensive and detailed information on copyright ownership for each title to be released in the Malaysian market as a prerequisite for the issuance of holograms. The government should consider waiving the requirement for a Statutory Declaration and allow the Letter of Authorization alone (with no requirement for legalization of this document) to suffice. However, whatever the government does, it must

charged, the MDTCA legal office directed a defendant in a copyright piracy case to be charged in court three days after a raid, or otherwise, a warrant of arrest could be issued against the pirate. At least as to the book publishers, this order is not being carried out at all in practice.

²¹ Under the Chief Justice's Directive, appeals must be completed within two months of the conclusion of a trial.

²² We also note that it is ironic that, at the same time the government is pushing to reduce prices on optical discs sold in the country, it is adding a huge additional burden to legitimate right holders by adding costs and delays to the distribution of their legitimate goods. These additional costs include the actual cost of the "holograms" as well as "compliance" costs such as increased manufacturing costs, e.g., where the hologram must be placed under shrinkwrap of legitimate copyright product.

take steps to ensure that fraudulent information is not used to obtain holograms (which apparently has already happened).

- **Requirement to Allocate and Keep Records on Holograms for Specific Titles is Overly Burdensome:** The Order requires legitimate businesses to allocate serial numbers of holograms to each copyright title. The government should permit purchase of “bulk” holograms, with no restriction on allocation to particular products.
- **Holograms are Overly Costly:** Holograms in Malaysia cost 20 sen (US\$0.05). The government should lower the cost of holograms to 4 sen, and take other steps to lower indirect costs to legitimate businesses.
- **Placing Hologram Under Shrinkwrap is Costly and Overly Burdensome:** The Order requires the hologram to be affixed inside the shrinkwrap. Since many copyright owners have a manufacturing source outside of Malaysia, the government should amend the Order such that placement of holograms outside the shrinkwrap is acceptable for all works.
- **Holograms on Pre-Existing Stock Represent a Major Expense for Legitimate Businesses:** Because the Order requires holograms to be applied retroactively to product released before January 15, 2003, those trying to comply are facing practical and costly obstacles to compliance. The government should dispense with the requirement for product the release date of which is before January 15, 2003.
- **Some Products Should Not Be Made Subject to Hologram Requirement:** The business and entertainment software industries produce “original equipment manufacturer” (OEM) software that is installed or distributed with hardware; at least these products should be exempt from the hologram requirement.

COPYRIGHT LAW REFORM/OPTICAL DISC LAW

Copyright in Malaysia is governed under the Copyright Act, 1987, as amended through 2003. The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003) strengthened criminal penalties and generally gives enforcement authorities more ability to carry out enforcement against copyright piracy, e.g., Section 50A gives MDTCA officials the ability to carry out arrests for copyright piracy.²³ These changes address in part the issue raised by IIPA in past filings about the need to deem piracy a “public crime,” and while the amendments do not go quite that far, they do in a practical sense address the need for MDTCA to be able to carry out its duties *ex officio*, so in that regard, we view them as a positive development.

The amendments do not otherwise address issues raised by IIPA in past filings, e.g., they do not impose mandatory minimum jail sentences for piracy; they do not address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright; they do not permit disclosure by enforcement authorities to copyright owners of evidence; and in civil cases they do not deem infringing the “possession and control” of infringing copies for the purpose of sale or other transfer.²⁴ Malaysia should also make certain other changes in order to more completely implement the WIPO “Internet” treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and to allow it to finally join these treaties.²⁵ We understand that MDTCA officials have been working on a draft to fully

²³ We understand that since these amendments went into force, MDTCA has made more than 10 retail arrests, all of which have been registered in court as offenses under the Copyright Act.

²⁴ Please see the 2003 Special 301 report on Malaysia, at <http://www.iipa.com/rbc/2003/2003SPEC301MALAYSIA.pdf> for a full discussion of needed amendments to the Malaysia Copyright Act.

²⁵ Malaysia amended its Copyright Act in 1999 to partially implement the WCT and WPPT, including the recognition of a broad exclusive right of “communication to the public” including the right to make works available on demand (for

implement the treaties, but that the draft has not yet been tabled with the Cabinet; we look forward to the possibility of reviewing this draft prior to its submission to the Parliament for passage.

The Optical Disc Act (2000) was enacted to address rampant optical disc piracy in Malaysia. The copyright industries would like to see several changes to the law which would lead to positive gains in the fight against optical disc piracy in Malaysia. For example, the sale of optical discs without SID code should be an offense under the Act; samples should be obtained from all plants; officers should be authorized to seize discs in inspections if necessary; right holders should have the ability to participate in inspections and receive samples for forensic examination; officers should be authorized to forcibly enter a plant if anyone obstructs or impedes the inspection; a plant's license should be automatically revoked if the plant or its agents commits any offense under the Act; and the Act should make it an offense to engage in "disc gouging" or "disc scouring."

instance, via the Internet). However, other treaty requirements, such as prohibiting the circumvention of technologies used by copyright owners to manage and control access to and use of their works, are not adequately addressed in the amendments. In addition, the law should be clarified as to the protection of temporary copies under the reproduction right.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

PERU

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Peru remain on the Special 301 Watch List in 2004.

Overview of key problems/achievements: Bilateral Free Trade Agreement (FTA) negotiations between the U.S. and Peru will commence in mid-2004. At present, Peru's copyright regime is completely inadequate, and inconsistent with the standards that the US should expect of its most trusted trading partners. While the IPR chapter of the FTA will undoubtedly include high levels of substantive copyright obligations as well as enforcement measures, it is essential that the U.S. demand, and that Peru extend, significant and immediate attention to the problem of copyright piracy, and in particular, initiate and sustain criminal actions against those who manufacture, distribute and sell pirate product.

Copyright piracy levels in Peru are still extraordinarily high. In particular, the legitimate recording industry in Peru has all but disappeared because of the high levels of piracy, including the growth of CD-R piracy, and totally ineffective enforcement. Optical disc piracy is on the rise, and adversely affects almost all the copyright industries. Effective enforcement—on both the administrative and the criminal levels—remains the copyright industries' primary concern in Peru. In general, 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.

Peru also needs to improve its border controls to halt the importation of pirate materials. Cooperation improved between motion picture anti-piracy personnel and INDECOPI, in coordinating with Peruvian police on major raids in 2003 and early 2004. Notwithstanding the 2003 Government Software Legalization Decree requiring all public government entities to use legal software and establish effective controls to ensure such legal use before March 31, 2005, the government has not yet approved the government guide for software management.

Actions which the Peruvian government should take in 2004

- Make anti-piracy an issue of national priority;
- 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. Attention should also be given to Miraflores, San Isidro, and other middle class neighborhoods;
- Pursue prosecutions and issue expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- Increase the level of sanctions in piracy cases to restrict the power of judges to suspend criminal sentences;
- 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);

- Support more administrative enforcement efforts by INDECOPI in business software, entertainment software, video/cable piracy, and music piracy;
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials used in making those products;
- Have customs officials establish a system to track the importation of blank media and polycarbonate;
- 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);
- Approve the government guide for software management as required by the 2003 Government Software Legalization Decree.

PERU
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	87.0	98%	70.2	98%	57.8	97%	55.0	96%	50.0	85%
Business Software Applications ²	NA	NA	14.7	60%	11.2	60%	12.6	61%	22.2	63%
Motion Pictures	4.0	45%	4.0	50%	4.0	50%	4.0	75%	4.0	65%
Entertainment Software	NA	NA	NA	NA	NA	NA	3.8	70%	NA	NA
Books	8.5	NA	8.5	NA	9.0	NA	9.5	NA	10.0	NA
TOTALS ³	NA		97.4		82.0		84.9		86.2	

In November 2003, Ambassador Robert Zoellick notified the U.S. Congress that the Bush administration intends to begin Free Trade Agreement (FTA) negotiations with the Andean nations,

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>. For more information on the history of Peru under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$10.3 million and levels of 58% were identified as preliminary. BSA's revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Peru, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Peru (including U.S. publishers) and (b) losses to local distributors and retailers in Peru.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Peru were \$93.0 million. IIPA's revised 2002 loss figures are reflected above.

starting with Peru and Colombia in the second quarter of 2004.⁴ The negotiating objectives specifically include high levels of copyright protection and effective enforcement measures, including criminal, civil/administrative and border enforcement. 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. Presently, 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).⁵ These two programs contain standards of intellectual property rights which must be afforded to U.S. copyright owners.⁶ There is little doubt but that Peru's present copyright regime fails to afford adequate and effective protection to U.S. copyrighted materials as contemplated under these statutes. It is essential that Peru take immediate steps to improve its poor enforcement record (especially exemplified in the case of recorded music), and that it not wait until negotiations are concluded to begin to address this problem. The absence of significant improvements in advance of the conclusion of negotiations will greatly prejudice the political environment for Congressional consideration of the FTA, and we hope that the Government of Peru will turn its attention to this critical issue without delay.

COPYRIGHT PIRACY IN PERU

Piracy of sound recordings in Peru is severe; the estimated piracy level is now at 98%, one of the highest music piracy rates in the world. The entire legitimate record industry in Peru has almost disappeared over the last three years. Another local independent company, Discos Independientes, ceased most of its operations during 2003. Pirate audio product in Peru appears in all formats—cassettes, CDs and now mostly CD-Rs (recordable CDs). 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. In recent years, many recording companies have closed because they could not compete with the overwhelming levels of piracy. Customs figures have indicated 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

⁴ See Press Release 2003-74, Office of the U.S. Trade Representative, "USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries," November 18, 2003, at <http://www.ustr.gov/releases/2003/11/03-74.pdf>; and President Bush's Letter to Congress, November 18, 2003, at http://www.ustr.gov/new/fta/Andean/2003-11-18-notification_letter.pdf.

⁵ During the first 11 months of 2003, \$100.3 million worth of Peruvian goods (or 4.7% 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 decrease of 36% over the same period in 2002. During this same time frame, an additional \$1.1 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 271% increase in ATPA benefits from the same period in 2002.

⁶ See IIPA Comments to the International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, May 21, 2003, at http://www.iipa.com/rbi/2003_May21_ATPA_ITC.pdf. In 2002, 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. See 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, at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf. Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Peru. There, 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 was informed that Peru made general commitments (a) to reduce piracy and (b) implement a software legalization decree by February 28, 2003.

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.

The key challenge for the business software industry continues to be the illegal duplication of business software within larger Peruvian private sector companies as well as small and medium-sized organizations. Reseller piracy remains a very significant problem, too; illegal bazaars operate openly in high-traffic areas like Avenida Wilson, with virtual impunity. The day after a raid, the same individuals continue selling illegal software from the same stalls and stores.

Book publishers report little change in the piracy problem over the last year. The most damaging forms of piracy—commercial book piracy and large-scale photocopying—remain at high levels. In addition, trade books of U.S. origin now appear as pirated translations. Publishers also report pirated translations of college texts. Estimated trade losses due to book piracy in Peru stayed constant at \$8.5 million in 2003.

Optical disc piracy (CD-R and DVD-R) has almost completely replaced VHS in pirate distribution systems, according to the Motion Picture Association of America (MPAA). This pirate product, of varying quality, is distributed in street markets, newspaper stands and in large black market distribution centers. The main cause for concern is the large black markets, such as Polvos Azules, Polvos Rosadas and Mesa Redonda, where optical disc piracy grew significantly in 2003. The black-market distribution centers are especially difficult to control because of their political leverage and their tendency to resort to violence to counteract police raids. The black market merchants of Polvos Azules, for example, fought off 150 police on September 29, 2003. Despite the use of tear gas and riot control tactics, police were unable to enter the center for search and seizure of pirate product. (A similar incident occurred on June 29, 2003.) The piracy situation in street markets is so pervasive that thousands of pirate discs are sold in the street market one block away from the police headquarters. In addition to street sales, 80% of Peru's estimated 800 video stores rent pirate videos and are beginning to rent pirate DVD-R. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Peru continue to be estimated at be \$4 million in 2003.

The Entertainment Software Association (ESA) 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

In Peru, criminal and administrative anti-piracy actions can be filed simultaneously. However, enforcement difficulties remain serious. On November 28, 2001, the Public Ministry and INDECOPI created a Special IP Prosecutor's Office, and appointed two special prosecutors. In June 2003, the Attorney General created a new Intellectual Property and Contraband Prosecutors Unit. This unit, along with the National Police, has recently cooperated with INDECOPI to take effective action against optical disc piracy. However, in November 2003, the Attorney General removed this specific designation and funding for this function, leaving the Special IP Prosecutor's office undefined as to its specialized function in 2004. This could result in the disbanding of this important office by mid-2004.

The Director of the Copyright Office (Oficina de Derecho de Autor) leads a campaign called "Cruzada Antipirateria" encouraging the IP industries to work together on public relations matters

and raids against centers of production and distribution of counterfeit products. In 2003, the audiovisual sector, in a coordinated effort of theatrical and video companies, joined INDECOPI's "Cruzada Antipirateria" to take actions against black market piracy with other copyright sectors.

Police actions: 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). 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. The copyright 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.

MPA reports that on January 17, 2004, Peru's Federal Police raided a DVD-R reproduction lab in Lima on Saturday, seizing 28 burners, 3,000 recorded DVD-Rs, about 25,000 unrecorded DVD-Rs and arrested two people. The 3,000 recorded DVD-Rs seized were, according to the arrested individuals, the daily production set for delivery to the markets (which would correspond to an annual production output of over 1 million DVD-Rs). This was done by INDECOPI coordinating with the Attorney General, federal police and tax authorities (SUNAT). This lab — located one block from the office of the Peruvian President — was a major supplier to the organized street markets. Since mid-2003, MPA, its local video association, and INDECOPI have been working together, and this cooperation has been very positive.

During the course of 2003, the local recording industry's anti-piracy unit cooperated in seizing 2.3 million pre-recorded music CD-Rs and 305,000 blank CD-Rs, and produced 7 sentences, all with no effective jail time. This level of activity hardly makes an impact when face with a pirate market of over 20 million units being distributed through an aggressive network of street vendors and flea markets. The recording industry does not bring administrative enforcement cases in Peru.

INDECOPI and motion picture actions: MPA reports positive developments in INDECOPI's efforts to combat piracy, specifically the effort of Martin Moscoso, head of INDECOPI's Copyright Office, to coordinate raids on black market piracy. Mr. Moscoso has been able to coordinate INDECOPI inspectors, federal police and prosecutors and SUNAT in several significant actions. For example, MPA reports that in the third and fourth quarters of 2003, INDECOPI organized six raids against large black market distribution points, including Polvos Rosadas and Mesa Redonda, and has continued to organize raids in the first quarter of 2004, including a significant raid in February on Mesa Redonda. This effort by INDECOPI has resulted in more effective action in the last several months than MPA has seen in the last several years. If the Attorney General cooperates with INDECOPI and investigates and prosecutes aggressively, this effort may be the most effective effort Peru has made in many years. If there is no effective prosecution, however, than MPA fears that INDECOPI's efforts will not result in deterrence. Nevertheless, the audiovisual sector, both through MPA and the local video and theatrical companies, is committed to supporting INDECOPI's efforts.

INDECOPI continues to work on business software activities: INDECOPI has given constant support to special business software campaigns to fight piracy. INDECOPI drafted the government guide for software management and it is now seeking approval by the government agency. The business software industry has relied significantly on administrative actions by INDECOPI against end users, since civil and criminal actions can last for years without having any deterrent impact on the market for pirate copyrighted products. Notwithstanding its positive results, INDECOPI has no authority to force an inspection when the defendant denies access to INDECOPI.

As an administrative entity, INDECOPi needs express authorization from a court to enter in the face of such a denial. This lack of authority has encouraged some defendant to deny access to INDECOPi, with the expectation that the amount of the fine to be imposed by INDECOPi for such denial would be smaller than the compensation and fines faced had the inspection occurred. INDECOPi must impose deterrent sanction to avoid this conduct in the future. INDECOPi has been effective in imposing fines on end-users that first reached a settlement with BSA but later chose not to comply with the settlement terms.

Criminal prosecutions still rare: Prosecutors have been unable to move copyright cases along and judges have issued only few, non-deterrent sentences. As always, once the prosecutors have done their initial work conducting raids and doing preliminary investigation, courts take years to issue final resolutions. In January 2003, a new special intellectual property rights prosecutor was appointed. 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 very limited resources. Furthermore, the special prosecutor only gets involved during the investigation stage. Once the process has moved into the indictment phase, a regular prosecutor without special expertise in intellectual property laws handles the case.

Non-deterrent results in the criminal courts: Few criminal cases reach the Peruvian judiciary. When they do, judges do not impose deterrent sentences. Cases simply 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.⁷ 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). Some bills have been introduced in Congress to increase the level of sanctions in piracy cases in order to restrict the power of judges to suspend criminal sentences

Customs: Border measures in Peru are inadequate to stop the flow of pirated material into the country. Interventions by customs authorities to seize suspect shipments are few. There are several actions which Peru could take to strengthen its borders from the entry of pirated products. 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.

⁷ 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.

SUNAT (National Tax Authority): SUNAT, which has tax and customs jurisdictions, can and should be a major player in anti-piracy efforts, in prosecuting tax evasion and contraband activity by pirates. During 2003, BSA tried to get SUNAT involved in the fight against piracy, but SUNAT has resisted participation. SUNAT has been working jointly with INDECOPI to take action on the ground to interdict and hold suspect merchandise. MPA expresses disappointment, however, that SUNAT appears reluctant to exercise its jurisdiction and acts only in actions coordinated by INDECOPI and then only with a minimal participation and insufficient follow-up.

COPYRIGHT LAW AND RELATED ISSUES

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 (1993). Peru's copyright law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. However, it is not without some provisions which fall below international consensus, especially with respect to the WIPO Internet treaties. Peru already has deposited its instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Given the higher standards of copyright obligations and enforcement measures contemplated in a U.S.-Peru FTA, Peru should be on notice that some additional reforms will be needed to its copyright law to comply fully with the comprehensive obligations found in U.S. FTAs.

Performers Law: In mid-2003, President Toledo properly vetoed legislation called "The Artists' Bill" which would have introduced a private copying levy, eliminate contractual freedoms between recording companies and artists, and require collections for public performance and broadcasting of sound recordings and music to be achieved through separate organizations. The "Artists and Performers Law" was published on December 19, 2003, and has to be within 90 days from its publication. This law establishes moral and economic rights for artists and performers, creates a private copy levy on blank media, and requires collections for public performance, broadcasting and rental of music included in audiovisual works and sound recordings.

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. INDECOPI has drafted the government guide for software management, but has not been able to get it approved by the appropriate agency. BSA urges the government to approve and implement the software guide and the other provisions contained in the decree.

⁸ A year ago there was some preliminary discussion among the Andean Community copyright office directors regarding a possible modification of Decision 351 to make it TRIPS and WIPO treaties-compatible, but at last report there was no progress.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Romania remain on the Watch List in 2004.

Overview of key problems: Ongoing enforcement and legal deficiencies continue to result in high piracy levels in Romania. Optical disc piracy is widespread in Romania; pirated products enter from Russia and the Far East, often via the Ukraine border and the Bucharest airport. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Romanian anti-piracy efforts often remain uncoordinated and a low priority for the police, prosecutors and courts, and their 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. The police have been conducting raids but prosecutors usually refuse to follow through and fail to press for deterrent sentences for those cases they do prosecute. This is a major stumbling block to successful and effective criminal enforcement. In fact, a Romanian court of appeal has dismissed a case in which the recording industry was awarded damages for infringement. Also, the public prosecutor's office dropped a case citing "lack of social harm," even where damages to the business software industry were over US\$100,000. The industries are also very concerned about the dangers working in environments where corruption exists.

Romania still does not afford viable civil *ex parte* search remedies in its copyright law or in practice, a clear TRIPS violation. ORDA (the Romanian copyright office) 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. More human and financial resources should be allocated to support ORDA's activities. Border enforcement must also be made a priority because pirate products easily enter the country for sale in the local market. Constant staff changes in the enforcement agencies have contributed to a general lack of efficiency. The prosecutor assigned to IPR matters with the General Prosecutor's Office attached to the Supreme Court of Justice was replaced four times in 2003. At the police level, there are unexpected "promotions" of successful enforcement agents to totally unrelated departments. All of these issues have seriously undermined the effectiveness of numerous industry- and U.S.-funded training programs.

Actions which the Romanian government should take in 2004

Enforcement

- High-level government officials must instruct the enforcement agencies to make piracy a priority, order the involvement of the anti-organized crime department and set goals for

tough anti-piracy enforcement actions and sanctions. The Prime Minister, along with the ministers of Interior and Administration, Finance, Culture and Religious Affairs, and Justice must tackle piracy in a cohesive manner to get on-the-ground enforcement results. The enforcement agencies must then commit to undertake these goals with clear lines of authority for copyright enforcement among the competing agencies.

- Encourage the economic police to increase substantially the number of anti-piracy raids, to extend their actions to the distribution networks supplying illegal street sellers and to bring more cases to the prosecutors.
- Provide training to police officers in order to improve the quality of the files presented to the prosecutors. Instruct police to impose administrative fines in small-scale piracy cases, as opposed to opening criminal files, in order to avoid prosecutorial bottlenecks. Also ensure that the police officers trained in IPR matters are not arbitrarily re-assigned to other matters, so that training efforts undertaken are not futile and resources are not wasted.
- Have the government and high-level officials in the Ministry of Interior and Administration clearly state that the IPR enforcement is a priority for the police. During 2003, various internal orders were transmitted by which IPR case results were not taken into consideration when evaluating police officers' annual performance.
- Ensure that the Prosecutor General refrain from constantly changing the prosecutor responsible for coordinating intellectual property cases (four in less than two years) and finally start appointing the promised IPR specialized prosecutors in each district. The Prosecutor General should also direct prosecutors to move criminal cases to their completion and push for deterrent penalties, especially directed at large-scale operations and repeat offenders. The list of such prosecutors should be made public, so that the rightsholders can contact the prosecutors for specific cases. Prosecutors should also be instructed to, as a rule, keep the rightsholders informed of the outcome of their criminal investigations and their decisions. Provide training for these IPR prosecutors.
- Improve border enforcement by having customs officials actually use their *ex officio* authority to make inspections and seizures and encourage continued consultations and coordination with rightsholders' organizations.
- Ensure that ORDA refrains from providing hologram permissions to highly suspect companies and increases its inspections and verification of the use of holograms.
- Imposing deterrent, non-suspended sentences (in criminal courts) and fines (in both criminal and administrative courts) and stop dismissing cases involving repeat offenders.
- Establish a system at the borders to track the importation of blank optical media products, especially given the prevalence of blank CD-Rs used to burn infringing content.

Legislation

- Revise 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).
- Amend the 1996 Romanian copyright law to meet Romania's bilateral, TRIPS and WIPO treaties' obligations.
- Amend the copyright law to provide a clear legal basis for civil *ex parte* search authority, a TRIPS requirement especially critical to the business software community.
- Abolish the "musical stamp" tax.
- Introduce and enforce a general prohibition of street sales of optical discs.

- Refrain from introducing a general private complaint obligation for the prosecution of copyright crimes.
- Refrain from introducing changes in the criminal code that would lower the level of penalties, including imprisonment provided for copyright infringements.
- Refrain from over-regulating and interfering with the collective management of rights.

ROMANIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	8.0	35%	6.0	55%	6.0	65%	6.0	60%	6.0	60%
Records & Music	18.0	80%	15.0	75%	14.0	70%	11.0	55%	25.0	85%
Business Software Applications ²	NA	NA	20.7	70%	15.7	75%	17.1	77%	9.8	81%
Entertainment Software	NA	NA	35.2	97%	NA	95%	6.9	91%	NA	NA
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
TOTALS ³	NA		78.9		37.7		43.0		42.8	

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. In September 2003, the U.S. government welcomed the European Commission's decision which endorses a political understanding preserving the U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Romania.⁴ In December 2003, President Bush asked the U.S. Senate to approve a protocol between the U.S. and Romania to preserve the BIT after Romania joined the European Union in 2007.⁵

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$16.4 million and levels of 72% were identified as preliminary. BSA's revised 2002 figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Romania, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Romania (including U.S. publishers) and (b) losses to local distributors and retailers in Romania.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Romania were \$74.6 million. IIPA's revised loss figures are reflected above.

⁴ For more details on Romania's Special 301 history, see IIPA's "History" appendix to filing, at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>. With respect to the GSP program, during the first 11 months of 2003, \$103 million worth of Romanian goods (or 15.3% of Romania's total exports to the U.S. from January to November 2003) entered the U.S. under the duty-free GSP code, representing a 7.8% increase over the same period in 2002.

⁵ U.S. State Department, "U.S.-Romania Investment Treaty Protocol Sent to U.S. Senate," Dec. 9, 2003, available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=December&x=20031209163752osnhjac1.789492e-02&t=xarchives/xarchitem.html>.

COPYRIGHT PIRACY IN ROMANIA

The Growing Problem of Optical Media Piracy

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. A large part of the pirate music CD material is coming from Russia and is shipped through Moldova and Ukraine. The share of CD-Rs containing illegal music in the Romanian pirate market is steadily growing. 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 Serbia and Montenegro border, Calmafat and Giurgiu on the Bulgarian border, and Albita, Giurgiuilesti and Iasi on the Moldovan border. 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 Romanian (especially in Bucharest and its vicinity) from Ukrainian master CDs. The Entertainment Software Association (ESA) continues to report that pre-recorded CD-ROMs of entertainment software (particularly PlayStation® games) continue to be produced in or shipped mostly from Russia and Ukraine, while pirated Game Boy® products mostly come from Asia.

Local production: Local pirate CD production is not the main problem in Romania. There is one known optical disc plant. There is no local blank CD-R production. Rather, blank CD-Rs are imported, and there has been an increase in the volume of illegal local CD-R burning of copyrighted products in Romania. 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. However, establishing a system at the borders to track the importation of blank optical media products might be a valuable effort.

High piracy levels continue across most industry sectors.

The Entertainment Software Association (ESA) 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 entertainment software for console platforms are primarily silver CDs, imported from Russia; while pirated cartridge-based videogames continue to be shipped 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 is severely damaging the ability of entertainment software companies to develop the console market in the country. Pirate entertainment software is sold in specialized shops, kiosks, Internet sellers and outdoor markets.

The largest segment of the consumer market for entertainment software is young people who prefer to buy pirated games in CD-R format. Two years ago, the internet cafés posed the biggest challenge.⁶ There are still several thousand Internet cafes in Romania, of which only about 5% have licenses from entertainment software publishers; the rest are using either illegal product or non-licensed product. Some companies have been taking enforcement actions

⁶ Eryka Lang, "PC games market, invaded by pirates," Dec. 30, 2003, available at www.expres.ro/afacerti/?news_id=141534.

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. 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

The recording industry faces the increasing problem caused by local CD-R burning of its recorded music. Another constant problem is the large amount of illegal material (CDs and cassettes), mostly from Russia and previously produced inventory from Ukraine, which continues to enter Romania due to weak border controls. 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 piracy level for international repertoire alone is higher at approximately 80%, representing trade losses for the U.S. industry of around \$18 million. The estimated overall piracy level for sound recordings (local and foreign) is 55%. 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. The recording industry reports some successes at the seizure level, but very 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 and courts for “lack of social harm,” the absence of a deterrent threat against pirates from the Central Economic Police and the lack of involvement of the anti-organized crime department mean that the music pirates in Romania, most of whom are part of organized criminal syndicates, have little fear of being punished for their illegal activities.

The Business Software Alliance (BSA) continues to report high levels of business software piracy in Romania. Hard-disk loading piracy remains a serious problem, as police refuse to take any concerted 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. Although the number of prosecuted cases and the number of convictions increased, most public prosecutors refuse to prosecute software infringement cases for lack of social harm, and the courts have never sent a person to jail for software copyright infringement. Widespread use of unlicensed software in both private and public sector remains a concern. The Romanian government should continue down the path toward implementation of effective software asset management 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.

The motion picture industry reports that optical disc piracy is increasing, with product entering Romania from the Far East and Russia via the border with Ukraine and through Bucharest airport. According to the MPAA and its local anti-piracy association ROACT, DVD piracy has increased to a level of over 75% of total disc sales, sold primarily via Internet sites and street markets. Pirate optical discs (DVDs, CD-Rs and DVD-Rs) generally are sold via the Internet or press advertisements and delivered by mail or personally, on the streets. The estimated OD piracy rate for audiovisual works in Romania is over 40%. Internet cafés, which are present all over Romania, also allow their customers to download and burn movies. The

⁷ Eryka Lang, “PC games market, invaded by pirates,” Dec. 30, 2003, available at www.expres.ro/afacerti/?news_id=141534.

local anti-piracy organization, ROACT, is gathering information to organize raids on Internet cafés and private locations. Due to ROACT's good collaboration with the Transport Police and the Bucharest police, about 16,000 DVDs were confiscated in 2003. ROACT is also increasing its focus on border areas and airports. A Romanian stewardess was caught by Customs in January delivering over 1,500 pirate DVDs from the Far East to a major dealer at Bucharest airport. The level of videocassette piracy in Romania has dropped to about 30%. Most blatant retail piracy has been eliminated. The most popular distribution methods are now Internet sites and street markets. There are over 400 regular markets in Romania and 250 other markets open at various times. Cable piracy outside Bucharest continues to be a problem, even though the level of cable piracy has fallen over the last three years and is now estimated to be 10% of that market. Many 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. MPAA estimates the combined OD/video piracy rate in Romania at 35%. Estimated annual losses to the U.S. motion picture industry due to audiovisual piracy in Romania have increased to \$8 million in 2003.

MPAA also notes that falling prices for Internet connections and DVD players have generated a proliferation of pirate Internet sites advertising pirate DVDs (from Russia and the Far East) and other pirate optical discs. As ROACT has blocked access to several well known sites offering movies and/or subtitles, the pirates are increasingly seeking hosting by foreign Internet Service Providers (ISPs). ROACT plans to initiate a collaboration program with the Ministry of Communications and Information Technology to develop law enforcement efforts aimed at e-commerce and Internet crimes. There are 40 major ISPs affiliated with the Romanian ISP Association. With only one exception, all ISPs requested by ROACT to block URLs have responded positively. ROACT enjoys good cooperation with about half of the country's ISPs.

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 2003.

COPYRIGHT ENFORCEMENT IN ROMANIA

Despite regular reminders from Romania's trading partners and the private sector, as well as ongoing training under U.S. and E.U. assistance programs, anti-piracy efforts remain a low priority for Romanian prosecutors and the courts remain extremely reluctant to impose deterrent penalties. For many years the 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. Although the police have been conducting raids, prosecutors have failed to push for deterrent sentences. ORDA needs to improve its interagency coordination skills, and its monitoring of illegal products in the marketplace; the Romanian Government should allocate more human and financial resources to support ORDA's activity and efforts in enforcing the law. Constant staff changes within ORDA, the National Police offices and Customs have contributed to an overall lack of efficiency. The Romanian Government, in December 2003, adopted a national strategy plan in the field of intellectual property, but there have been no concrete results. The copyright industries look forward for tangible progress in 2004.

Criminal enforcement in Romania is ineffective.

Poor interagency cooperation and communication: 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 Anti-Fraud Crimes Unit (the economic police), and ORDA to undertake the proper criminal enforcement activity. 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 is only a handful of police officers assigned to IPR protection. Staff changes as well as internal organizational changes within government agencies with IPR responsibilities have contributed to an overall lack of efficiency. Resource scarcity is true in all of the law enforcement organizations, including the National Anti-Fraud Crimes Unit, the financial police, the ONC (National Film Office, formerly the CNC), as well as the local police, prosecutors, and the judiciary.

The state body responsible for copyright enforcement, ORDA, has direct reporting lines to the Council of Ministers and the Ministry of Culture. ORDA needs to improve its interagency coordination skills, its willingness to work with all rightsholders' groups, its verification and enforcement of the hologram system (see discussion on holograms, below), and its monitoring of illegal products in the marketplace. ORDA also continues to face severe internal and budgetary problems, which is hurting its ability to work effectively. The current legislation considers ORDA the only authority in copyright matters in Romania, resulting in many files being rejected because ORDA investigators (of which there are 10-20 for the entire country) were not present at the raids. The recording industry reports good news in that ORDA did not actively pursue in 2003 its prior policy aimed at excluding the local recording industry association (UPFR) from joint enforcement actions with the police.

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. Unfortunately, despite such cooperation, piracy levels remain high. Another concern is that raids are not being initiated against larger companies and organizations involved in piratical activities. The business software and entertainment software industries report a positive note in that the National Institute for Crime Research and Prevention within the police has worked with both ORDA and the National Institute for Criminology in various copyright infringement actions.

In 2003, various internal orders regarding the criteria against which the effectiveness of police officers is measured did not include intellectual property actions. Including intellectual property criteria, both the quality and quantity of cases investigated, should become a criteria for evaluation so as to provide incentives for police to conduct more raids.

Few prosecutions and many dismissals: Romanian prosecutors remain far too ready to drop copyright cases. Although the number of prosecuted IPR cases increased in 2003 and some previously dismissed cases were re-opened, prosecution continues to be a major hurdle. For example, the recording industry notes that despite a great number of music piracy cases brought last year, the prosecutor in Bucharest only pursued one criminal case in 2003. There continues to be a lack of prosecutorial knowledge about copyright cases in more rural jurisdictions. The motion picture industry (ROACT) reports that 10 criminal files have been sent to the courts in 2003, compared with only 1 in 2002. Two convictions were obtained in 2003 that resulted in fines. ROACT initiated 60 criminal cases in 2003.

All industries continue to 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. RIAA reports a typical scenario: A pirate distributor in Bucharest is raided in December 2001 and 2400 pirate optical discs are seized. The estimated damage is US\$34,000 (note: in Romania this represents the equivalent of 400 minimum monthly wages). The case is filed in February 2002 and it took until June 2003 before the prosecutor in question (Bucharest, Sector 6) decided to drop the case for “lack of social harm” (apparently, 400 minimum monthly wages does not represent social harm). A complaint against this decision was rejected in October 2003, and the appeal of that decision is still pending.

At the same time, there has been a number of cases where the prosecutors refused to recognize the validity of the powers of attorney of the rightholders’ representatives, misinterpreting a Criminal Procedure Code provision. BSA also reports that the attitude of prosecutors toward 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 the prosecutor in Bucharest Sector 4 has rejected all criminal copyright infringement files. Another negative phenomenon is the lack of transparency at the public prosecutors’ offices—there are situations in which they fail to communicate their decision in the case to the rightsholders, not allowing them to file a complaint against the decision in due time.

During 2003, the prosecutor in charge of coordinating IPR issues changed four times in a single year. There has been no progress on drawing up a list of prosecutors appointed to be responsible for IPR issues (or, at least, this list has not been communicated to the copyright community). To improve this situation with weak prosecutions, the Prosecutor General’s Office together with ROACT, the Business Software Alliance and UPFR (the local music recording industry group) was developing a program to create specialized prosecutors for IPR matters. However, the industries report no progress on this initiative.

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 low number of cases forwarded by public prosecutors to Bucharest courts; the fact that few cases arise from the customs police; the great reluctance of the Economic Police to take any action beyond simple street sellers of pirated materials against the distribution networks supplying them and the very disturbing fact that, in 2001, the Head of the Police National Inspectorate issued an order prohibiting the Anti-Organized Crime Directorate from getting involved in copyright piracy enforcement. (Note: the U.S. Embassy and Commercial Law Development Program organized an IPR Enforcement conference in Bucharest on February 3, 2004, at which the head of the Police National Inspectorate was supposed to hold a presentation on the importance of combating IPR crime; this official did not attend).

Lengthy court proceedings: Criminal judgments of even minor fines against copyright infringers require a considerable exertion of effort and time in Romania. 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. This unacceptable result occurred despite the fact that the copyright industries in the last three years have begun to receive some cooperation from the police to conduct raids and seizures of infringing product, as well as the support from the public prosecutors in promoting the cases to court.

The recording industry reports an extremely disturbing result in a major case, thus showing the dismal track record of the Romanian judiciary in copyright cases. In March 2002, over 2,700 counterfeit music CDs were seized; the recording industry and the Ministry of Finance filed a request to recover damages from the defendant "Suburbia Sibiu." The first two courts in Sibiu ruled in favor of the record producers (issuing a one-year jail term, awarding US\$38,000 in damages, and requiring the destruction of the seized CDs). However, in October 2003, the Alba Iulia Court of Appeal dismissed the case on appeal. The recording industry cannot take any further action; only the Prosecutor General is entitled under the Criminal Procedure Code to file an extraordinary appeal, and he had not yet done so (as of February 2004).

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN ROMANIA: 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	198	419	
By ORDA			6
By Police			217
By Customs		0	n/a
Number of criminal files produced (compare with no. of cases actually commenced!)		307	196
Number of (new) cases commenced	60	45	24
Number of defendants convicted (including guilty pleas)	2	74 (in which the rightholders were informed)	
Acquittals and Dismissals (in 2003)		559 (including the ones from previous years still pending)	126
Number of Cases Pending	18	11	7
Total number of cases resulting in jail time	0	11	
Suspended Prison Terms		9	
Maximum 6 months		0	
Over 6 months		2	
Over 1 year		11	
Total Suspended Prison Terms		0	7
Prison Terms Served (not suspended)		0	
Maximum 6 months		0	
Over 6 months		0	
Over 1 year		0	
Total Prison Terms Served (not suspended)		34	
Number of cases resulting in criminal fines	2	34	10
Up to \$1,000		0	
\$1,000 to \$5,000		0	
Over \$5,000		Approx. US\$4,500	
Total amount of fines levied		419	

Civil *ex parte* search authority is still missing.

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. 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 Procedure Code and Criminal Procedure 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. BSA confirms that no civil *ex parte* searches were granted in Romania in either 2002 or 2003.

Stronger Border Enforcement Needed

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. Romanian Law No. 202 of 2000, as modified in 2002, 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. 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.

A National Authority for Control was created at the end of 2003 to include some of the structures of the Customs Administration. No concrete steps against piracy have yet been taken by this authority. In terms of industry cooperation, it should be noted that the recording industry recently signed a Memorandum of Understanding with the National Border Police, and some border actions were taken in the last two months of 2003.

Still Inconsistent Enforcement by ORDA of the Hologram Decrees

In 2000, two decrees were issued requiring the affixation of holograms to certain copyrighted products; the various industries have different views on the usefulness of these hologram decrees.

First, a governmental decree was issued in January 2000 to establish a registration and hologram program for the production and distribution of phonograms. It is administered by the recording industry (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. 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 17,928,781 holograms in 2003, compared to 16,925,552 in 2002. However, the hologram program still did not result in productive monitoring of the production or importation of sound recordings, despite regular calls upon ORDA to improve control of the hologram system. In fact, 2003 saw the occurrence of a new and very unwelcome phenomenon: the purchase and subsequent resale of large quantities of holograms. This totally undermines the effectiveness of the program and ORDA is not taking the action necessary to prevent this from happening. Instead, holograms were placed on illegal products, thus only making enforcement more difficult. ORDA needs to be much more thorough when it checks the background of companies for which it issues holograms. ORDA should be more cognizant of companies ordering excessive numbers of holograms. It 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. The government of Romania should 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.

Second, in August 2000, a decree (a so-called “emergency ordinance”) was enacted, bringing software and audiovisual works under a stickering program; these provisions entered into force on February 1, 2001. This initiative affecting software was dropped, and this stickering decree currently applies only to audiovisual works. However, 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. 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.⁸ The Ordinance should be revised to be consistent with the concerns of the motion picture and software (both business and entertainment) industries. The BSA remains opposed to extending the stickering regime to business software.

⁸ The hologram 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 move forward.

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

Copyright Act of 1996

Reports indicate that in 2003, the Romanian government began its process to amend its 1996 Copyright Act. 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. The 1996 copyright law needs to be amended to reflect comprehensive integration of TRIPS and the WIPO treaties' obligations into national law. Local industry colleagues inform IIPA that ORDA has prepared the amendments' package to the copyright law, which were introduced to the parliamentary Cultural Committee in 2003. This Committee has held several discussions on the draft amendments together with interested parties from private sector. After the discussions, the Cultural Committee will prepare the draft amendments for the discussions in the parliamentary Plenary. Although this copyright package is at the beginning of its legislative journey, the industries note already some negative and seriously concerning developments with the draft law.

For example, the recording industry reports that ORDA has designed two following proposals: (a) to replace the phonogram producers' exclusive broadcasting, cable retransmission and communication to the public rights with the right to remuneration, and (b) to establish in the law that phonogram producers and performers should operate through one collecting society. These proposals are unreasonable and clearly frustrate the still fragile collective management of neighboring rights in Romania and, therefore, the Romanian Government should refrain from these proposals. Furthermore, the Romanian Government should also refrain from the cable operators' initiative to introduce the following amendments to the Copyright Law: (a) to establish one collecting society for all rightsholders for collecting royalties from the cable retransmission, and (b) to exclude cable operators from the obligation to pay royalties for cable retransmission and keep this obligation only for cable TVs.

Examples of some of the problems (and the solutions needed) in the current Romanian copyright law follow:

- Although the current copyright law does correctly provide that the right of reproduction covers temporary copies, it is limited to only computer programs, so it must be amended to include all works in order to provide the necessary protections against digital piracy.
- There are no express provisions in the copyright act to actually provide for civil *ex parte* search orders (as required by TRIPS). The government of Romania refers to Civil Procedure 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.
- Adopt a more complete right of communication to the public, including a right of making available.
- Provide 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.

- Protect “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.
- Make clear that the law provides full protection for pre-existing sound recordings, as required by Article 14.6 of the TRIPS Agreement.⁹
- Delete the maximum levels of the statutory license fees for the use of rights as set in Article 133(1) of the current Copyright Law. The international rule is that the license fees are subject to negotiations between rights holders (or their collecting society) and the users.
- 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.

Turning to enforcement-related reform, the Copyright Act of 1996 did improve certain enforcement measures, including: *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 defines unauthorized satellite and cable retransmissions as copyright infringements. The Act also strengthened penalties for copyright infringement. The law provides criminal fines ranging from 200,000 Romanian ROL to 10 million ROL (US\$6 to \$307) and imprisonment of one month to five years (Articles 140-142). 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 weakened by inflation and are now too low to effectively deter piracy, particularly by criminal organizations in Romania. The criminal procedure code provides police with the proper (*ex parte*) search authority, but these searches have not been undertaken as needed.

The copyright industries have advocated that 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. Rightsholder industries accept ORDA’s authority in this field, but taking into consideration that they have only 62 people total (including the general director) and only one office in Bucharest, insist that the police retain general authority in the area of copyright infringement. Third, the act of “offering” pirate product for commercial sale should be sanctioned with criminal penalties (currently, a sale has to be completed). In recent years, the local copyright industry representatives have submitted proposed amendments to extend

⁹ For the recording industry, the most serious, historical legal deficiency—lack of protection for pre-existing materials—was corrected when Romania acceded to the Geneva Phonograms Convention (effective October 1, 1998). 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.

copyright enforcement activities to organizations other than ORDA to officially act in IPR enforcement activities. These proposals have been ignored (e.g., they were excluded from the two “emergency ordinances” — administrative decrees — passed in 2000).

Criminal Code

In early 2003, the Ministry of Justice was preparing to amend the Criminal Code in ways which might undermine existing penalties (for example, lowering jail sentences down to 2 years instead of the 5 years in current law). Reports indicate that the possibility of such deleterious amendments remains.

The Romanian criminal code 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.

The current wave of amendments to the copyright system also threatens to include the introduction of a private complaint as a pre-condition for starting enforcement action and subsequent prosecution. This would constitute a very serious negative development in a system that is already affected by a lack of law enforcement initiative, not to mention the continued poor performance of the judiciary. Finally, the recording industry also notes that Law 543/2002 a full pardon for prison sentences of up to five years (even for suspended sentences) as well as the fines pronounced by courts. This amnesty law applies to all convictions issued through April 3, 2003.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SAUDI ARABIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Saudi Arabia should remain on the Watch List and USTR should conduct an out-of-cycle review to determine if the copyright law has been implemented properly to protect all U.S. works and sound recordings in line with international standards, and to review enforcement efforts for transparency and effectiveness in reducing piracy rates.

Overview of Key Achievements/Problems: The enforcement system in Saudi Arabia is one of the least transparent in the world. Raids taken in recent years have not had a deterrent effect on piracy in the Kingdom. Right holders receive only spotty information about raids (usually in the form of aggregate statistics), are not permitted to cooperate with authorities to identify and catalog (for inventory purposes) the seized product, and have no ability to verify final disposition of seized items. Judicial results have to date never been publicized, and fines imposed are low and non-deterrent. Illegal redistribution of pay television services without authorization continues to occur in compounds. While the Ministry of Information has conducted raids against many compounds, confirming illegal redistribution and resulting in seizure of smart cards, none of the pirates has been penalized or stopped. Book piracy remains a major problem. The new Saudi copyright law strengthens penalties available in piracy cases, and may give hope for greater transparency in the administrative and judicial system. Unfortunately, it fails to meet the basic minimum standards of the TRIPS Agreement and fails to fully meet the standards set by the two WIPO “digital” treaties (the WCT and WPPT). The new law also fails to protect sound recordings (and musical works) adequately—an egregious deficiency—and while the Saudi government has indicated that U.S. sound recordings are protected, TRIPS-compatible (and preferably WPPT-compatible) implementing regulations must be issued as soon as possible to confirm that sound recordings are protected. Saudi Arabia would like to join the WTO, and the United States and Saudi Arabia signed a Trade and Investment Framework Agreement (TIFA) in July 2003. Saudi Arabia must live up to its commitments and bring its copyright system up to adequate standards—both substantive and enforcement—before it should be rewarded with favorable trade treatment and WTO accession.

Actions to be taken in 2004

- Issue implementing regulations to the new Saudi copyright law to provide for TRIPS-compatible (and WPPT-compatible) protection for sound recordings and musical works.
- Allow right holders to send experts to “cooperate” with authorities to identify pirate copyright product and verify final disposition of seized items.
- Raid more compounds engaging in unauthorized redistribution of pay television services, and report results from raids, including imposition of penalties and cessation of illegal activities.
- Continue sustained inspections and raids (including by officials of Ministries of Information and Interior) on retail establishments, storage areas, distribution hubs, and duplication sites, and move up the chain toward sources of production (i.e., importers, distributors, duplication sites).
- Improve overall transparency in the enforcement, prosecutorial, and judicial processes,

including informing right holders of judicial processes, and information or announcements regarding copyright infringement actions and outcomes for each specific case.

- Intercept pirate imports at the borders through a more robust customs enforcement program.
- Order universities to regulate procurement practices with respect to purchase of authorized copies of books (and other copyrighted materials).
- Continue to follow up on enforcement of the software usage directive.

For more details on Saudi Arabia's Special 301 history, see IIPA's "History" Appendix to this filing.¹ Please also see previous years' reports.²

SAUDI ARABIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	20.0	40%	20.0	35%	30.0	45%	40.0	65%	40.0	65%
Records & Music	16.0	40%	16.0	42%	12.0	42%	8.0	40%	12.0	45%*
Business Software ⁴	NA	NA	13.3	50%	16.4	52%	17.7	52%	31.8	64%
Entertainment Software ⁵	64.0	83%	NA	NA	115.7	83%	28.0	NA	20.2	59%
Books	14.0		14.0	NA	14.0	NA	14.0	NA	14.0	NA
TOTALS	NA		63.3		188.1		107.7		118.0	

COPYRIGHT PIRACY IN SAUDI ARABIA

Optical Disc Piracy: Notwithstanding some large-scale enforcement actions over the past couple of years, the piracy situation in Saudi Arabia remains serious. Optical discs (CDs, VCDs, DVDs, CD-ROMs, and "burned" CD-Rs) of a cornucopia of copyrighted content (videogames and entertainment software, music, movies, business software, and published materials) are available for retail sale in Saudi Arabia; music piracy is being imported from Pakistan and Indonesia. Saudi Arabia ranks last in the Gulf region in terms of piracy of console-based videogames (over 90% of console-based games are pirate, while games for personal computer are 75% pirate). Such pirate products are sold openly in retail markets and *souqs*. Console-based videogames are imported from Malaysia and transshipped through Dubai (UAE), while personal computer-based (PC) games

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁵ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

apparently are coming from Russia, Syria, and Pakistan.⁶ Cartridge-based games continue to be imported from Taiwan and China. CD-R “burning” (in which a street vendor will offer to produce pirate product on demand) is on the rise. Some large retailers are selling legitimate PC games, but most other retailers still sell pirate PC games. Ironically, games which the Saudi authorities would not permit to be sold in the market due to content concerns (i.e., they are censored) are sold openly by pirates in Saudi Arabia. It is also 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.

Pay Television Piracy: 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 2003. The Kingdom’s prohibition against cinemas makes the pay TV market particularly lucrative, and almost all of the residential compounds in Saudi Arabia illegally redistribute pay TV signals without authorization [the compounds are able to obtain a smart card from the market that is intended for a Direct-to-Home (DTH) subscription and then to use this card to provide pay TV services to hundreds of homes in the compound through their own internal cabling system]. Ministry of Information (MOI) raids in 2003 went after illegal distribution of pay TV signals in many compounds (including Lotus, Al Basateen Village, Sierra Village, Shurbatly), and the Minister has personally condemned the practice of illegally distributing pay TV signals. Unfortunately, these actions have not had a deterrent effect since none of the compounds has been penalized (except for the seizure of the smart cards) and they all continue to engage in this illegal activity.

Book Piracy: Saudi Arabia’s publishing market is deeply hindered by piracy. Pirate commercial offset prints as well as illegally photocopied books, including textbooks, English language and teaching (ELT) materials, and other materials continue to be available. There is evidence that pirate editions are being produced locally in Saudi Arabia (where there is a sizeable domestic printing industry). Some universities, especially in the Central and Eastern Provinces, have regulated purchase practices (i.e., they “buy centrally,” which means that all the adoptions within a university are collated by its purchasing department which runs an on-campus bookshop). The Western Province has seen improvement in 2003, with increased procurement near King Abdulaziz University of Jeddah. Others do not “buy centrally,” which invites pirate photocopies to take the place of legal purchases. The Saudi government should work in 2004 to regularize the procurement practices of books within all the universities so that they can be responsible academic citizens. It should also carry out enforcement actions against illegal offset printing as well as illegal photocopying to bring piracy levels down.

End-User Piracy of Software and Government Illegal Use of Software: The unlicensed use of software in a business setting (so-called “end-user” piracy) continues to be a problem in large, medium and small enterprises in Saudi Arabia. In 2003, the Ministry of Information continued implementing its License Certification Program, whereby businesses are required to demonstrate that they use only legal software as a requirement to obtain or keep their business licenses. IIPA understands that MOI was to make repeat visits to see if the 2,500 companies previously visited have actually followed through and legalized their software usage. By contrast, despite the fact that the country’s leadership has 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

⁶ Almost all PlayStation2[®] consoles on the market have been modified to allow the play of pirate entertainment software.

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.

Internet Piracy: Internet piracy, namely, download and peer-to-peer sharing of copyrighted materials over the Internet, is slowly rising in Saudi Arabia, but since the Internet is under strict control of the government, Internet piracy has not yet become a substantial problem.

COPYRIGHT ENFORCEMENT IN SAUDI ARABIA

Lack of Transparency Stifles the Saudi Enforcement System from the Raid to the Final Result

In 2003, the Ministry of Information and the Ministry of Interior continued to conduct raids on retail establishments, distributors, warehouses, and duplication labs.⁷ Such efforts have made some inroads against day-to-day piratical operations and resulted in those operations moving underground.⁸ However, most raids and investigations are initiated by right holders, rather than *ex officio* by the Ministries. In addition, raids are generally carried out on small-time retail operations (although there have been some notable exceptions), and fail to uncover or deal with the major sources of piracy in Saudi Arabia.

Unfortunately, the raids run in recent years, even against larger warehouses, have accomplished little due to the absence of deterrent penalties and the lack of transparency in the Saudi enforcement system. The Saudi government needs to ensure the application of deterrent penalties and to urgently implement some reforms to address the difficulties arising due to lack of transparency, including the following:

- Inform right holders of all enforcement activities being carried out or planned.
- Permit right holders to send experts to cooperate with authorities to identify, inspect, inventory, catalog, and analyze pirate copyright product that has been seized in a raid/action.
- Provide specific, on-time raid reports and investigation reports to right holders, including data on seized materials (case-by-case reporting rather than aggregate).
- Order destruction of pirated goods, and permit experts or right holder representatives to witness destruction or final disposition of goods seized.
- Impose deterrent sentences on pirates under the new law's stricter penalty provisions, and provide specific reports on status of cases against individuals or companies, including results of cases, jail sentences, fines imposed, and compensatory damages awarded.
- Publicize results of raids, and subsequent prosecutions/cases.

⁷ For example, authorities seized close to 1.2 million pirate units in January 2003 from three warehouses. Unfortunately, due to lack of post-raid transparency, we are unaware of the final disposition of the product; meanwhile, the industry reports that product availability of pirate PlayStation® and PlayStation2® did not abate after the raids.

⁸ For example, the recording industry reports that 311 raids were carried out in 2003, yielding seizures of over 200,000 pirate cassettes, over 37,500 pirate music CDs, and over 18,000 pirate "burned" CD-Rs. The motion picture industry group carried out 205 audiovisual raids in 2003, resulting in the seizure of 161,504 pirate videocassettes, 9,420 pirate VCDs, and 38,664 pirate DVDs.

The Government Must Continue Raiding with Focus on Larger Targets and Sources of Piracy

In addition to the above reforms to provide greater transparency in the enforcement system, the Saudi government should continue with the successful raiding carried out, especially in 2002, including by: raiding more compounds engaging in unauthorized redistribution of pay television services; reporting results from raids, including imposition of penalties and cessation of illegal activities; and continuing sustained inspections and raids (including by officials of Ministries of Information and Interior) on retail establishments, storage areas, distribution hubs, and duplication sites, and moving up the chain toward sources of production (i.e., importers, distributors, duplication sites).

Much of the pirate material is coming in at the borders, and the Saudi authorities must make greater strides in 2004 in intercepting pirate imports through a more robust customs enforcement program. The entertainment software industry reports that many of the pirated factory-produced PC games (so-called silver discs) are shipped from Russia, and through Pakistan and Syria.

Regarding book piracy, the Saudi government could make the greatest strides in 2004 by ordering universities to regulate procurement practices to ensure purchases of authorized copies of books (and could address piracy of other copyrighted materials on university campuses as well), following up where necessary to ensure that those universities comply with the law.

The “Breach Committee” and “Board of Grievances” Must be More Transparent and Mete Out More Severe Penalties for Piracy

A major shortcoming in the Saudi enforcement system has been the secretive way in which copyright cases are handled and kept close after a raid is conducted. The Ministry of Information has closely guarded any data on administrative penalties it issues and rarely announces the amounts of fines and penalties applied for copyright law violations in specific cases. The new copyright law, discussed below, establishes a “Breach Review Committee” (BRC) under the Ministry of Information, “staffed by up to three members, two of whom must be a legal advisor and Sharia advisor” (Article 25(1)), and deems that serious crimes shall be referred to a “Board of Grievances” (BG) which shall also apparently have appellate jurisdiction over the decisions of the BRC. The BRC has substantial authority to determine infringement, mete out warnings, criminal penalties, suspensions of business licenses, fines of up to SR100,000 (US\$26,665), etc. Only cases in which the BRC recommends that the offender be punished by a jail sentence or a fine exceeding SR 100,000 or revoke a business license must be referred to the BG by the Minister of Information. IIPA has enormous hopes for this BRC and the BG, and would consider it a major achievement if the BRC and BG reporting mechanisms regarding ongoing proceedings and results in specific cases were to be regularized and made transparent. In appropriate cases, copyright owner representatives stand ready to assist the BRC in the development of cases (through forensic and other analysis of evidence), and greater transparency will permit right holders to be compensated, as the new law provides, for damage they have suffered as a result of infringements. It is also crucial that the BRC use its authority under the new copyright law to mete out substantial penalties and damage awards in order to deter further infringements and compensate right holders for losses due to piracy.

COPYRIGHT LAW AND RELATED ISSUES IN SAUDI ARABIA

The New Copyright Law Is TRIPS-Incompatible and Fails to Protect Sound Recordings and Musical Works

The new Saudi Arabia Copyright Law was reportedly published in the official gazette on September 19, 2003 and goes into effect on March 19, 2004. The law was approved by the Shoura Council and was signed by the King in February 2003. The law represents a step backward, particularly with respect to sound recordings, notwithstanding some improvements on the 1990 law (many of which were intended to bring the law closer to compliance with the TRIPS Agreement).

That said, the following improvements have resulted from passage of the law:

- **Increase in Criminal Penalties:** Maximum criminal penalties are increased. Fines are up to SR250,000 (US \$66,670) and prison terms are up to six months, which can be doubled for recidivists.
- **Enumerated Exclusive Rights:** The law contains a more complete list of the exclusive rights of copyright owners at least as to works (including TRIPS-compatible rights like a rental right (Art. 9(1)(4)).
- **Catch-All Infringement Provision:** Infringing activities (Art. 21) are set forth with more specificity than in the 1990 law (including a “catch-all” in Article 21(11)).
- **Greater Enforcement Authority Expressed:** Certain enforcement provisions appear to grant greater authority to the Saudi government to enforce against businesses/premises engaged in piracy, e.g., they allow temporary closure of an establishment or suspension of a business’ “privilege to participate in functions, occasions, exhibitions” (Articles 22(1)(3) and 22(6)).

Nonetheless, several TRIPS deficiencies remain, including, among other structural problems, the following:

- **Protection of Sound Recordings and Musical Works:** It is unclear whether and how sound recordings and musical compositions are protected under the Saudi law (i.e., without passage of implementing regulations).
- **Retroactivity:** IIPA takes the position that the 1990 law and Saudi’s adherence to the UCC in 1994 did not afford retroactive protection by law. Thus, Article 20 of the new law is TRIPS-incompatible because it does not by its terms provide a full term of life plus 50 years or 50 years of protection retroactively for existing works/sound recordings as required by TRIPS.
- **Non-Deterrent Remedies/Penalties:** While the maximum penalties were increased, the minimum penalty under the new law can be a mere warning—which is totally non-deterrent (TRIPS Article 61); not even a minimum fine is mandated.
- **No *Ex Parte* Civil Searches:** There is no express provision for *ex parte* civil search orders (TRIPS Article 50).
- **Seizure Provisions (Goods, Tools and Implements) TRIPS-Incompatible:** The provisions on seizure of infringing goods were weakened compared with the previous law, and fail to meet the TRIPS standard (TRIPS Articles 46 and 61).

- **No Costs or Attorneys Fees:** There is no express provision for the award of costs or attorney fees in civil cases (TRIPS Article 45).
- **No Border Enforcement in Copyright Law:** There are also no provisions regarding border enforcement, namely, the ability of authorities to suspend the release of suspected infringing goods into the channels of commerce, and to order the destruction or disposal of infringing goods (TRIPS Articles 51, 59); the Saudi government should provide other statutes that may address this deficiency.

In addition, it is highly unfortunate that the government of Saudi Arabia has failed to take the opportunity, within the context of this law revision, to enact standards of protection needed to provide healthy electronic commerce in Saudi Arabia, and to provide proper levels of protection for copyrighted materials in the digital environment. In particular, the law fails to fully meet the standards set by the two WIPO “digital” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). While the law adds certain provisions which appear intended to take into account the WCT and WPPT, other provisions are either left out or appear to be incomplete. For example:

- **Communication to the Public Right:** The communication to the public right has been expanded to include digital communications (“information service”) but does not expressly include the right of “making available” which is key to encompass the “upload” of a work to the Internet, for example (and coverage of sound recordings remains unclear).
- **Protection of Temporary Reproductions:** The law also fails to confirm that the reproduction right includes coverage of temporary reproductions, and to provide an express distribution right.
- **Prohibition Against Circumvention of Technological Protection Measures:** The provisions prohibiting the circumvention of technological protection measures appear fairly broad, although unlawful circumvention is deemed to be an “infringement of the rights protected by this Law” instead of as a separate violation, which raises the concern over whether copyright exceptions are applicable to the offense of circumventing a TPM (exceptions that would eviscerate the rule).

Notwithstanding that there is some more work to be done to fully implement the WCT and WPPT, Saudi Arabia should take the important next step of joining these treaties which are the latest international standards for copyright protection.

Most disappointing is the Saudi law’s failure to deal adequately with protection for sound recordings. We understand that the Saudis were reluctant to acknowledge protection of “musical works” for religious reasons, and this is why the term “musical work” has never appeared in the Saudi law. The term “audio work” was added in the 2003 law, and a broad reading might suggest that sounds recordings are protected as works, as “audio works” and/or as “works ... prepared for broadcast.” Moreover, the 1990 law and the 2003 law are both ambiguous as to point of attachment for sound recordings. The Saudi government may indicate that protection of foreign sound recordings as works continues due to Saudi Arabia’s continued adherence to the UCC, which it joined in 1994.⁹ It must be confirmed that U.S. sound recordings remain protected in Saudi Arabia

⁹ It was not until July 1, 1994 (when Saudi Arabia acceded to the Universal Copyright Convention (UCC)) that foreign works, including U.S. works, were first protected in Saudi Arabia. The U.S. and the IIPA had been pressing Saudi Arabia

under the new law as works and that the producer (the natural or legal person who takes the initiative to make the original audio work and bears the cost and responsibility for it) is deemed the owner of the economic rights.

United States and Saudi Arabia Sign Trade Investment Framework Agreement

On July 31, 2003, the United States and Saudi Arabia signed a Trade Investment and Framework Agreement (TIFA). This TIFA sets the stage for continual talks and contact on various economic issues, including intellectual property rights. Recital 13 indicates that Saudi Arabia recognizes “the importance of providing adequate and effective protection and enforcement of intellectual property rights and the importance of adherence to international intellectual property rights standards.” Article 4 permits the parties to discuss what further “agreements relating to . . . intellectual property rights . . . would be desirable.” Finally, Article 5 contains a consultation mechanism by which intellectual property issues can be raised by the United States. We would encourage the United States to continue to engage Saudi Arabia to address the problems and issues addressed in this report through the use of the TIFA mechanism.

Saudi Arabia Joins the Berne Convention

On December 11, 2003, the government of Saudi Arabia deposited its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works, 1971 (Paris) text (the Berne Convention will become effective in Saudi Arabia on March 11, 2004). IIPA understands that the Saudi government attempted, in its Instrument of Accession, to add a reservation for “works that are contrary to Islamic law.” However, WIPO’s “Notification of Accession” does not include the reservation, as WIPO has made an official determination that such a reservation is not permissible under the Convention. We understand that WIPO has informed the Saudi Permanent Mission of this. We would point out that a reservation of this sort is impermissible under the Berne Convention, since nothing in the Berne Convention allows the complete nonrecognition of rights or would permit Saudi Arabia to deny protection for entire classes of works that must be protected under Berne. Such a denial of protection would also be TRIPS-incompatible. IIPA hopes to be able to confirm soon that Saudi Arabia protects all works and subject matter in accordance with the Berne Convention and in a TRIPS-compatible way.

to amend its law and join the Berne Convention, but because it did not wish to make the required amendments, Saudi Arabia chose the UCC as the point of attachment for the protection of foreign works. The Saudi government has also stated unequivocally that its law extends protection to sound recordings as “works” under the UCC. To clarify any ambiguity, Saudi should join the Geneva Phonograms Convention; if it then joins the WTO, that agreement itself expressly requires protection for sound recordings from UCC member countries as well, retroactive for a full TRIPS-compatible term of protection.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPAIN

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Spain be added to the Watch List in 2004.

Overview of key problems/achievements in Spain: The copyright industries express their grave concerns about the problems affecting the music, film and entertainment software sectors in Spain. Factory-produced pirate music CD products dominate the street market. Pirated entertainment software remains readily available on the street, as do pirate movie DVDs. The piracy level for sound recording in Spain is 25%, the highest among developed countries. Spain has had at least two online music services which are distributing music without authorization from the record companies. Many top videogame titles are being downloaded from the Internet before they are localized for launch in the domestic market.

While the Internet is used for hard goods distribution (as it gives pirates an additional layer of protection, because judges have to authorize special warrants to allow police to search their homes), Internet downloading is a rapidly growing concern, especially via P2P (peer-to-peer) systems and IRC (Internet relay chat) channels. To make matters worse, organized crime syndicates are becoming active in the production and distribution of pirated materials, especially recorded music.

There have been some reports of progress in the overall anti-piracy fight. The copyright industries continue to promote copyright protection. For example, in September 2003, the recording industry teamed up with the Spanish authors' society in an anti-piracy campaign. The local motion picture industry continues to maintain good contact with police on operational matters. The business software industry also has seen several positive developments in 2003, including an improved commitment to fight software piracy on the part of the national police. The Guardia Civil has been equally supportive. Despite this improved commitment by law enforcement and legislative improvements, problems remain with the judiciary. While improving, and much more expedient in 2003, delays in rulings on civil search applications are still encountered; in fact, the business software industry also has seen unreasonably high bond/security requests for civil search applications. The Anti-Piracy Roundtable, a cross-industry platform, was created at the end of 2001 to raise public awareness and lobby the government regarding the seriousness of intellectual property crime. On the legislative front, the Spanish criminal code and criminal procedure code were amended in 2003. The creation of new specialized courts for IP matters and amendments to the criminal codes — strengthening the penalties for copyright infringement and offering more effective enforcement procedures — demonstrate the Spanish government's efforts to fight piracy.

Actions to be taken by the Spain government in 2004

Enforcement

- Announce a nationwide anti-piracy campaign focusing on all types of piracy, including Internet piracy;
- Implement the mandates issued by the Spanish Senate included in the report of the sub-commission on piracy. These mandates ask the government to strengthen the fight against piracy by increasing penalties for copyright infringement, ensuring procedural legislation facilitates prosecution for copyright infringement and eases the burden for rightsholders in copyright cases, increasing law enforcement resources for copyright cases and developing a law enforcement strategy for fighting piracy, enacting legislation which complies with EU copyright legislation, and formulating public awareness measures on the seriousness of piracy.
- Increase raids, prosecutions, and, in particular, the imposition of deterrent penalties.
- Institute judicial reform to speed up criminal and civil proceedings.
- Encourage the Spanish government to (1) eliminate bond requests or ensure that unreasonable security requests are not made by amending the intellectual property law or civil procedure law to introduce appropriate limitations on bonds; (2) provide necessary training in IP matters for judges; (3) increase resources for law enforcement in order that they may pursue copyright crime effectively.
- Encourage the Spanish government, as part of a government software asset management initiative, to require the legal use of business applications software as a condition for private companies having access to public funds.

Legal Reform

- Move promptly to implement the EU Copyright Directive and to do so in a manner that fully and faithfully reflects that directive. The deadline for implementation was December 22, 2002; no advances in the Spanish legislature are expected until the second semester of 2004.
- Revise the Spanish legislation implementing the EU E-commerce Directive because it creates a limitation on liability for Internet service providers (ISPs) which goes beyond that permitted by the directive.

SPAIN
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	10%	25.0	7%	25.0	5%	25.0	5%	25.0	7%
Records & Music	60.0	25%	63.0	25%	N/A	21%	N/A	N/A	N/A	N/A
Business Software Applications ²	N/A	N/A	79.4	47%	85.0	49%	121.4	51%	69.0	37%
Entertainment Software	N/A	N/A	N/A	34%	N/A	N/A	N/A	N/A	115.7	68%
Books	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	21.0	N/A
TOTALS	N/A		167.4+		110.0+		146.4 +		230.7+	

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Internet piracy is growing, and growing fast

Online piracy in Spain is increasing. The Internet is still used for hard goods distribution, since it gives pirates an additional layer of protection because judges have to authorize special warrants to allow police to search their homes. Moreover, Internet downloading is a rapidly growing concern, especially via peer-to-peer systems and Internet Relay Chat (IRC) channels. The copyright industries cooperate with the National Police and Civil Guard's special departments for investigating Internet crime.

In 2003, a new Madrid-based pay-music download service called "Puretunes" launched its new service. According to press reports, Puretunes claims to have found a loophole in the Spanish copyright law which permits it to charge for music without getting authorization/permission from the recording companies. The service is now not operational. Another Spanish online service called WebListen.com is currently the subject of litigation brought by the recording industry, and so far, has had several verdicts issued against it. As regards the criminal proceedings against Weblisten, the trial is still pending. Weblisten's manager is charged with copyright violation under Article 271 of the Spanish Criminal Code (this article refers to the more serious infringements). The charges have been also filed by the Public Prosecutor.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in Spain, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Spain (including U.S. publishers) and (b) losses to local distributors and retailers in Spain.

Internet rightsholders contemplating legal action against Internet pirates in Spain face difficulties in identifying infringers due to restrictions imposed by Spanish data protection laws. Rightsholders cannot generally obtain from ISPs, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Such information may, however, be obtained via a criminal prosecution.

Optical disc piracy is on the rise in Spain

CD-R and DVD-R burning and other forms of digital piracy are on the rise in Spain. The motion picture industry reports that digital piracy is affecting its industry as CD-Rs and DVD-Rs contain movie titles in the DivX format, a decompression technology that facilitates the downloading of a movie from the Internet.

Currently, industry reports that there are 14 OD plants in Spain that contain machinery to replicate optical discs. In total, these plants represent approximately 100 lines, with an estimated maximum annual capacity of over 600 million discs (including both CD and DVD systems). All but three of these plants have SID (source identification) codes; two of these are devoted to the manufacturing of blank discs and the third was raided in 2002 because of piracy.

Spain has high levels of copyright piracy for all industries

Many of the copyright-based industries report relatively high levels of piracy in Spain — high levels especially for a European country.

Annual losses due to widespread piracy of sound recordings in Spain were estimated at \$60 million, with a 25% piracy rate in 2003. The situation for the recording industry in Spain has continued to deteriorate, and pirate recordings are sold in the most open and notorious manner. Some 20 million pirate units were sold in 2003, more than any other country in Europe. This grave situation has been widely reported in the national media, and the pirates grow bolder and more organized each day. Given the government's relative indifference to the problem, organized criminal syndicates are rapidly taking over the market. According to the local sound recording association, here is a summary of the major piracy concerns in several cities. In Madrid, the usual piracy level is about 40%; during the December 2003 holiday season, the police became very active and the piracy level in the city dropped to 20-25%. Police cooperation with industry is excellent in Barcelona, yet the music piracy level approaches 20% of the market. In Sevilla, networks (often gypsies) are organized to distribute pirate product. Valencia is the city which experienced the sharpest decrease of piracy during the last quarter of 2003. The piracy of sound recordings in Granada is supported by a large university population. In the cities of Alicante, Murcia, and Zaragoza, the piracy levels are less stable, in the range of 15-20% of the market, with higher levels in the summer.

The Motion Picture Association of America (MPAA) reports that the number of street vendors selling pirate optical disc products (music, software, interactive games and movies) in major Spanish cities grew significantly in 2003. These street vendors are called "blanket men" (*manteros*) locally, referring to the blankets that they use to exhibit pirate products and to remove them quickly whenever the police show up. Generally speaking, the blanket men are illegal immigrants, which can create additional judicial hurdles. FAP, the local anti-piracy organization, estimates that there are approximately 5,000 blanket men in Spain, mainly located in the cities of Madrid, Granada, Sevilla and Alicante (and to a lesser extent in Barcelona and Valencia). FAP estimates that around 30% of the blanket men are selling illegal audiovisual products and that, on average, 40% of their stock comprises illegal movies recorded on CD-Rs

or DVD-Rs. In contrast, smart card piracy seems to have been effectively eradicated and the cable piracy situation has improved markedly. Annual trade losses due to audiovisual piracy in Spain are estimated at \$30 million for 2003.

The entertainment software industry is also experiencing difficulties in Spain, though there has been relative improvement in some areas. While there has been an increase in the level of cooperation with Spanish authorities, piracy of entertainment software remains a problem. Domestic CD-R piracy continues, but it is now primarily at flea markets and not through legitimate retail outlets. A member-company of the Entertainment Software Association (ESA) reports that in 2003, Spanish law enforcement authorities conducted approximately 35 raids (in several major cities and the Canary Islands), resulting in the seizure of over 140,000 pirate and counterfeit cartridge-based entertainment software products. The company's efforts revealed that the pirated products were being imported from Hong Kong and Thailand, transshipped through Germany and later transported to Spain. The company is also working with Europol, and Spanish and German customs authorities, to investigate and halt the importation of pirate and counterfeit cartridge-based products. There have also been a significant number of raids which have resulted in the seizure of pirate discs. A substantial number of legal actions were also initiated by ESA members, and while only a few actually wound their way through the courts, the few that did resulted in decisions favorable to the rightsholder. Internet piracy remains a growing concern. As noted last year, many top videogame titles are being made available for download from the Internet before they are localized for launch in the domestic market. Piracy at Internet cafés is also on the rise.

The Business Software Alliance (BSA) reports that end-user piracy in small and medium-sized businesses is the main source of economic harm for software companies. The good news is that Spain has reduced its piracy rate by 16 points between 1996 and 2002. In turn, this helped the Spanish software industry grow by 15.9% and generate \$13 billion in sales.³ Despite these positive developments, Spain continues to have one of the highest piracy rates in the EU for business software. Further reduction of piracy will require continued strong enforcement. For example, BSA would encourage the government to require that all private sector entities seeking recourse to public funds be required to demonstrate that their use of software is compliant with all applicable laws and licenses. To this end, BSA cooperated with AENOR (a local certification and normalization body) in 2001 to create a Certification on Legal Use and Management of Software, available to companies that wish to certify legal use of software and implementation of proper internal policies to ensure legal use. Private sector entities seeking to demonstrate legal use of software could do so via this certification process. Demonstration of legal software use could be done via this certificate, and its promotion by the Spanish Government would be a significant step in piracy reduction.

COPYRIGHT ENFORCEMENT IN SPAIN

The Spanish government has undertaken several initiatives aimed at improving enforcement. In 2000, the Spanish government set up an inter-ministerial commission to coordinate its actions. The commission initially worked well, but has since become far less effective. The Anti-Piracy Roundtable (*Mesa Anti-Pirateria*), a cross-industry platform created at the end of 2001 to raise public awareness and lobby the government regarding the seriousness of intellectual property crime.

³ See Business Software Alliance, "Eighth Annual Global Software Piracy Study" (research compiled by International Planning and Research Corporation, published June 2003), available at <http://global.bsa.org/globalstudy/>.

In early 2003, Parliament established a sub-committee, with the representatives of the intellectual property sector, to examine and develop effective solutions to fight piracy. The sub-committee issued its conclusions in early November. The sub-committee called for stronger criminal penalties, for increased *ex officio* police actions against the *manteros*, for increased police coordination and for the inclusion of IP violations in the list of cases that qualify for "Fast Hearings." The conclusions are expected to be approved by the Parliamentary Culture Commission and will then be forwarded to the government for implementation.

Good cooperation with police authorities: There has been a specialized unit within the Guardia Civil and National Police that also deals with technological crimes and organized crime, but this is not new or created by the anti-piracy roundtable.

The motion picture industry generally enjoys excellent cooperation with the government and with the enforcement authorities. FAP is using its high-profile membership in the government's inter-ministerial Anti-Piracy Commission to further the cause of improved intellectual property protection and enforcement in Spain. FAP estimates that the number of pirate optical discs containing movies sold by street vendors exceeded 9 million in 2003. Organized criminal gangs are manufacturing the pirate CD-Rs and DVD-Rs and distributing them to the street vendors. Since September 2003, FAP has noticed that groups of *manteros* have begun to arrange their own duplication to reduce their reliance on the organized gangs. When police activity on the streets increases, the *manteros* seek customers in bars and restaurants rather than waiting for them on the streets or in flea markets.

MPA reports that since September 2002, when FAP refocused its resources against street vendor piracy at the request of its members, FAP and the police have conducted over 400 raids, resulting in the arrest of more than 425 individuals. In addition, FAP and the police have successfully dismantled some of the main networks supplying the *manteros* in over 50 operations in the cities of Madrid, Sevilla, Barcelona, Grenada, Malaga, Huelva and Lerida. Overall, these networks had the cumulative capacity to produce over 50 million pirate copies a year. These particular operations led to the arrest of 119 individuals and to the seizure of 1,726 DVD-R and CD-R burners, 21,537 CD-Rs with movies, 21,907 DVD-Rs, 290,506 music CD-Rs, 14,907 interactive games, more than 825,000 blank CD-Rs and DVD-Rs, 268,107 inlays and over €63,000 in cash (US\$80,024). FAP estimates that the market value of these seizures amounted to approximately €9 million (US\$11,431,776). Despite these excellent results, the number of so-called *manteros* on the streets has not significantly decreased. FAP believes that this is due to insufficient governmental priority, prosecutorial delays that enable the *manteros* to disappear and avoid judgment, and a lack of deterrent sentencing.

During 2003, the sound recording industry (including the local industry association, AFYVE) maintained great cooperation with all the police and customs bodies, supporting in investigations, prosecutions and training. To this end, training is going to be once again reinforced in 2004 to improve the police awareness of the piracy problem and get better expertise with it. This effort by the music industry is going to be especially relevant in the case of the local police, dependent on the city council, considered to be the ones who can exercise more control over the sale in the streets. For example, local police have seized in 2003 1.6 million pirate discs, almost 40% of the total. In addition, AFYVE, the Spanish National Group of IFPI, and SGAE, the Spanish authors' society, teamed up in September 2003 to tackle piracy.

The sound recording industry has focused its main operations in Spain against pirate networks run by China and North Africa criminals. The average action of this kind usually results in seizures of tens of burners and thousands of music CD-Rs. For example, the Policía

Nacional broke a Chinese network in Madrid, conducted 13 searches, arrested 40 Chinese nationals and seized 346 CD burners in raids in January 2003. The Policía Nacional in June 2003 raided a large distributor in Barcelona, seizing over 1,000 CD burners and 1,212 units of ripping software, all worth an estimated €500,000 (about US\$635,099). In February –March 2003, two customs-led operations in Barcelona resulted in the seizure of approximately 200,000 discs (60% pressed discs, 40% blank discs with Morocco as destination).

BSA has enjoyed excellent cooperation over the past few years with the Cuerpo Nacional de Policía and with the Guardia Civil. Cooperation with the respective computer crime units in both of these entities is especially strong. National police have undertaken raids against illegal resellers, assisting BSA in ridding the channel of illegal software. As part of this cooperation, in late 2002/early 2003, police raided 18 resellers in a three month period. Further channel actions are planned in 2004. Police assistance also enabled BSA to take action against a large Spanish end-user (a printing and copying company); the action involved simultaneous raids on 11 of the company's sites in five different cities across Spain.

Prosecutions and criminal sentences: The Spanish judicial system remains slow, with many judges still not regarding piracy as a serious offense.

The MPA reports that FAP's strategy to join criminal cases as private prosecutor is yielding good results, as court decisions are generally positive. However, the Courts generally apply the lowest penalties (6 to 12 month fines at a rate of €6 per day, whereas the Law provides for sentences ranging from six-month fines to a four-year jail term). This minimizes the deterrent effect of the positive decisions. More work needs to be done to improve judicial awareness of the dangers of copyright piracy and the benefits of deterrent sentences. Although street vendor piracy is generally considered by the Spanish judicial community to be a social problem rather than a criminal one, the first decision was handed down against a *mantero* in April 2003. This represents a positive sign that the courts have started to appreciate the increased piracy problems created by the *manteros*. The defendant was sentenced to a six-month fine (3 Euro per day) and ordered to pay damages of €40,000 (US\$50,811). The general problem posed by the prosecution of illegal immigrants is that they cannot be automatically expelled, and they can take advantage of procedural delays to disappear, resulting in many legal procedures being filed with no decision (since no decision can be made if the defendant cannot be located). Nonetheless, efforts to promote awareness of piracy have had a positive effect, with judges imposing more deterrent sentences, including imprisonment. The conviction rate is higher than 90% and at least 15% of offenders receive more than a one-year jail sentences.

The recording industry reports that the number of criminal prosecutions against *manteros* who distribute illegal pirate music CD-Rs has sharply increased during 2003 with a high rate of convictions (low fines, in most cases).

Although nearly all BSA actions against end-user business pirates have been civil cases, BSA has experienced some success in criminal cases. As result of the major action against the printing and copying company described above, the relevant Court of Appeal confirmed that it is not necessary to have a search warrant to conduct raids on establishments open to the public. This decision will help to facilitate future criminal cases. In a separate criminal action involving a training center (initiated in 1997), the defendant pled guilty in 2003. The court imposed a fine of 4869 euros and awarded damages of €27,000 (US\$34,297). (The low level of fines was negotiated by defendants and the public prosecutor as part of the plea agreement).

Judicial reform in criminal and civil cases: Judicial reform to speed up criminal and civil proceedings is needed. It is hoped that the creation of specialized commercial courts with jurisdiction over IP matters will expedite civil copyright cases considerably. The new courts are expected to commence hearing cases in September 2004; thus it is likely that the benefits from these courts in this regard are not likely to be seen until 2005. With respect to criminal cases, amendments have been introduced concerning criminal court procedure which are also hoped to reduce delays in criminal cases.

SPAIN – CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003
(as of January 1, 2004)

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE (End User)	BUSINESS SOFTWARE (Retail)	SOUND RECORDINGS
Number of investigations initiated	922	0	145	N/A
Number of raids conducted	804	0	32	9,548
Number of pirate product seized (not optical media)	6,939	0	0	82,804
Number of DVDs seized	49,633	0	0	294,608
Number of CD-Rs or CD-ROMs seized	1,241,643	0	1904	3,956,851
Other equipment seized	2,674	0	50 Floppy disks, 509 PCs	2,607 (burners)
Number of cases commenced	272	0	34	108
Number of indictments		0	33	
Number of defendants convicted (including guilty pleas)	68	0	0	61
Number of acquittals/dismissals	10	None	None	12
Number of cases pending	1,128	3	5	N/A
Total number of cases resulting in jail time		0	1	24
Suspended prison terms				
Maximum 6 months				14
Over 6 months				3
Over 1 year				7
Total suspended prison terms				24
Prison terms served (not suspended)		None	None	
Maximum 6 months				0
Over 6 months				0
Over 1 year				0
Total prison terms served (not suspended)		None	None	0
Number of cases resulting in criminal fines			2	37
Up to \$1,000				34
\$1,000 to \$5,000				2
Over \$5,000		0	\$ 15,375.58	1
Total amount of fines levied (in US\$)		0	\$ 15,375.58	N/A

Civil copyright cases: Delays in civil cases have been reduced significantly. Spanish Courts now only take days to rule on civil search applications, and it is hoped that the creation of the specialized IP courts above mentioned will further expedite rulings on civil searches. BSA has seen more efficient rulings on civil search applications in 2003. On average, BSA-initiated civil search applications were pending 15 days. BSA is, however, significantly concerned by recent, unreasonably high security deposits required by courts as a precondition for granting a civil search application, especially in Madrid's civil courts. In one case, a security was ordered by a Madrid court in the amount of €150,000 (US\$190,534). Other Madrid courts have also requested unreasonably high bonds as a condition to executing civil searches, thus rendering Madrid an increasingly difficult jurisdiction in which to undertake civil end-user cases. Unreasonably high security deposits are a significant impediment to effective copyright enforcement.

COPYRIGHT ENFORCEMENT STATISTICS IN SPAIN: CIVIL CASES

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2003	
ACTIONS	BSA
Number of civil raids conducted	9
Amount of pirated product seized in the above raids (copies)	653.020,81 € (US\$ 825.483,61)
Post Search Actions	
Cases Pending	1
Cases Dropped	1
Cases Settled or Adjudicated	6
Value of loss as determined by Right holder (\$USD)	653.020,81 € (US\$ 825.483,61)
Settlement/Judgment Amount (\$USD)	Damages: 354,937 € (US\$447,613)

COPYRIGHT LAW AND CRIMINAL LAW REFORM

The Spanish Parliament recently approved reforms to the Criminal Code and to the Criminal Procedure Law. More work is needed to properly implement various EU directives affecting copyright.

Criminal Code: Amendments to Criminal Code (Organic Act 15 of 25th November 2003) will enter into force in October 2004. These amendments include provisions for: (i) increased penalties for IP infringements; (ii) community service penalties as an alternative to lower prison penalties, which will help to increase public awareness and consciousness on piracy; (iii) police commencement of actions against IP infringers without the rightsholders' filing a complaint (*ex officio* action); and (iv) direct liability of companies through which IP crimes have been committed for the payment of fines imposed on the managers of the companies, in order to guarantee payment of such fines. More specifically, it will be considered a criminal offense to manufacture, import or hold any instrumentalities specifically intended to allow the unauthorized removal or circumvention of any technical device used to protect works/other subject matter. The amendments increase the minimum penalties ("from 6 months imprisonment or a fine of 6 months" to "6 months imprisonment and a fine of 12 months"),

increase penalties for the circumvention of technological protection devices (“from 6 months to 2 years imprisonment or a fine from 6 to 24 months” to “from 6 months to 2 years imprisonment and a fine of 24 months”), and increase the penalties for aggravating circumstances (e.g., to belong to a criminal organization or to employ minors in illegal activities).

Criminal Procedure Law: Reform of the Criminal Procedure Law has resulted in including flagrant intellectual property violations in the list of cases that qualify for “fast hearings.” Police forces are now able to conduct preliminary investigations without the need of judicial warrant or rightsholder’s filing of complaint. The amendments also include the expulsion of immigrants who do not have legal documents. These amendments to the Criminal Procedure Law entered into force in December 2003.

Civil procedures: The 2000 amendments to the Civil Procedure Act have significantly reduced delays in civil matters. Also, the creation of dedicated IP courts (these Commercial Courts are expected to begin operation in September 2004) is expected to further increase effectiveness and efficiency in civil cases.

Legal reform needed for the digital age: Spain also has incorrectly implemented the EU E-Commerce Directive⁴ in its June 2003 law, *Ley de Servicios de las Sociedad de la Información y de Comercio Electronico*. Spanish law creates a limitation of liability for Internet Service Providers (ISPs) in that it fails to correctively implement the constructive knowledge standard and imputes liability only on the basis of “effective knowledge.” For years, rightsholders have been working with Spanish officials to seek improvements to this legislation.

Spain has failed to implement the EU Copyright Directive by the December 22, 2002 deadline,⁵ and therefore has yet to fulfill its implementation of the two WIPO Internet treaties. The draft Spanish implementation legislation, proposed originally in November 2002 and revised in January 2003, continues to contain deficiencies and requires amendments/clarifications in several areas. The Parliament is not expected to pass any legislation to implement this directive until after the March 2004 parliamentary elections (and the draft could change, depending on the outcome of the elections). A more realistic date for legislative passage might be October 2004.

⁴ The EC Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (the “EU E-Commerce Directive”) came into force on June 8, 2000, and was to have been implemented by Member States by January 17, 2002.

⁵ The EC Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (the “EU Copyright Directive”) came into force on June 22, 2001, and was to have been implemented by Member States by December 22, 2002.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

TURKEY

EXECUTIVE SUMMARY

Special 301 Recommendation: We recommend that Turkey remain on the Watch List.

Overview of Key Problems: Turkey is one of the world's worst markets for book piracy. In addition, optical disc pirate production, mainly of "burned" CD-Rs, increased in 2003, with little reaction by enforcement authorities. The sale of pirate discs, including CD-Rs by street vendors (directly supplied by local networks operating in complete secrecy) also continued to proliferate. There were some raids and seizures of pirate materials in 2003, but fines are non-deterrent and the courts pose numerous hurdles for right holders, who also suffer from long delays in adjudication. In September 2003, the Ministry of Culture and Tourism (MOCT) agreed to address the issue of street sales of pirated materials by legislating to ban all street vending of copyrighted materials. Unfortunately, this Bill also would significantly lower criminal penalties achieved in the 2001 amendments to the copyright law. The Bill has reportedly been sent to the Turkish Council of Ministers. The government should reconsider its position on decreasing criminal penalties that were a lynchpin of the 2001 modernization of Turkey's law.

Actions to be taken in 2004

- Run sustained enforcement on three fronts:
 - Close down printers and copyshops engaged in piracy of published materials.
 - Enact regulations, then investigate sources of production of optical discs (including factories and commercial duplicators of "burned" CD-Rs).
 - Follow the MOCT plan to shut down all pirate street vendors.
- Invigorate activities of Enforcement Committees, by empowering them with adequate resources; create better cooperation with prosecutors to bring cases to final conviction.
- Enforce the copyright law through the courts by: granting civil *ex parte* search orders; imposing deterrent sentences on pirates, including jail time and significant fines; decreasing delays and burdens placed on right holders; awarding increased civil damages and 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.
- Introduce, without delay, essential changes to the copyright law and related enforcement legislation, and join the WIPO "Internet" treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.
- Pass and implement a new law banning street sales of pirated materials, but amend the Bill so that criminal penalties will remain as they exist in the 2001 law.

For more details on Turkey's Special 301 history, see IIPA's "History" appendix to this filing.¹ Please also see previous years' reports.²

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

TURKEY
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	50.0	45%	50.0	45%	50.0	40%	50.0	50%	50.0	85%
Records & Music ⁴	15.0	75%	18.0	75%	3.5	35%	4.0	40%	4.0	30%
Business Software ⁵	NA	NA	38.5	58%	22.4	58%	78.6	63%	78.2	74%
Entertainment Software	NA	NA	NA	NA	23.7	90%	116.2	96%	95.1	82%
Books ⁶	25.0	NA	25.0	NA	27.0	NA	28.0	NA	32.0	NA
TOTALS ⁷	NA		131.5		126.6		276.8		259.3	

COPYRIGHT PIRACY IN TURKEY

Turkey Is One of World's Worst Book Piracy Markets

The book piracy situation in Turkey is one of the world's worst and remained largely unchanged in 2003. There has been a noticeable increase of pirate reprints in bookstores in 2003 (for example, in public markets such as Kadiköy Carsisi, Beyazit Meydani). The book piracy problem occurs all over Turkey, including in Istanbul, Ankara, Izmir, and Adana. Piracy levels as to academic materials remain high, including illegal photocopying and unauthorized translations of science, technical and medical texts (with levels of piracy ranging from 40 to 90%, depending on the type of media and time of year, with many being high-quality, four-color editions), and unauthorized ESL (English as a Second Language) materials. Copy shops near the universities thrive in the pirate trade, and increasingly, professors at public universities endorse the practice of having students purchase "bound notes" for their classes, containing unauthorized copies of entire sections of books. Illegal photocopying and piracy in the higher education sector are also evidenced by increased requests by teachers for access to free supplementary materials through electronic databases in areas where sales have plummeted. This problem is likely to worsen as digital copying and print-on-demand technology become more common. Certain local distributors have also been caught attempting the unauthorized sale of "India-only" reprints, much to the dismay of their foreign publisher suppliers.

CD-R Piracy Is the Dominant Form of Piracy in Turkey in 2003; Retail Markets Continue to Be Swamped by Piracy

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ 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.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ Loss numbers decreased in 2002 due to the shrinking overall market in Turkey, but the number of pirated copies increased, and the latter trend has continued throughout 2003.

⁷ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Turkey were \$93.0 million. IIPA's revised loss figures are reflected above.

The predominant method of pirating in Turkey in 2003 was “burning” of content onto blank optical media (i.e., CD-Rs). Burned CD-Rs constituted over 90% of music optical discs in Turkey in 2003, and almost all movie discs are burned CD-Rs, with only a few of the discs being imported from abroad as masters. These “burned” CD-Rs are produced locally in small- to medium-sized facilities, “workshops,” and in private residences. On the other hand, almost all pirate DVDs are imported from abroad (while DVD-Rs are rare), and other optical discs are similarly imported from Asia (e.g., from Malaysia, Hong Kong, Thailand, Taiwan, Ukraine, Bulgaria, and Russia, with the number of pirate DVDs imported from Ukraine and Russia increasing in 2003).⁸ Much of the pirated product is smuggled in, as pirates often carry pirated materials in personal luggage on airplanes. The domestic market (with Istanbul as the center of distribution) is replete with pirated CD-Rs, sold by street vendors in Turkey and sometimes “under-the-counter” in retail shops.⁹

On top of domestic production of pirate CD-Rs and import piracy, the growth in optical disc production capacity in Turkey must not escape notice. In 2003, sources indicate that Turkey had eight known optical disc plants in operation, with at least 18 known production lines, for a total optical disc production capacity of at least 63 million discs,¹⁰ while Turkey has a legitimate domestic demand of roughly 7 million discs. Given that this represents overcapacity in Turkey, the government should pass and implement an effective optical disc law.

Other Piracy Phenomena in Turkey

Several other forms of piracy appear in Turkey. For example, the growth of the Internet has introduced the country to pirates advertising the sale of hard goods and home-burned CD-Rs over the Internet (websites or newsgroups). Other problems for the motion picture industry include unauthorized public performances of new and popular films (25% piracy level),¹¹ and broadcast piracy (15% piracy level).¹² There is also music broadcast piracy in Turkey, with only 41 out of over 1,500 radio and television broadcasters having a proper license agreement with local recording industry group, MÜ-YAP. A new phenomenon in music piracy has recently occurred, especially in Turkey’s tourist hot spots: hotels (including well-known international hotels), bars and clubs selling on-the-spot made, illegal CD-R copies of the music they play. Moreover, most of the sources of music played in bars and discos are illegal copies or Internet downloads. 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), 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.

⁸ Entertainment software products in optical disc format (typically factory-produced silver discs) continue to be imported from Asia, while cartridge-based games continue to be imported from China.

⁹ New motion picture titles are available prior to or upon their theatrical release at an average price of US\$1.50 per title. Pirate DVDs of newly released titles with Turkish sub-titles can be found in retail stores for about US\$8 to \$10. The average number of pirate CD-Rs varies between 50 and 300 per retailer, and between 50 and 800 per street vendor.

¹⁰ Production capacity of optical discs is derived by multiplying the number of lines by 3.5 million; this is by all accounts considered a conservative estimate.

¹¹ Unauthorized public performances include DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers, and unlicensed video theatres are frequently encountered. Certain inter-city coach services also show films during journeys without authorization.

¹² It is now estimated that approximately 15% of the 230 local broadcast stations continue to engage in transmitting domestic and foreign films using videocassettes and pirate VCDs as masters.

COPYRIGHT ENFORCEMENT IN TURKEY

TURKEY CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	BUSINESS SOFTWARE	SOUND RECORDINGS
Number of raids conducted	6	375 ¹³
Number of VCDs seized	-	280,099
Number of DVDs seized	-	
Number of CD-Rs seized	-	199,616
Number of investigations	-	30,271
Number of VCD lab/factory raids	-	932,175
Number of cases commenced	2	44
Number of Indictments	-	495
Number of defendants convicted (including guilty pleas)	-	
Acquittals and dismissals	1	245
Number of cases Pending	11	
Number of factory cases pending	-	10
Total number of cases resulting in jail time	-	
Suspended prison terms		
Maximum 6 months		
Over 6 months		10
Over 1 year		
Total suspended prison terms		
Prison terms served (not suspended)		
Maximum 6 months		
Over 6 months		10
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\$)	-	

TURKEY CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	BUSINESS SOFTWARE
Number of civil raids conducted	2
Post-search action	
Cases pending	1
Cases dropped	
Cases settled or adjudicated	1
Value of loss as determined by right holder (\$USD)	
Settlement/judgment amount (\$USD)	7,500

There are many serious obstacles to effective enforcement against piracy in Turkey. Chiefly among them are the lack of true government will to eradicate piracy in all its forms, non-deterrent results from actions that are taken, tactics used by pirates, such as employing children in the piratical trade, and the secretive and elusive way organized piracy operations are conducted. Each industry has a slightly different story to tell in 2003, with all agreeing that

¹³ Results are for Istanbul only. No other data is available.

enforcement efforts by the Turkish government are highly inadequate. For example, the book publishers continued to receive some raids in 2003,¹⁴ but fines remained non-deterrent. The Turkish government seems unwilling to tackle the problem of piracy on university campuses, e.g., they will not instruct universities to implement policies to ensure that professors and students are using only legal materials. Certain practices by the Ministry of Education and the Council of Educational Policy (*Talim Terbiye Kurulu*) have actually helped the pirates by keeping legitimate books out of the market.¹⁵ For example, they often change prescribed books on extremely short notice, giving publishers little or no opportunity to import legitimate versions of books. For the motion picture industry, raiding in 2003 generally focused on seizures of “burned” CD-Rs and pirate DVDs.¹⁶ In addition, there was one very successful result working with Turkish Police, arresting the main distributor of Russian-manufactured pirate DVDs in Istanbul in early September 2003.¹⁷

Regarding retail and CD-R piracy, too few actions were taken to close down street piracy or sources of production in 2003. Gunay Gormez, Deputy Director General for Copyright Issues at the MOCT, indicated that sweeps on street vendors would begin once a draft law banning street sales of copyrighted materials could be enacted. Meanwhile, some actions were taken against street sales in Istanbul (the only major city in Turkey where the Enforcement Committee, with the assistance from right holder organizations such as MÜ-YAP and AMPEC, has active operations), but these failed to effectively address the piracy problem.

“Enforcement Committees” May Hinder Enforcement Efforts

In 2002, 81 Enforcement Committees (one for each province in Turkey) were officially established. However, very few actually started operations due to lack of funding, and consequently, the establishment of these committees has had little to no effect in reducing piracy in Turkey. It should be noted that the few committees that have started some enforcement actions have been discouraged by frequent case dismissals at the judicial level. The strength of these committees is that they can act *ex officio*,¹⁸ but the Committees thus far have been poorly resourced and equipped, and since they have power to override the actions of prosecutors, the result has been in some cases that the activities of prosecutors were hindered.

Notwithstanding these difficulties, at least the Committee in Istanbul appears to be getting some results. In 2003, the Istanbul Enforcement Committee carried out a reported 375 operations against 1,084 offenders, seizing over 35,700 music cassettes, over 199,600 music CDs, over 280,000 CD-Rs containing movies, over 87,900 videogame and software discs, over

¹⁴ A trade group of scientific publishers reported that out of 346 raids run between June 1, 2002 and June 1, 2003, more than 350,000 pirated books were seized.

¹⁵ For example, on August 28, 2003, the *Talim Terbiye Kurulu* wrote to the provincial governors revoking the approval for a number of imported coursebooks to be used in schools. In addition, foreign publishers are required to pay at least double the standard fee to have books approved by the Ministry of Education and the TTK. Decisions such as these are made non-transparently and without explanations as to reasoning. Finally, MOE has never taken any steps to discourage students from bringing pirated books to school.

¹⁶ For example, the chief industry group for the motion picture industry reported that by the end of 2003, 500,411 pirate CD-Rs and 41,560 pirate DVDs had been seized.

¹⁷ Motion picture industry representatives, working with Turkish Police, raided a warehouse located in the Tahtakale district, seizing 2,135 pirate DVDs with Turkish sub-titles, 810 pirate interactive games, and 125 pirate music DVDs, almost all of which were imported from Russia and Ukraine. The 24 year-old pirate had already been arrested twice since the beginning of 2003, but escaped the first time, and had the Istanbul Special Court order him to face only administrative sanctions the second time.

¹⁸ 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.

51,900 books, 44 CD burners and over 9,300,000 CD inlay cards. Nationwide, however, the committees need to do more.¹⁹ IIPA recommends that the Committees continue their *ex officio* activities, but make some changes to improve their effectiveness. Most notably, the government should make substantially more funds available for the Committees, which could come from income from the banderole system and private copying levies. At the same time, selected right holder organizations should be made competent to take independent enforcement actions on behalf of their members. This could be done by an implementing regulation.

Specialized IPR Courts Not Working

The copyright industries considered the prospect of establishing specialized intellectual property courts (*Fikri Haklar mahkemesi*) under Article 76 of the 2001 Copyright Law as a very positive development, but with almost three years' experience, IIPA is deeply disappointed at the slow speed with which the government has moved to set up the courts,²⁰ the many procedural hurdles that remain in the system, and the largely non-deterrent results in copyright cases.²¹ The chief reasons for the continued inadequacy of the court system in Turkey include the following: judges do not consider copyright piracy to be a serious offense warranting high fines and imprisonment in severe cases; the courts' dockets remain seriously overloaded (leading to delays in adjudication of copyright cases);²² the courts do not provide presumptions of ownership to right holders, but instead impose burdensome documentary requirements on right holders to prove ownership;²³ copyright cases are given low priority by prosecutors and courts; the Attorneyship Law requires that a private copyright owner representative hire a local lawyer to be an intermediary for many aspects of a copyright case;²⁴ and the use of "court experts" and, specifically, defendants' use of objections and experts has led to excessive delays and even wrongful acquittals.²⁵ A fundamental problem is the amount of time cases take to move through the system; for example, the entertainment software industry has cases pending

¹⁹ For example, according to the U.S. publishers, out of 70 complaints from 2002 to 2003, the Enforcement Committees have followed up on only 7 complaints.

²⁰ For example, IIPA understands only one court has been established to date in Istanbul, and this court remains seriously overloaded with cases.

²¹ There have been six first-instance court decisions issued under the 2001 copyright law. The defendants in the first two cases appealed to the Supreme Court. In the first, the result was no conviction, with the court finding there was no evidence that the pirate discs displayed in the defendant's shop had been personally manufactured by him. The second case is still pending before the Supreme Court. In the next four first instance decisions, all issued in 2003, the courts initially sentenced defendants to two-year prison terms and fines ranging from US\$7,000 to US\$11,000. However, due to the defendants' good conduct, the courts later reduced the sentences by 1/6 (as per the Turkish Criminal Code) in all four cases, resulting in all sentences becoming *de facto* within suspendable limits; consequently, no appeals were filed by the defendants.

²² Copyright infringement cases generally take two years to adjudicate in the first instance, and up to one year further to appeal. Since 2002, MÜ-YAP initiated 495 music piracy cases, of which 245 ended up in court. However, only 10 suspects were sentenced to a suspended prison term. This means that, despite the huge piracy level, there is still no actual prison term being served for music piracy.

²³ For example, in cases brought by U.S. publishers, many judges are now demanding notarized translations of original contracts between the author and publisher in order to prove copyright ownership for each title.

²⁴ The Attorneyship Law adds additional burdens and substantial costs to bringing cases in Turkey. As a result, lawyers must be hired for five key phases of any case: (1) to file an initial complaint with the Public Prosecutor; (2) to obtain a special search warrant from the judge; (3) to obtain a search warrant from the Public Prosecutor; (4) to conduct a raid with the police; and (5) to have the Public Prosecutor press charges and to provide assistance in the courtroom to obtain a conviction.

²⁵ 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 reproduction of software on the hard disk of a computer is a copyright infringement. In some cases, courts appeared to favor Turkish defendants over foreign plaintiffs and would interpret provisions of the copyright law in ways prejudicial to the foreign right holder. IIPA understands that the new specialized IP court has taken some steps to obtain evidence and appoint experts with more urgency and care than in the past.

from as far back as 1999. Such timeframes cannot provide the deterrent needed for an industry whose product has a short shelf life. Another problematic feature of judicial enforcement in Turkey involve the difficulty of obtaining *ex parte* civil searches, as required by TRIPS.²⁶ Finally, courts must make reasonable costs and fees available in Turkey in civil and administrative actions.

It is of paramount importance that judges recognize the seriousness of the crime of commercial piracy, and sentence defendants in accordance with the current copyright law, which provides for fines from TL10 to 150 billion, and up to four years imprisonment. Unfortunately in Turkey, severe penalties for copyright infringement are not often imposed and jail sentences rarely ever served; fines that are actually imposed are ridiculously low. Sentencing guidelines could help guide judges to mete out deterrent punishments. The recording industry reports that in the second half of 2003, judges trained abroad were appointed to the specialized IPR courts in major cities; this move, along with amendments that will hopefully strengthen the law would, we hope, make the courts more effective in combating copyright piracy in Turkey.

The Banderole System Needs Improvements

It remains the case in Turkey that the banderole (sticker) system does not function well as an anti-piracy tool. Some 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), but those remain largely untested. The MOCT, together with local offices in Istanbul, reportedly reviewed applications more strenuously in 2003 and banderoles issued were reported to the right holder organizations. Nonetheless, some plants continue to hold unnecessarily large quantities of unused banderoles, which are not secured adequately.²⁷ Additionally, pirates are often inserting pirate discs into original jewel cases that have already used banderoles to make them look “legitimate.” 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 provides for fines and imprisonments for such offenses).

COPYRIGHT LAW AND RELATED ISSUES IN TURKEY

2001 Copyright Law

Amendments to the 1951 copyright law in Turkey (Law No. 5846) enacted in 2001 brought Turkey’s copyright regime considerably closer to international treaties standards and implemented many of the requirements of the WIPO “Internet” treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.²⁸ Passage of the amended law

²⁶ For example, the business software industry 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 others (e.g., U.S. publishers) need this mechanism as well. The 2001 Copyright Law provides for *ex parte* civil searches, according to the Ministry of Justice, but practice and precedent with respect to *ex parte* civil searches have not yet been firmly established, and IIPA is unaware of a single instance in which the search and seizure provisions have been successfully used in Turkey.

²⁷ For example, the publishers report that the banderole system for books was set up and is administered by Edisam, an association of book importers, local publishers and authors; since it is not regulated, booksellers could order batches of stickers which might easily be diverted to infringing copies.

²⁸ While certain key elements of the WCT and the WPPT still do not appear in the law in Turkey (the most notable deficiency is the failure to prohibit the circumvention of technological protection measures, including the trafficking in

must not signal the end of Turkey's efforts to modernize its copyright system, but should lead to proper implementation through strict enforcement of the law. There are a few remaining ambiguities or deficiencies in the Law regarding which further changes may be needed.²⁹

New Amendments to Copyright Law Amendment and Cinema, Video and Music Works Law

IIPA understands that MOCT has drafted legislation designed, among other things, to "ban" all street sales of copyrighted materials. MOCT is also to be commended for working on the necessary documents for ratification of the WCT and WPPT. IIPA understands that the draft was finalized in January 2004, and that legislative amendments are expected to be finalized by the end of February 2004. The amendments to the copyright law would accomplish the following:

- Prevent the street sales of copyrighted products (even if the products are legal);
- Qualify piracy as an organized crime;
- Introduce full *ex officio* obligations for law enforcement agencies in copyright piracy cases (something that, under the present system, is apparently still not the case);
- Increase the effectiveness of customs border controls (including an *ex officio* obligation);
- Qualify importation of illegal products as organized smuggling;
- Prevent unauthorized radio and television broadcasting/retransmission;
- Increase the effectiveness of the banderole system and the enforcement activities related to this system;
- Establish a data base for rights verification;
- Reduce prison terms and fines and give judges the option to apply one or the other, repealing the current requirement to apply both; in cases of recidivism, however, criminal penalties could not be suspended or commuted.

Along with the copyright law amendments, the MOCT is also working on updates to the 1986 Cinema, Video and Music Works Law (Law No. 3257). In December 2002, a new bill entitled "Law on the National Cinematography Institute" was introduced by the government.³⁰ This law would delete provisions conflicting with the Copyright Law (the Cinema Law is as important as the Copyright Law from an enforcement perspective, because the authorities tend to use this law rather than the Copyright Law for piracy cases involving film and music works). The bill would establish the National Cinematography Institute as a separate legal entity within the Ministry of Culture and Tourism. The NCI would be the central body to oversee the cinema and audiovisual sectors in Turkey.³¹ The bill would apparently keep in place an "inspection" system (a kind of censorship); and classification criteria, which are not stated in the bill, would probably be determined by Ministry regulations. Because the present Cinema Law would be repealed by this legislation, IIPA notes that the courts and the Banderole Commission,

circumvention devices; the Turkish Criminal Code, Article 525 *et seq.*, provides limited protection of this sort against circumvention of computer encryption). This should not discourage Turkey, if possible, from seeking immediate accession to the WCT and WPPT, and swift deposit in Geneva.

²⁹ A more detailed discussion of these concerns is contained in IIPA's 2003 Special 301 report on Turkey, which can be found at <http://www.iipa.com/rbc/2003/2003SPEC301TURKEY.pdf>.

³⁰ Minister of Culture announcement on December 24, 2002; text of the bill was posted on the MOCT website on December 30, 2002.

³¹ The duties of the NCI would include making administrative and legal determinations, providing support for the industry to issue licenses, inspecting and classifying audiovisual productions, arranging for co-productions, and setting up and operating establishments and facilities, including archives, libraries, studios, and an observatory.

among others, would no longer be able to apply the Cinema Law for piracy offenses rather than the Copyright Law in order to bypass stiff criminal penalty provisions in the Copyright Law; of course, the effect of this change will be mitigated by a sharp decrease in criminal penalties should the copyright law amendments, as currently drafted, be enacted.³² IIPA urges swift passage of these related laws, but notes concern about the Government of Turkey's intention to lower criminal penalties. We fear that reducing penalties would send a negative signal to pirates and would reinforce judges in their current practice of applying the lowest possible levels of penalties.

The Need for 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. In addition, the proliferation of optical disc manufacturing facilities in the past couple of years calls for the immediate introduction of an effective law to regulate optical disc production in Turkey. The global community has agreed on the key elements to be included in an effective law, which would include licensing of facilities that wish to produce blank or finished discs; identification codes for discs, moulds and stampers/masters in order to trace the source of production back to the facility; coverage of key parts used to make discs (stampers and masters); licensing of import/export of machines, key parts, and raw materials used to make discs; inspection authority (including participation by right holder groups); and deterrent penalties for engaging in unlawful acts (like producing without a license, gouging or using false identification codes, etc.). Because of Turkey's rampant CD-R "burning" problem, the law should also require registration of those engaging in commercial duplication of recordable discs.³³ The MOCT is reportedly working on a regulation of optical disc plants in the form of a Directive.

Generalized System of Preferences

In 2003, the U.S. government formally announced that in 2001, it closed the investigation into whether Turkey remains eligible to enjoy benefits under the Generalized System of Preferences (GSP) trade 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." While the official investigation was closed, IIPA notes that one key element of the Action Plan agreed to by Turkey has not been fully implemented, namely, that it carry out adequate and effective enforcement against copyright piracy, sufficient to bring down piracy levels. This most important benchmark still has not been met. In the first eleven months of 2003, almost \$649.3 million in goods from Turkey were imported into the United States duty free under the program, accounting for almost 18.7% of its total imports to the U.S. In 2002, \$472.4 million in Turkey's imports to the United States benefited from the GSP program, accounting for 13.4% of its total imports to the U.S.

³² Under the current system, some prosecutors have referred anti-piracy cases to municipalities for administrative fines per the Cinema Law instead of filing criminal cases under the Copyright Law.

³³ A more detailed discussion of optical disc legislation is contained in IIPA's 2003 Special 301 report on Turkey, which can be found at <http://www.iipa.com/rbc/2003/2003SPEC301TURKEY.pdf>.

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COUNTRIES DESERVING SPECIAL MENTION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

BOSNIA AND HERZEGOVINA

The lack of effective legislation and enforcement activities is problematic in Bosnia and Herzegovina, particularly for the business software and music industries. High levels of piracy in the business software sector are reported, including the widespread use of unlicensed software in companies and public enterprises. The overwhelming amount of music discs sold in the country also are pirate, largely on CD-Rs. CD shops routinely sell pirated business software, and computers regularly are sold with illegal software pre-installed. As for the music industry, city or town CD shops tend to sell legitimate copies of regional and local repertoire. International repertoire is virtually exclusively the domain of the street stall pirate vendors, and the numerous specialist shops located by, and catering to, troop bases of the multinational Stabilization Force (SFOR) that serves in the country.

With respect to business software, BSA reports that the pertinent laws of Bosnia and Herzegovina do not provide for full and efficient protection of copyright. Even more troubling, the current, incomplete copyright law is not applied in practice. Police, prosecutors and customs officials lack the equipment and expertise necessary to conduct raids, perform investigations, and commence cases against copyright infringers, thus impeding effective enforcement efforts. Most software users continue to use illegal software, and licensed software is so rare as to be almost non-existent. Furthermore, the software industry understands that illegal software is used by institutions that are responsible for enforcement of copyright and related rights law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

CAMBODIA

Cambodia has passed a Copyright Act, completed its WTO accession negotiations and is expected to become a full WTO member this year. However, it has yet to accede to the Berne Convention or the WIPO Digital treaties. The government should be strongly encouraged to move its laws toward providing higher standards of intellectual property rights protection, before it becomes a haven for pirate production and export.

Cambodia also raises concerns with respect to the potential migration of optical disc plants given the country's proximity to Thailand. The lack of an appropriate legal regime to address optical disc overproduction must be addressed to forestall the likelihood of plant migration. Cambodia has already been confirmed to have at least some small volume of optical disc manufacture taking place, and with the ongoing pressure on Thailand to clean up OD production, it is likely this manufacturing will increase. The United States should encourage the Cambodian government to adopt comprehensive optical disc regulations.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

CANADA

In 2002, the Canadian Government unveiled a three-tiered agenda for Copyright Reform. The Copyright Reform process will address the areas in Canadian copyright law in which amendments will be required in order to adequately implement obligations under the World Intellectual Property Organization's Copyright Treaty, and its Performances and Phonograms Treaty. The first tier (so-called "short-term agenda" review) addresses WIPO digital treaties implementation issues including the making available right, technological protection measures and rights management information, plus issues of ISP liability. Consultations on these issues are expected to continue beyond the end of 2004.

After playing a major role in negotiating and drafting the WIPO digital treaties more than seven years ago, and nearly six years after the Government of Canada signed the treaties, the government still has failed to introduce legislation to implement those treaties. Meanwhile, over 40 countries worldwide, including the United States, have acceded to the treaties. Canada is the only North American country that has not done so. Ratification is needed to harmonize Canada's regime with that of other WIPO-enacting states around the world, and the timing of these necessary changes is highly relevant. The copyright industries are experiencing difficult challenges from technical advances that have left them vulnerable. The availability of pirate copies of materials on the Internet and illegal digital copying are devastating sales. In the music sector alone, over one billion songs were copied without authorization in Canada in 2001-2002. Canada must act swiftly to address this large and growing problem.

The WIPO digital treaties provide the principal legal tools required to fight piracy. The treaties provide strong practical support for intellectual property rights by encouraging and protecting the use of technological measures in controlling and administering these rights. The treaties are also critical for creating a legal environment in which rights owners can protect against infringement in information networks, and develop new, more sophisticated products and licensing options. Electronic commerce in copyrighted content requires a working digital marketplace in which only legitimate copies of works are transmitted, and only under the terms negotiated or permitted by the rights owner.

A number of troubling policy notions are emerging in Canada, and it is critical that the reforms undertaken meet WIPO treaties requirements and not undermine the ability of copyright owners to protect their works in the digital environment.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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SPECIAL MENTION

C.I.S. - ARMENIA

Armenia, now a member of the WTO, is not TRIPS compliant in its enforcement regime. 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 code sets an unreasonably high threshold to apply to IPR violations—even after adoption of the November 2002 amendments.

According to the recording industry (the International Federation of the Phonographic Industry, IFPI), the level of music piracy in Armenia is estimated at about 86% (more than 95% for international repertoire) with trade losses estimated at US\$4.1 million. It is also estimated by the recording industry that in total, 3.6 million cassettes and 0.9 million CDs were sold in Armenia in 2003 and that, of these, 3.0 million cassettes and 0.8 million CDs were pirated copies.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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SPECIAL MENTION

C.I.S. - GEORGIA

In a February 2002 review, the U.S. Trade Representative noted that, even after Georgian accession to the WTO (in 2000), “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.” Under Georgian law, 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. Now more than two years after the report by the U.S. government, Georgia has still not corrected these deficiencies and thus has not improved its enforcement regime. As for enforcement, the copyright industries could not find a single case in Georgia in 2003 in which criminal penalties were levied.

According to the recording industry (the International Federation of the Phonographic Industry, IFPI), the level of music piracy in Georgia is estimated at about 80%, with trade losses estimated at \$8 million. It is also estimated by the recording industry that in total, 4.9 million cassettes and 1.2 million CDs were sold in Georgia in 2003 and that, of these, 3.9 million cassettes and 1.1 million CDs were pirated copies. The industry also reported 10 raids and the seizure of US\$49,200 worth of pirate material (4700 CDs and 1550 cassettes) in 2003 by local enforcement agencies.

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SPECIAL MENTION

C.I.S. - KYRGYZ REPUBLIC

Even as a member of the WTO (and WIPO digital treaties), the Kyrgyz Republic is still not providing the type of effective enforcement necessary to stem the copyright piracy there, nor is it in compliance with the enforcement obligations of the WTO TRIPS Agreement. As the U.S. Trade Representative noted after an out-of-cycle review (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.” Now, two years after this report by the U.S. government, the Kyrgyz Republic has still not corrected these deficiencies. In addition, a lingering problem is that the civil code, 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, contradicts the 1998 Copyright Law. As IIPA has noted in past filings, 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.

According to the recording industry (the International Federation of the Phonographic Industry, IFPI), the level of music piracy in the Kyrgyz Republic is estimated at about 85%, with trade losses estimated at \$5 million. It is also estimated by the recording industry that in total, 5 million cassettes and 0.9 million CDs were sold in the Kyrgyz Republic in 2003 and that, of these, 4.3 million cassettes and 0.7 million CDs were pirated copies. The industry also reported 35 raids and the seizure of US\$44,700 worth of pirate material (1700 CDs, 797 CD-Rs, 4300 cassettes, and 18 recording devices) in 2003 by local enforcement agencies.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

C.I.S. - REPUBLIC OF MOLDOVA

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. Moldova is the only country in the C.I.S. whose customs code (Article 308) provides explicit *ex officio* authority. But there are many deficiencies. In particular, the Republic of Moldova needs to amend its criminal code to apply to copyright and neighboring rights violations—necessary to protect authors and producers of sound recordings. Second, it must improve the levels of enforcement with criminal convictions and improved border enforcement. Third, the Copyright Law provides only a right of remuneration 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. Finally, as it pertains to WTO compliant enforcement, although there are signs of stepped-up police activity in the past few years, there have not been prosecutions and convictions under the criminal law as required for Moldova to meet its international obligations.

According to the recording industry (the International Federation of the Phonographic Industry, IFPI), the level of music piracy in Moldova is estimated at about 69%, with trade losses estimated at \$4 million. It is also estimated by the recording industry that in total, 4 million cassettes and 1.3 million CDs were sold in Moldova in 2003 and that, of these, 2.8 million cassettes and 0.9 million CDs were pirated copies. The industry also reported 203 raids and the seizure of US\$64,350 worth of pirate material (4700 CDs, 560 DVDs, 347 CD-ROMs, 6800 cassettes, and 6 recording devices) in 2003 by local enforcement agencies.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

COSTA RICA

Costa Rica and the United States have just concluded negotiations to finalize Costa Rica's participation in the U.S.-Central America Free Trade Agreement (CAFTA). We hope that Costa Rica will now promptly resolve ongoing intellectual property/enforcement problems faced by the software industry.

Long delays in copyright enforcement cases continue to be a serious problem, since it normally takes several months between the filing of a complaint, the day a raid or inspection takes place, and the issuance of an official inspection report. During this time, there is little incentive for the infringer to resolve the problem. Moreover, there are significant delays between the time an official inspection report is issued in a particular case and the time a sentence is handed down in the same case.

The *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual* should be amended to bring it into full compliance with Costa Rica's obligations under the TRIPS Agreement and the WIPO Copyright Treaty. It also should be amended to increase penalties for copyright violations, including permitting courts to issue prison sentences. To date, no progress has been made to bring about the requisite amendments to this law.

A Special Prosecutor's Office (*Fiscalía Especializada*) is required because existing prosecutors generally are not sufficiently trained to adequately enforce Costa Rica's intellectual property laws. In 2003 the Costa Rican legislature proposed a law to create a Special Prosecutor's Office, but the law failed to pass.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

GUATEMALA

Guatemala and the United States have just concluded negotiations to finalize Guatemala's participation in the U.S.-Central America Free Trade Agreement (CAFTA). We hope that Guatemala will now promptly resolve ongoing intellectual property/enforcement problems faced by the software industry. The lack of an adequate and effective civil *ex parte* enforcement mechanism, primarily because of information leaks and the imposition of unreasonably high bonds, and the 2001 copyright law amendments reducing criminal penalties for copyright infringement to non-deterrent levels, are some of the more serious enforcement issues faced by software copyright holders. These issues continue to plague copyright enforcement in the country.

CAFTA will mandate that the authorities act and execute in *audita altera parte* requests for relief in an expeditious manner. Ensuring the confidentiality of the information related to those requests is key to maintaining the provisional measure's viability as an effective enforcement tool. Similarly, while permitting the imposition of security or other assurance in order to authorize a provisional measure, CAFTA requires that such security or equivalent assurance be set at a level "so as not to unreasonably deter recourse to such procedures." CAFTA, art. 15.11.18. Finally, the IPR chapter of the CAFTA requires Guatemala to provide criminal remedies, including imprisonment and/or fines, that are "sufficient to provide a deterrent to future acts of infringement." CAFTA, art. 15.11.26(a). This would call for an increase in the length of imprisonment terms and fines under the current law.

By signing the CAFTA, Guatemala has taken positive steps toward achieving the highest standards of protection for copyrighted content. We congratulate the Guatemalan government for these steps and trust that the issues above will be quickly resolved as Guatemala moves ahead to fully implement all of its obligations under the IPR chapter of the CAFTA.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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SPECIAL MENTION

HONG KONG

The publishing industry reports good cooperation from the Hong Kong Customs & Excise Bureau in obtaining raids in conjunction with copyright holders. Indeed, government authorities have put forward legislation that should prove helpful in combating illegal activities undertaken by photocopy shops [Copyright (Amendment) Bill 2003, Section 118(C)]. While Section 118(C) should provide many helpful tools in the fight against illegal activities in photocopy shops, AAP reports that only about 50% of illegal photocopying in Hong Kong is undertaken in these types of shops. Thus, AAP members remain extremely concerned about Section 118(A) of the same bill, which categorically excludes printed materials from a provision calling for criminal liability for those who use illegal copies in the course of a trade or business. This discrimination against a particular category of copyrighted works, inconsistent with Hong Kong's obligations under Article 61 of TRIPS, deals a severe blow to a subset of copyright owners left to defend themselves against the 50% of illegal users who are not making use of photocopy shops. It is vital that the Hong Kong government lift the current suspension of Section 118(A) as to printed materials and abort proposals for legislation calling for permanent exclusion of such works. Likewise, the Hong Kong government should correct the deficient provision in Section 118(C) and pass that provision at the next appropriate interval.

The entertainment software industry appreciates the Hong Kong government's increased efforts against pirate video game retailers and anticipates seeing equally aggressive initiatives aimed at upstream sources of pirate product, including importers, exporters and local CD-burning operations. However, the industry remains concerned with the recent but significant increase in the number of counterfeit cartridge-based games being exported from the territory to the U.S. and Europe. Hong Kong is being used as an operations base by pirates and counterfeiters operating out of China; these pirates establish an "office" in the territory that merely receives purchase orders and facilitates delivery of counterfeit products. The Customs Authority must strengthen its inspection procedures to impede the flow of counterfeit goods both into and out of Hong Kong, and is likewise urged to initiate cooperative efforts with its counterparts on the Chinese mainland to better address syndicate operations involved in shipping counterfeit cartridge-based goods between Hong Kong and China.

Entertainment software companies must also contend with the burdensome evidentiary requirements for prosecuting copyright offenses, having to spend excessive efforts and resources to bring a copyright infringement case. Under Hong Kong procedure, the copyright holder must provide §121 affirmations for every copyright infringement prosecution, which includes providing evidence of copyright ownership, as well as attaching genuine copies of the video game titles that are the subject of the case. In certain cases, copies of as many as 200 different pirate video game titles have been seized. The burden of collecting the copyright information as well as providing legitimate copies of all these titles is both time consuming and very expensive for U.S. publishers—

who often have to obtain and ship the necessary information from the U.S. The situation remains unresolved due to the government's delay in using its powers under existing legislation to designate foreign copyright registries (including the U.S. Copyright Office) under §121. Recognizing U.S. copyright registration certificates and allowing their substitution for copies of the genuine article would greatly reduce the burden on copyright owners and expedite their compliance with the affirmation requirements. Despite long-standing representations that this simple technical requirement would be addressed, this has yet to occur.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

LAOS

Laos has no intellectual property regime within which to address piracy problems and is still in the initial phases of WTO accession negotiations. Like Cambodia, it is not yet a member of the Berne Convention or the WIPO digital treaties, and should be strongly encouraged to move its laws toward providing intellectual property rights protection before it becomes a haven for pirate production and export.

Laos is also of concern given the potential migration of optical disc plants because of its proximity to Thailand. The lack of an appropriate legal regime to address optical disc overproduction must be addressed to forestall the likelihood of plant migration. The United States should encourage Laos to adopt comprehensive optical disc regulations.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

SERBIA AND MONTENEGRO

The lack of adequate legislation and effective enforcement activities remains problematic in Serbia and Montenegro, particularly for the business software and recording industries. The level of piracy experienced by these industries remains at unacceptably high levels.

Legislative amendments are necessary to bring copyright protection in Serbia and Montenegro into compliance with international standards, to adequately protect right holders, and to ensure effective enforcement. For example, the current law does not provide for effective provisional measures in practice. On a promising note, after much delay, the Federal Intellectual Property Office has prepared draft copyright amendments. These draft amendments would, if adopted without any significant changes, represent a substantial improvement of the copyright system in Serbia and Montenegro. The Council of Ministers must pass these amendments without any further delay, failing which the deficiencies in copyright protection will persist and will encourage pirates to increase their illegal business. In cases of criminal copyright infringement, the Copyright Law and the Penal Code of the Republic of Serbia cover the same criminal act in a conflicting manner with respect to both procedure and penalties.¹ BSA reports that this conflict has resulted in significant confusion and delays in enforcement cases. Furthermore, the Market Inspectorate currently does not have the necessary legislative authority to enforce copyright law.

Although the recording industry does report several encouraging *ex officio* actions by the Ministry of the Interior, enforcement of copyright is generally still weak, inefficient and ineffective. While current legislation certainly requires amendment, legislative deficiencies cannot stand as an excuse for enforcement in Serbia and Montenegro. Current law already provides numerous, albeit imperfect, options for the protection of copyright. BSA reports that the police took action in only a small percentage of cases reported to them, and then only after considerable delays with criminal raids. Police, prosecutors and customs officials lack the necessary equipment and expertise to conduct raids, perform investigations, and commence cases against copyright infringers. In 2003 the government created a special inter-ministerial antipiracy commission, which adopted an ambitious work program. In the first half of 2003 this led to some spectacular enforcement actions against blatant street trade in pirate copyright products, especially in Belgrade. However, the initiative gradually lost its steam and most points of the action plan remain unfulfilled. This includes the adoption of a much-needed optical disc regulation. Finally, one of the most serious right holder concerns remains poor border enforcement. In the last week of 2003, a government decree on IP border measures was issued but its actual enforcement remains to be seen. Currently, Serbia and Montenegro continues to experience an inflow of pirated product on a regular basis.

¹ Under the CRL the offence cannot be prosecuted *ex officio*, but under the PCRS the offence can be prosecuted *ex officio*. Furthermore, the penalties for the same criminal act differ in the CRL and the PCRS—a maximum of three years and eight years, respectively.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

SINGAPORE

Wholesale illegal photocopying of textbooks and academic journals continues to be a major problem for publishers in Singapore, despite the fact that virtually all local universities and polytechnics have taken out licenses with the local reprographic rights organization. Large-scale, high-profile commercial photocopy operations continue to operate with impunity, with no self-initiation of raids by government authorities. Two issues demand immediate attention, given the publishing industry's consequent reliance on the self-help system. First, publishers are unable to rely on "trap purchases" (in which an undercover representative of the right holder tests the willingness of a particular commercial entity to engage in illegal photocopying by placing such an order) in securing search warrants, as current law deems such investigative tactics by copyright owners' representatives as tantamount to consent to the illegal reproduction. Given the largely "made to order" nature of the photocopy shops' business, the publishers' inability to obtain search warrants based on trap purchases renders the "self-help" system at best ineffective for publishers. Singapore needs to bring about appropriate legislative changes and/or procedural clarifications to ensure the ability of publishers to use "trap purchases" in gathering information. Second, publishers are being asked to submit a list of the suspected infringing titles to each warrant request. It is almost impossible for the publishing community to guess which of its thousands of titles may be infringed on any particular shop on a given day, and compiling all titles from all publishers is quite an administrative burden. Officers on site have routinely refused to confiscate infringing materials not listed in the warrant, even if those materials are published by a complainant who is listed. Local publishing industry representatives report that Singapore is considering amending the law to allow for a general description of the items to be seized rather than requiring a title-by-title list. The publishing industry finds it imperative that this provision move forward in an expedient manner.

The music industry reports that there have been instances over the past few years of pirated exports by registered Singaporean optical disc factories, seized in such foreign markets as the EU, Canada and other Southeast Asian countries, that were traced back to Singaporean plants. Record industry officials have provided information and evidence on these pirated exports to the Singapore authorities and requested that action be taken. We hope that strong action from the Singaporean authorities will be forthcoming.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

URUGUAY

In 2003, Uruguay finally amended its 65-year old copyright law. While the enactment of these amendments was indeed positive, the IIPA also noted that the new law still had deficiencies.

The prosecution of intellectual property cases also remained a significant problem. This proved particularly true for the entertainment software industry in 2003. Copyright owners have repeatedly highlighted the need for increased prosecutions against intellectual property crimes to serve as a deterrent against piracy, particularly where the targets have been large-scale commercial infringers rather than mere small-time vendors. The prosecution of a criminal trademark infringement case in early 2003 against the primary supplier of pirated cartridge-based entertainment software in Uruguay by the enforcement authorities was therefore a welcome result for the entertainment software industry.¹ A series of raids on retail stores and warehouses owned by the defendant resulted in the seizure of large quantities of pirate and counterfeit cartridge-based video games, as well as the filing of a criminal complaint against the defendant and his associates. The case was progressing well, with strong evidence presented on the counterfeit nature of the products being supplied and sold by the defendant. However, in May 2003, the Supreme Court of Justice issued an “executive pardon” (known as *gracia* under the Uruguayan criminal code) in favor of the defendant, dismissing all charges against him and absolving him of all criminal liability. The pardon resulted in the return of all the confiscated counterfeit and pirate video game product to the defendant. This action was a disappointing setback and indeed serves only to weaken intellectual property protection in the country. It can hardly be expected that police and prosecutors will bring increased attention to intellectual property crimes when all their actions would appear to come to naught through an arbitrary grant of pardon from the high court.

¹ Nintendo brought the complaint in 2001 following raids against retail establishments and warehouses in Montevideo. The premises were all owned by one Roberto Lewinger Lencina who was subsequently brought up on trademark counterfeiting charges. Please see Nintendo of America’s separate 2004 Special 301 submission.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SPECIAL MENTION

VIETNAM

Vietnam is a country of concern given the probable migration of optical disc and cartridge manufacturing facilities, as well as optical disc overproduction. There are now eight (8) optical disc plants located in the country, making the adoption of optical disc regulations rather pressing. Entertainment software companies have found Vietnamese-sourced pirate products in Canada, the Czech Republic, Poland and surrounding Asian countries. It is believed that organized criminal syndicates are also involved in piracy operations. CD-burning operations also exist in the country, with pirate PC-games sourced from cracked versions made available through the Internet. Piracy is also widespread in Internet cafés.

Vietnam also acts as a haven for book pirates, virtually decimating the market for foreign publishers. Publishers of English language teaching materials report an estimated piracy rate of over 90%. Piracy also heavily affects the academic textbook market. Publishers report that, in some cases, state-owned printers are directly engaged in piracy. Print piracy production not only consumes the local market, but also feeds demand for infringing product in surrounding territories such as Laos and Cambodia. Rampant illegal photocopy operations add to the obstacles facing legitimate publishers, with commercial photocopy operations permeating areas near universities throughout the country.

APPENDIX D

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2003) & IIPA'S 2004 SPECIAL 301 RECOMMENDATIONS

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2003) AND IIPA 2004 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2004	USTR 301 PLACEMENT (as of April/May of each year)														
		2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Argentina	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL
Armenia	SM		WL	WL	WL											
Australia						WL	WL	WL	WL		WL	PWL	PWL	PWL		
Austria							OO	OO								
Azerbaijan	WL	WL	WL	WL	WL											
Bahamas		PWL	WL + OCR	OCR	OCR											
Bahrain							WL	WL	WL	WL						
Bangladesh																
Belarus	WL	WL	WL	WL	WL	WL	OO									
Belgium																
Bolivia	WL	WL	WL	WL	WL	WL	OO	WL	OO							
Bosnia and Herzegovina	SM															
Brazil (GSP)	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Bulgaria	PWL						PWL	WL	OO	OO						
Canada	SM	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
Cambodia	SM															
Chile	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Colombia	PWL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	SM	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia		WL														
Cyprus								OO	OO	OO	WL	WL	WL	WL		
Czech Republic					WL	WL	WL	OO								
Denmark					WL	WL	WL	WL								
Dominican Rep.(GSP)	PWL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
Ecuador	WL	WL			WL	WL	PWL	PWL	WL			WL	WL			
Egypt	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	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	PWL		
Finland																
Georgia	SM			OCR												
Germany							OO	OO	OO	OO	OO		WL	WL		
Greece			WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Guatemala	SM	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Honduras							WL	WL	OO	OO	OO					
Hong Kong	SM					OCR	WL	WL	OO							
Hungary	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2003) AND IIPA 2004 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2004	USTR 301 PLACEMENT (as of April/May of each year)														
		2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Indonesia	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL
Ireland					WL	WL	WL	WL	OO							
Israel	PWL	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					
Italy	WL	WL	WL	WL	PWL+OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Jamaica		WL	WL	WL	WL	WL	WL									
Japan				OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan						WL	WL	WL	OO	OO						
Kazakhstan (GSP)	WL	WL	WL	WL	WL		OO									
Kenya																
Kuwait	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
Kyrgyz Republic	SM			OCR												
Laos	SM															
Latvia	WL	WL	WL	WL	WL											
Lebanon (GSP)	PWL	PWL	PWL	PWL	WL	WL	OO									
Lithuania	WL	WL	WL	WL	WL											
Luxembourg								WL								
Macau				WL	WL	PWL	PWL									
Macedonia																
Malaysia	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Mexico		WL	OCR			WL	OO	OO	OO							PWL
Moldova	SM				WL											
Myanmar																
Netherlands							OO									
New Zealand			WL	WL		WL							WL	WL		
Nicaragua							OO	OO								
Oman					WL	WL	WL	WL	WL	OO						
Pakistan (GSPP)	PFC	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority					OCR											
Panama							OO	WL	OO		OO					
Paraguay	306	306	306	306	306	306	PFC	PWL	WL	OO	OO		WL			
Peru	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Philippines	PWL + OCR	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL
Poland	PWL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL			
Portugal									OO							WL
PRC	306	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
Qatar			WL		WL	WL	WL	OO	OO	OO						
Romania	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						
Russian Federation (GSP)	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL+OCR	WL	OO					

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2003) AND IIPA 2004 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2004	USTR 301 PLACEMENT (as of April/May of each year)														
		2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
San Marino								WL								
Saudi Arabia	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	PWL
Serbia & Montenegro	SM				WL	WL	WL	WL	WL	WL	OO			WL	WL	WL
Singapore	SM															
Slovakia		WL	WL	WL												
Slovenia					OCR											
South Africa						WL	WL		OO	WL						
South Korea	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
Spain	WL				WL	WL	OO				WL	WL	WL	WL	WL	WL
Sri Lanka																
Sweden						WL	WL	WL								
Taiwan	PWL + OCR	PWL	PWL	PWL	WL	WL			OO	WL	WL	PWL	PFC	WL	WL	PWL
Tajikistan	WL	WL	WL	WL	WL											
Thailand	PWL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL
Tunisia							OO									
Turkey	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL
Turkmenistan	WL	WL	WL	WL	WL											
UAE				WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
Ukraine	PFC	PFC	PFC	PFC	PWL	PWL	WL									
Uruguay	SM	WL	PWL	PWL	WL	WL	OO	OO								
Uzbekistan (GSP)	WL	WL	WL	WL	WL											
Venezuela		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	SM	WL	WL	WL	WL	WL	WL	WL	OO	OO						
Yemen							OO									

PFC: Priority Foreign Country
 PWL: Priority Watch List
 WL: Watch List
 []: the country did not receive a ranking by
 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

APPENDIX E: HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS

FEBRUARY 2004

ARGENTINA

IIPA recommends that Argentina remain on the Priority Watch List. See IIPA's 2004 report on Argentina at <http://www.iipa.com/rbc/2004/2004SPEC301ARGENTINA.pdf>. 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." No such improvement is noted in USTR's 2003 Special 301 Announcement, which cites "lax and ineffective enforcement against piracy . . . and counterfeiting." Specifically, enforcement efforts have been hampered by "inadequate resources and border controls and slow court procedures."

Argentina also 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 granted to Argentina under the GSP program, and placed increased duties on about \$260 million worth of Argentina's imports (resulting in only about a \$13 million penalty). In 2002, \$287.5 million worth of goods from Argentina entered the U.S. under the GSP duty-free code, accounting for roughly 9.0% of its total imports. During the first 11 months of 2003, \$407.6 million worth of Argentine goods (or 14.6% 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 62.7% increase over the same period in 2002.

ARMENIA

IIPA highlights copyright concerns in Armenia in its Special Mention section this year. See IIPA's 2004 Armenia country report at <http://www.iipa.com/rbc/2004/2004SPEC301ARMENIA.pdf>. Armenia does not currently appear on any of the USTR lists. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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 suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine, for much more serious piracy problems) be listed, and for filing purposes only, grouped them together 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 Kazakhstan or Uzbekistan. Armenia acceded to the WTO on February 5, 2003. On September 3, 2003, USTR announced that it had terminated Armenia’s GSP review.

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 2002, \$13.6 million worth of Armenian goods entered the U.S. under the GSP duty-free code, accounting for 44.4% of its total exports to the U.S. During the first 11 months of 2003, \$20.6 million worth of Armenian goods (or 62% 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 67.7% increase over the same period in 2002.

AUSTRALIA

Australia does not currently appear on any of the USTR lists. 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

IIPA recommends that Azerbaijan remain on the Watch List, where it has remained since 2000. See IIPA's 2004 CIS report at <http://www.iipa.com/rbc/2004/2004SPEC301CIS.pdf>. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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 suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine, for much more serious piracy problems) be listed, and for filing purposes only, grouped them together 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's 2003 Announcement, which kept Azerbaijan on the Watch List, cited similar problems, noting "provisions under the Azerbaijani Criminal Code are minimal and contain a high threshold for the imposition of criminal penalties." Moreover, they are limited to copyright and patent violations, completely excluding neighboring rights violations, and do not provide *ex officio* authority.

BAHAMAS

The Bahamas is currently on the Special 301 Priority Watch List. 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.” We believe that OCR did not occur. In the 2003 301 announcement, USTR cited the same problems regarding compulsory licensing and Bahamas’ failure to act, and elevated the Bahamas to the Priority Watch List.

The Bahamas currently participates in the Caribbean Basin Initiative (CBI), and is also an eligible beneficiary country under the Caribbean Basin Trade Partnership Act (CBPTA). 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 2002, \$70.8 million worth of Bahamian goods entered the U.S. under the CBI, representing 15.4% of the Bahamas’ total exports to the U.S. During the first 11 months of 2003, \$79.7 million worth of Bahamian goods (or 18.7% of the Bahamas’ total exports to the U.S. from January to November) entered under the CBI, representing an increase of 24.8% from the same period in 2002.

BAHRAIN

Bahrain does not currently appear on any of the USTR lists. 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 2002, \$54.3 million worth of goods from Bahrain entered the United States under the GSP duty-free code, accounting for 13.7% of its total exports to the U.S. During the first 11 months of 2003, \$60.4 million worth of goods from Bahrain (or 17.1% of Bahrain’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 28.2% from the same period in 2002.

BELARUS

IIPA recommends that Belarus remain on the Watch List, where it has remained since 1999. See IIPA’s 2004 CIS country report at <http://www.iipa.com/rbc/2004/2004SPEC301CIS.pdf>. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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.” The USTR’s 2003 Special 301 Announcement expressed gratification that the Armita optical media plant was shut down and that the Geneva Phonograms Convention had entered into force in Belarus. USTR also, however, restated numerous concerns from the 2001-2002 Announcements, as well as the Interior Ministry’s comments that it does not intend to take action to end retail piracy of optical media. Belarus therefore remained on the Watch List in 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, 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

IIPA recommends that Bolivia remain on the Watch List, where it has been since 1999. See IIPA’s 2004 Bolivia country report at <http://www.iipa.com/rbc/2004/2004SPEC301BOLIVIA.pdf>. 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.” The USTR 2003 Special 301 Announcement also kept Bolivia on the Watch List, noting “efforts to amend its copyright law have languished,” and adding “the government has not taken significant steps toward legalizing the use of its own software.”

In IIPA’s 2004 report, IIPA also recommends that if the requisite improvements in Bolivian law and copyright enforcement are not forthcoming, IIPA will request that the U.S. government initiate a review of Bolivia’s eligibility to obtain trade benefits under the Generalized System of Preferences and the Andean Trade Preferences Act. In 1995, IIPA also requested that USTR initiate investigations of Bolivia’s

copyright practices under the statutory provisions of the GSP and ATPA programs, both of which include discretionary criteria that the country provide “adequate and effective” copyright protection. IIPA never received notice of any formal action taken on its 1995 GSP and ATPA petitions, and thus concluded that they were denied. In 2002, \$31.5 million worth of goods from Bolivia entered the U.S. under the duty-free GSP code, accounting for 19.7% of its total exports to the U.S. Another \$32.6 million worth of Bolivia’s exports to the U.S. received benefits under the ATPA program, accounting for 23% of its total exports to the U.S. that year. During the first 11 months of 2003, \$7.8 million worth of Bolivian goods (or 4.7% 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 74.5% decrease over the same period in the previous year. Another \$85 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2003, representing an increase of 159.3% from the same period in 2002.

BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina have never appeared on a USTR Special 301 list. This year, in its Special Mention section http://www.iipa.com/rbc/2004/2004SPEC301BOS_HERZ.pdf, IIPA highlights certain legislative and enforcement deficiencies which adversely affect the business software and music industries.

BRAZIL

IIPA recommends that Brazil stay on the Priority Watch List, to which it was elevated in 2002. See IIPA’s 2004 Brazil country report at <http://www.iipa.com/rbc/2004/2004SPEC301BRAZIL.pdf>. 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 “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.” The USTR’s 2003 Special 301 Announcement commented on the continued lack of enforcement actions, noting “very few prosecutions and deterrent convictions result from raids.” Brazil therefore remained on the Priority Watch List.

IIPA’s dissatisfaction with the lack of progress being made by Brazil to enforce its copyright law led IIPA to file a petition with USTR in August 2002, 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, and hearings were held in March 2001 and October 2003. The investigation remains underway. In 2002, \$2.1 billion worth of goods from Brazil entered the United States under the duty-free GSP code, accounting for 13.6% of its total exports to the U.S. During the first 11 months of 2003, \$2.3 billion worth of Brazilian goods (or 14% 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 17.5% increase over the same period in 2002.

BULGARIA

IIPA recommends that Bulgaria be placed on the Priority Watch List. See IIPA’s 2004 Bulgaria country report at <http://www.iipa.com/rbc/2004/2004SPEC301BULGARIA.pdf>. Bulgaria does not currently appear on any of the USTR lists, though there was much engagement under Special 301 in the mid-1990s. 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." Despite IIPA's request to add Bulgaria to the Watch List in 2003, USTR choose to keep Bulgaria off the lists, noting again that increased piracy and revisions to CD planting licensing laws may be being revised to undermine their effectiveness.

In terms of GSP, in 2002, \$30.2 million worth of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 8.6% of its total exports to the U.S. During the first 11 months of 2003, \$37.4 million worth of Bulgarian goods (or 9.3% 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 44.2% increase over the same period in 2002.

CANADA

USTR has kept Canada on the Watch List since 1995 for a variety of copyright and patent concerns as well as poor border enforcement. This year, in its Special Mention section (<http://www.iipa.com/rbc/2004/2004SPEC301CANADA.pdf>), IIPA highlights the importance placed on closely monitoring Canada's ongoing copyright reform efforts and its glacial progress toward implementing the WIPO internet treaties.

CAMBODIA

Cambodia has never appeared on a USTR Special 301 list. In its 2003 submission, IIPA noted Cambodia as a Special Mention country, citing concerns over migration of optical disc plants. This year, in its Special Mention section (<http://www.iipa.com/rbc/2004/2004SPEC301CAMBODIA.pdf>), IIPA highlights certain legislative and enforcement deficiencies, particularly the lack of an optical disc regulation, which, if passed, would help insulate Cambodia from potential migration of optical disc plants from neighboring countries.

CHILE

IIPA recommends that Chile remain on the Watch List, where it has been since 1991. See IIPA's 2004 Chile country report at <http://www.iipa.com/rbc/2004/2004SPEC301CHILE.pdf>. In 2001, 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. USTR's 2003 Special 301 Announcement retained Chile on the Watch List, even after the Chile FTA negotiations were announced.

The U.S.-Chile FTA entered into effect on January 1, 2004. For years, Chile participated in the Generalized System of Preferences (GSP) program, a trade program that offers preferential trade benefits to eligible beneficiary countries and includes and IPR discretionary criteria for eligibility. In 2002, \$512.7 million worth of Chilean imports to the United States benefited from the GSP program, accounting for 14.4% of Chile's total exports to the U.S. During the first 11 months of 2003, \$475 million worth of Chilean imports to the United States benefited from the GSP program, or 13.2% of Chile's total exports to the U.S. between January and November, representing a 2.8% increase over the same period in 2002.

COLOMBIA

IIPA recommends that Colombia be elevated to the Priority Watch List in 2004. See IIPA's 2004 Colombia country report at <http://www.iipa.com/rbc/2004/2004SPEC301COLOMBIA.pdf>. Between 1989 and 2001, Colombia was on the Special 301 Watch List 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 against foreign content." Because of the need for the Colombian government to license pay-TV operators and improve enforcement efforts, IIPA recommended that Colombia be elevated to the Priority Watch List in 1998. In 1998, 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 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." In 2002, Colombia passed Decree 2085 to implement Article 39.3 of the TRIPS Agreement. Despite continued high levels of piracy (especially in the home video market), USTR noted Colombia's exemplary progress in the area of data protection, and the 2003 USTR Special 301 Announcement downgraded Colombia from the Priority Watch List to the Watch List.

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 2002, \$204.2 million worth of Colombian goods entered the United States under the GSP program, accounting for 3.8% of its total exports to the U.S. \$404 million worth of Colombian goods entered the U.S. under the ATPA program, accounting for 7.5% of its total exports to the U.S. During the first 11 months of 2003, \$148.4 million worth of Colombian goods (or 2.5% 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 16.2% decrease over the same period in the previous year. \$2.7 billion worth of Colombian goods entered the U.S. under the ATPA program for the same period, accounting for a 989% increase from the prior year.

COMMONWEALTH OF INDEPENDENT STATES (CIS)

The CIS, as a whole, no longer appears on any USTR lists. 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. See IIPA's 2004 CIS country report at <http://www.iipa.com/rbc/2004/2004SPEC301CIS.pdf>. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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 Kazakhstan or Uzbekistan. On September 3, 2003, USTR announced it had terminated GSP review of Armenia. 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

IIPA highlights copyright concerns in Costa Rica in its Special Mention section this year. See IIPA's 2004 Costa Rica country report at <http://www.iipa.com/rbc/2004/2004SPEC301COSTARICA.pdf>.

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 were 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 their 2003 Special 301 Announcement, however, USTR pointed out several deficiencies, including "two amendments to improve penalties and enforcement infrastructures [that are] pending and an executive decree on data exclusivity [that] has yet to be signed." These failures, along with other problems such as delays in judicial proceedings and lack of official investigators, necessitated Costa Rica's continued placement on the Watch List.

In 2002, \$13.2 million worth of Costa Rican goods entered the U.S. under the GSP, accounting for 0.4% of its total exports to the U.S. Under the CBI, Costa Rica had \$660 million worth of goods enter the U.S. in 2002, accounting for 21% of its total exports to the U.S. In 2002, \$494.2 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2003, \$389 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2003, \$49.4 million worth of Costa Rican goods (or 1.6% 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 322% increase from the same period in 2002. During the first 11 months of 2003, \$609.2 million worth of Costa Rican goods entered the U.S. under the CBI, representing an increase of 0.2% from the same period in 2002.

CROATIA

Croatia is currently on the Watch 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. In its 2003 Special 301 Report, USTR noted that "Croatia's otherwise strong protection and enforcement of intellectual property rights . . . is undermined by inadequate protections in the patent area and delayed judicial decision-making." They urged Croatia to ratify and implement the 1998 bilateral Memorandum of Understanding Concerning Intellectual Property Rights and to maintain criminal copyright enforcement. In the meantime, Croatia was placed on the Watch List.

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 2002, \$36.2 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 25% of its total exports to the U.S.). During the first 11 months of 2003, \$61 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 36.2% of its total imports from January to November), representing a 94% increase over the same period from the prior year.

CYPRUS

Cyprus does not currently appear on any of the USTR lists. 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

The Czech Republic does not currently appear on any of the USTR lists. 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 and 2003.

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 2002, \$299.2 million worth of Czech goods entered the United States under the duty-free GSP code, accounting for 24.3% of its total exports to the U.S. During the first 11 months of 2003, \$263.8 million worth of Czech goods (or 20.8% 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 2.8% decrease from the same period in 2002.

DOMINICAN REPUBLIC

IIPA recommends that the Dominican Republic be elevated to the Priority Watch List. See IIPA’s 2004 Dominican Republic country report at <http://www.iipa.com/rbc/2004/2004SPEC301DOMREP.pdf>. The Dominican Republic is currently on the Watch List, to where it was downgraded in 2003 from the Priority Watch List.

Special 301 is not the only trade forum in which the copyright industries have engaged the Dominican Republic. 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 and again in October 2003. The review remains ongoing. In fact, the current review is the second GSP IPR review brought by the copyright industry. In June 1992, the Motion Picture Association (MPA) filed a GSP petition 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.

With respect to Special 301 placements, 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.” USTR’s 2003 Special 301 Announcement revealed that the Government of the Dominican Republic (GODR) took several important steps in 2002-2003. As part of its aggressive campaign against piracy, the GODR “initiated inspections of two television stations and submitted evidence of piracy to the Attorney General for prosecution, and initiated action against a third station.” Furthermore, GODR appointed an intellectual property rights committee to review the patent law and bring it into compliance with TRIPS. The changes made by the committee were then announced in an executive decree. These steps were sufficiently progressive for USTR to move the Dominican Republic from the Priority Watch List to the Watch List.

Regarding preferential trade benefits, in 2002, \$16.4 million worth of Dominican goods entered the U.S. under the duty-free GSP code, accounting for 0.4% of its total exports to the U.S. During the first 11 months of 2003, \$66.1 million worth of Dominican goods (or 1.6% 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 366.1% increase from the same period in the prior year. In 2002, \$895 million entered under the CBI, accounting for 21.5% of its total exports to the U.S. During the first 11 months of 2003, \$777.3 million worth of Dominican goods entered under the CBI, representing a 6% decrease over the same period in the prior year. In 2002, \$1.8 billion worth of Dominican goods entered under the CBTPA. During the first 11 months of 2003, \$1.6 billion worth of Dominican goods entered under the CBTPA, representing a 1.9% decrease over the same period in the prior year.

ECUADOR

IIPA recommends that Ecuador stay on the Watch List, where it was placed in 2003. See IIPA’s 2004 Special 301 Ecuador country report at <http://www.iipa.com/rbc/2004/2004SPEC301ECUADOR.pdf>. 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. The 2003 USTR Special 301 Announcement noted the “lessening of intellectual property protection in Ecuador, with a decrease in enforcement efforts.” Most of USTR’s concerns were directed

at patent issues, but one major copyright problem highlighted involved a poorly drafted provision in the Education Law appears to allow free software to educational institutions. Due to their concerns, USTR moved Ecuador back to the Watch List in 2003.

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 2002, \$74.6 million worth of goods from Ecuador entered the U.S. under the duty-free GSP code, accounting for 3.5% of its total exports to the U.S. During the first 11 months of 2003, \$44 million worth of Ecuadorian goods (or 1.8% 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 36.9% decrease over the same period in the previous year. In 2002, \$177.7 million worth of goods entered under ATPA, accounting for 8.4% of its total exports to the U.S. In the first 11 months of 2003, \$1.4 billion entered under the ATPA, representing a 1,914% increase from the same period in 2002.

EGYPT

IIPA recommends that Egypt be elevated to the Priority Watch List. See IIPA’s 2004 Egypt country report at <http://www.iipa.com/rbc/2004/2004SPEC301EGYPT.pdf>. Egypt is currently on the Watch List. 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 deficiencies 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 and 2003, IIPA recommended that Egypt remain on the Priority Watch List, citing deficiencies in the draft copyright and patent laws, as well as lax enforcement and unchecked copyright piracy. In 2002, Egypt remained on the Priority Watch List, but in the 2003 USTR Special 301 Announcement, emphasized Egypt was lowered to the Watch List for passage of a new IPR Code and improvements in patent protection (although USTR noted the new IPR Code contains many “TRIPS inconsistencies” USTR found that Egypt also “made some progress in combating piracy of records and music, books and business software applications.”

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 2002,

\$23.5 million worth of Egyptian goods entered the U.S. under the duty-free GSP code, accounting for 1.8% of its total exports to the U.S. During the first 11 months of 2003, \$28.5 million worth of Egyptian goods (or 2.7% 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 33.3% increase over the same period in 2002.

EL SALVADOR

El Salvador does not currently appear on any of the USTR lists. 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 terms of preferential trade benefits, in 2002, \$12.1 million worth of Salvadoran goods entered the U.S. under the duty-free GSP code, accounting for 0.6% of its total exports to the U.S. During the first 11 months of 2003, \$15.4 million worth of Salvadoran goods (or 0.8% 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 50.2% decrease over the same period in the previous year. In 2002, \$85.9 million worth of Salvadoran goods entered the U.S. under the CBI. During the first 11 months of 2003, \$68.5 million worth of Salvadoran goods entered the U.S. under the CBI, representing a 15.3% decrease over the same period in the previous year. In 2002, \$1.1 billion worth of Salvadoran goods entered the U.S. under the CBTPA. During the first 11 months of 2003, \$1 billion worth of Salvadoran goods entered the U.S. under the CBTPA, representing a 5.4% increase from the same period in the previous year.

ESTONIA

IIPA recommends that Estonia be added to the Watch List in 2004. See IIPA's 2004 Estonia country report at <http://www.iipa.com/rbc/2004/2004SPEC301ESTONIA.pdf>. Estonia does not currently appear on any of the USTR lists. 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 and 2003, 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 2002, \$15.3 million worth of Estonian imports to the United States benefited from the GSP program, accounting for 8.9% of its total exports to the U.S. During the first 11 months of 2003, \$27.9 million worth of Estonian goods (or 17.7% 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 105% increase over the same period in the previous year.

GEORGIA

IIPA highlights copyright concerns in Georgia in its Special Mention section this year. See IIPA’s 2004 Georgia country report at <http://www.iipa.com/rbc/2004/2004SPEC301GEORGIA.pdf>. Georgia does not currently appear on any of the USTR lists. 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 ten of the CIS countries be placed on the Special 301 Watch List Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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 2002, \$7.3 million worth of Georgian goods entered the U.S. (or 43% of Georgia’s total exports to the U.S.). During the first 11 months of 2003, \$10.6 million worth of Georgian goods (or 17.7% 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 45.2% increase over the same period a year before.

GERMANY

Germany does not currently appear on any of the USTR lists. 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 'de-scrambling' devices used to steal encrypted satellite, cable and broadcast transmissions, particularly of U.S. motion pictures." The IIPA recommended in our 1999 Special 301 Report that Germany be kept on the Other Observations list. Germany has not appeared on any USTR list since 1998.

GREECE

Greece does not currently appear on any of the USTR lists. 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

IIPA highlights copyright concerns in Guatemala in its Special Mention section this year. See IIPA's 2004 Guatemala country report at <http://www.iipa.com/rbc/2004/2004GUATEMALA.pdf>. Guatemala has been on the Watch List since 2001. 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. The 2003 USTR Special 301 Announcement retained Guatemala on the Watch List, noting that decreased criminal penalties and ineffective legal remedies in civil actions remain serious problems.

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 Guatemala's 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, likely because Congress had 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 2002, \$20.4 million worth of Guatemalan goods entered the U.S. under the duty-free GSP code, accounting for 0.7% of its total exports to the U.S. During the first 11 months of 2003, \$38.4 million worth of Guatemalan goods (or 1.4% 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 129.5% increase from the same period in the previous year. In 2002, \$344.4 million worth of Guatemalan goods entered the U.S. under the CBI, accounting for 12.4% of its total exports to the U.S. During the first 11 months of 2003, \$274.2 million worth of Guatemalan goods entered under the CBI, representing an 8.8%

decrease (or 10.2% of Guatemala's total exports to the U.S. from January to November). In 2002, \$699.7 million worth of Guatemalan goods entered under the CBTPA, accounting for 25.1% of its total exports to the U.S. During the first 11 months of 2003, \$699.1 million entered under the CBTPA, representing 25.9% of Guatemala's total exports to the U.S. for the same period in 2002.

HONG KONG

IIPA highlights copyright concerns in Hong Kong in its Special Mention section this year. See IIPA's 2004 Hong Kong country report at <http://www.iipa.com/rbc/2004/2004SPEC301HONGKONG.pdf>. Hong Kong does not currently appear on any of the USTR lists. 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

IIPA recommends that Hungary stay on the Watch List, where it was placed in 2003 by USTR. See IIPA's 2004 Hungary country report at <http://www.iipa.com/rbc/2004/2004SPEC301HUNGARY.pdf>. 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. USTR’s 2003 Special 301 Announcement noted Hungary’s positive steps, primarily in the area of patent protection, but also that the country “has made important strides in modernizing its legal regime for copyright over the last several years, including extensive revisions to its criminal code.” This progress allowed Hungary to move from the Priority Watch List to the Watch List in 2003.

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 2002, \$366.3 million worth of Hungarian goods entered the U.S. under the duty-free GSP code, accounting for 13.9% of its total U.S. imports. During the first 11 months of 2003, \$366.2 million worth of Hungarian goods (or 14.6% 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 7.1% increase over the same period in 2002.

INDIA

IIPA recommends that India remain on the Priority Watch List. See IIPA’s 2004 India country report at <http://www.iipa.com/rbc/2004/2004SPEC301/INDIA.pdf>. India has been on the Priority Watch List since 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.” 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's 2003 Special 301 Announcement, noted little change, commenting, "piracy of copyrighted works remains a problem . . . and protection of foreign trademarks remains difficult." Export of counterfeit goods to other countries was also cited as a major problem. These deficiencies necessitated India's continued placement on the Priority Watch List.

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 2002, \$2 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 17.3% of its total exports to the U.S. During the first 11 months of 2003, \$2.4 billion worth of Indian goods (or 20% 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 30.8% increase over the same period in 2002.

INDONESIA

IIPA recommends that Indonesia stay on the Priority Watch List, where it has remained since 2001. See IIPA's 2004 Indonesia country report at <http://www.iipa.com/rbc/2004/2004SPEC301INDONESIA.pdf>. 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. USTR kept Indonesia on the Priority Watch List, noting "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." In 2003, IIPA once again recommended, and USTR agreed, that Indonesia should remain on the Priority Watch List. In its announcement, USTR noted, "overall protection of intellectual property rights remains weak."

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 2002, \$1.5 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 15.7% of its total exports to the U.S. During the first 11 months of 2003, \$1.3 billion worth of Indonesian goods (or 14.3% 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 9.8% decrease over the same period in 2002.

IRELAND

Ireland does not currently appear on any of the USTR lists. 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 recommends that Israel be elevated to the Priority Watch List. See IIPA's 2004 Israel country report at <http://www.iipa.com/rbc/2004/2004SPEC301ISRAEL.pdf>. Israel is currently on the Watch List. 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 optical disc 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 optical discs, videos and software, IIPA recommended that USTR place Israel on the Priority Watch List. USTR agreed, noting in its April 2001 Special 301 Announcement that "Israel's domestic market for copyright goods remains dominated by pirated music, video and software CDs," and "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." In 2003, IIPA once again recommended that Israel remain on the Priority Watch List due to "its failure to criminalize and enforce against the unlicensed use of software in a business setting . . . in violation of TRIPS," while also noting that piratical production of optical discs for export had abated. USTR lowered Israel to the Watch List, noting passage of a law that

increased criminal penalties for piracy and strengthened the ability of Israeli authorities and courts to prosecute and punish copyright crimes.

ITALY

IIPA recommends that Italy remain on the Watch List, where it has been since 2001. See IIPA's 2004 Italy country report at <http://www.iipa.com/rbc/2004/2004SPEC301ITALY.pdf>. 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." In its 2003 Special 301 Announcement, USTR described further problems with Italy's new laws: "Notwithstanding new government procedures to exempt business software that were enacted on January 25, 2003 . . . Italy continues to enforce a problematic program requiring copyright owners to pay for and apply a government-approved sticker on genuine copyrighted works." Italy therefore remained on the Watch List in 2003.

JAMAICA

Jamaica has been on the Watch List since 1998. The 2003 USTR Special 301 Announcement stated that "Jamaica's trademark and copyright regimes are generally consistent with international standards and enforcement efforts over the last year have been commendable." It remains on the Watch List, however, because of lack of parliamentary action to bring patent and industrial design laws into conformity with international standards.

Jamaica 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 2002, \$1 million worth of Jamaican imports to the United States benefited from the GSP program, accounting for 0.3% of its total exports to the U.S. During the first 11 months of 2003, \$1.7 million worth of Jamaican goods (or 0.5% of Jamaica's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 91.3% increase from the same period in the previous year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$84.2 million worth of Jamaican goods entered the U.S., accounting for 22.6% of total exports to the U.S. in 2002. During the first 11 months of 2003, \$77 million worth of Panamanian goods (or 20.3% of Panama's total exports to the U.S. from January to November) entered under the CBI, representing a 2% increase over the same period in the previous year. Under the Caribbean Basin Trade Partnership Act (CBTPA), which has IPR criteria similar to CBI and GSP, \$109.9 million worth of Jamaican goods entered

the U.S. in 2002. During the first 11 months of 2003, \$85.1 million worth of Jamaican goods (or 22.5% of Jamaica's total exports to the U.S. from January to November) entered the U.S. under the CBTPA.

JORDAN

Jordan does not currently appear on any of the USTR lists. 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 2002, \$6 million worth of Jordan's imports to the United States benefited from the GSP program, accounting for 1.5% of its total exports to the U.S. During the first 11 months of 2003, \$26.9 million worth of Jordanian goods (or 4.4% of Jordan's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 428.6% from the same period in 2002.

KAZAKHSTAN

IIPA recommends that Kazakhstan remain on the Watch List, where it has been since 2000. See IIPA's 2004 Kazakhstan country report at <http://www.iipa.com/rbc/2004/2004SPEC301KAZAKHSTAN.pdf>. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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 again held hearings with respect to Kazakhstan on October 7, 2003. The U.S. government has not yet decided whether to withdraw or to suspend GSP benefits in Kazakhstan. In 2002, \$166 million worth of Kazakhstan's imports to the United States benefited from the GSP program, accounting for 49.7% of its total exports to the U.S. During the first 11 months of 2003, \$147.9 million worth of Kazakh goods (or 42.2% 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 4.9% decrease from the previous 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. The 2003 USTR Special 301 Announcement took a similar view and maintained Kazakhstan's status on the Watch List, pointing out their lack of full retroactive protection for works or sound recordings, weak enforcement, and potentially non-deterrent Criminal Code provisions with their very high burden of proof.

KUWAIT

IIPA recommends that Kuwait be elevated to the Priority Watch List. See IIPA's 2004 Kuwait country report at <http://www.iipa.com/rbc/2004/2004SPEC301KUWAIT.pdf>. Kuwait has been on the Watch List since 2000. 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 and 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. In 2000, IIPA recommended keeping Kuwait on the Priority Watch List since the law passed was TRIPS-incompatible and the government took no enforcement actions. USTR decided to lower Kuwait to the Watch List in 2000 in recognition of passage of the copyright law. In 2001 through 2003, IIPA has never wavered in recommending that Kuwait be elevated to the Priority Watch List, since the 1999 law is TRIPS-deficient, enforcement efforts have never taken off, and piracy rates remain the highest in the region. USTR, while noting "continuing problems with copyright piracy" (2002) and that Kuwait needed "to pass long-promised amendments to Kuwait's 1999 Copyright Law, increase[e] the effectiveness of enforcement procedures, strengthen[e] an existing interagency process, and improve[e] judicial capacity to penalize present offenders and deter future ones" (2003) has kept Kuwait on the Watch List.

KYRGYZ REPUBLIC

IIPA highlights copyright concerns in the Kyrgyz Republic in its Special Mention section this year. See IIPA's 2004 Kyrgyz Republic country report at <http://www.iipa.com/rbc/2004/2004SPEC301KYRGYZREPUBLIC.pdf>. The Kyrgyz Republic does not currently appear on any of the USTR lists. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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 2002, \$1 million in Kyrgyz imports to the United States benefited from the GSP program, accounting for 21.1% of its total exports to the U.S. During the first 11 months of 2003, \$780,568 of Kyrgyz goods (or 8.7% 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 18.4% increase over the same period in 2002.

LAOS

Laos has never appeared on a USTR list. In its 2003 submission, IIPA noted Laos as a Special Mention country, citing optical disc piracy concerns. This year in its Special Mention section (<http://www.iipa.com/rbc/2004/2004SPEC301LAOS.pdf>), IIPA highlights legislative and enforcement deficiencies, particularly the lack of an optical disc regulation, which, if passed, would help insulate Laos from potential migration of optical disc plants from neighboring countries.

LATVIA

IIPA recommends that Latvia remain on the Watch List, where it has been since 2000. See IIPA’s 2004 Latvia country report at <http://www.iipa.com/rbc/2004/2004SPEC301LATVIA.pdf>. 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. The USTR 2003 Special 301 Announcement noted that there was some positive movement in 2002, including raids on sellers of pirated optical media. Latvia stayed on the Watch List, however, because of the continuing transshipments and the fact that “police, customs officials, prosecutors and judicial authorities have not placed sufficient emphasis on combating 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 2002, \$11.2 million worth of Latvia’s imports to the United States benefited from the GSP program, accounting for 5.8% of its total exports to the U.S. During the first 11 months of 2003, \$10.3 million worth of Latvian goods (or 2.8% 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 0.7% decrease over the same period in the previous year.

LEBANON

IIPA recommends that Lebanon remain on the Priority Watch List, where it has been since 2001. See IIPA’s 2004 Lebanon country report at <http://www.iipa.com/rbc/2004/2004SPEC301LEBANON.pdf>. 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 [to] 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 accepted this request on September 3, 2003, and the review remains ongoing. In 2002 and 2003, IIPA continued to recommend that Lebanon remain on the Priority Watch List (and in 2002, 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 did not accept the recommendation for the OCR). 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.” USTR also retained Lebanon on the Priority Watch List in 2003, noting that while “some raids of pirate stores and operations occurred in 2002, leading to the first sentencing of a software pirate,” otherwise there was very little progress; USTR also noted an “overly broad software exception for certain educational uses.”

On September 3, 2003, the United States Trade Representative “accepted for review” a Petition filed by the IIPA 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 Petition noted three major deficiencies in Lebanon’s

protection of copyright that caused economic harm to U.S. right holders that result in Lebanon failing to meet the GSP standard of providing “adequate and effective” copyright protection in practice: (1) deficiencies in the copyright law in Lebanon that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators, making protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon that are inadequate and ineffective.

USTR, in its 2003 Special 301 decision in May, reiterated the concern of the U.S. government regarding “Lebanon’s severe copyright piracy problem and the lack of a comprehensive government commitment to eliminate piracy and foster legitimate business.” The decision continues:

Despite the entry into force in 1999 of a new copyright law, there has been little action by Lebanon against piracy. Some raids of pirate store and operations occurred in 2002, leading to the first sentencing of a software pirate and financial penalties in other cases. However, pervasive cable piracy continues to undermine legitimate theatrical, video, and television service providers. Overall Lebanon had made little progress in 2002 in addressing its significant IPR deficiencies. The United States urges the Lebanese Government to press forward with its recent proposal to draft a law regulating the cable television industry and to mount an aggressive campaign against pirates. End-user piracy of computer software is widespread among large companies, banks, trading companies, and most government ministries. Also troubling is an overly broad software exception for certain educational uses in the new copyright law that seriously undermines the viability of this market for legitimate products. Book piracy also remains a serious problem...A committed and vigorous program to enforcement intellectual property rights, particularly copyright protection, is essential to the success of the Lebanese Government’s efforts to reform its economy, increase trade and foreign direct investment and prepare for accession to the WTO.

If Lebanon does not take concrete steps toward eradicating piracy in 2004, its trade benefits under GSP could be suspended. During the first 11 months of 2003, Lebanon imported almost \$28.2 million of products into the United States without duty, or almost 33.6% of its total imports into the U.S.¹

LITHUANIA

IIPA recommends that Lithuania stay on the Watch List, where it has been since 2000. See IIPA’s 2004 Lithuania country report at <http://www.iipa.com/rbc/2004/2004SPEC301LITHUANIA.pdf>. 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

¹ During 2002, Lebanon imported almost \$22.7 million of products into the United States without duty, or almost 37.7% of its total imports into the U.S.

copyright materials, including large volumes of optical media products.” The USTR 2003 Special 301 Announcement also cites the transshipment problem, and noted that the lack of adequate and effective enforcement continues to be the most persistent IPR problem in Lithuania, and kept it on the Watch List in 2003.

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 2002, \$4.3 million worth of Lithuania’s imports to the United States benefited from the GSP program, accounting for 1.4% of its total exports to the U.S. During the first 11 months of 2003, \$5.5 million worth of Lithuanian goods (or 1.6% 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 52.4% increase from the same period in 2002.

MACAU

Macau does not currently appear on any of the USTR lists. 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 recommends that Malaysia remain on the Watch List (where it has remained since 2002), and that an out-of-cycle review (OCR) be conducted. See IIPA’s 2004 Malaysia country report at <http://www.iipa.com/rbc/2004/2004SPEC301MALAYSIA.pdf>. 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.

In 2001, 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." USTR continued: "[w]ithout criminal prosecutions and the imposition of serious criminal sentences, there is no true deterrence to piracy in Malaysia." In 2003, IIPA recommended that Malaysia be retained on the Watch List, and that an out-of-cycle review be conducted, noting "lack of deterrent sentencing results in organized criminals remaining free to produce and export product with impunity around the globe." The USTR 2003 Special 301 Announcement, keeping Malaysia on the Watch List in 2003, noted that "[p]rosecution is a weak link, and the judicial process remains slow," while also noting that the Malaysian government intensified anti-piracy efforts in 2002, leading to closures of some unlicensed manufacturers of optical discs.

MEXICO

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, judicial reform, tax inspections, border enforcement, governmental legalization of business software, and further copyright law reform efforts, and related IPR matters. High-level government engagement, by both governments, on copyright matters is required, and IIPA requested such in public letters sent to the U.S. government in March 2002 and April 2003.

Mexico did not appear on any Special 301 lists since 1999. 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." 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." In its 2003 Special 301 Announcement, USTR decided to add Mexico to the Watch List, citing "lax enforcement against copyright and piracy and trademark counterfeiting," difficulties for foreign firms attempting to enforce trademark rights in Mexico, the failure of raids to lead to prosecutions and convictions and copyright amendments that do not meet international obligations.

MOLDOVA

IIPA highlights copyright concerns in Moldova in its Special Mention section this year. See IIPA's 2004 Moldova country report at <http://www.iipa.com/rbc/2004/2004SPEC301MOLDOVA.pdf>. Moldova does not currently appear on any of the USTR lists. 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 ten of the CIS countries be placed on the Special 301 Watch List

(Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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 2002, \$100,773 worth of Moldavian imports to the United States benefited from the GSP program, representing 0.3% of its total exports to the U.S. During the first 11 months of 2003, \$439,402 worth of Moldavian goods (or 1.1% 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 increase of 336% over the same period in 2002.

NEW ZEALAND

New Zealand does not currently appear on any of the USTR lists. 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

Nicaragua does not currently appear on any of the USTR lists. 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.

As a beneficiary country of the Caribbean Basin Initiative, Nicaragua must 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 2002, \$85.1 million worth of Nicaraguan imports to the United States benefited from the CBI program, accounting for 12.6% of its total exports to the U.S. During the first 11 months of 2003, \$84.8 million worth of Nicaraguan goods entered the U.S. under the CBI,

representing a 9.7% increase from the same period last year. Nicaragua also receives benefits under the Caribbean Basin Trade Partnership Act, which contains very high levels of IPR obligations. In 2002, \$127.7 million worth of Nicaraguan goods benefited from the CBTPA program, accounting for 18.9% of Nicaragua's total exports to the U.S. During the first 11 months of 2003, \$135.2 million worth of Nicaraguan goods benefited from the CBTPA program.

OMAN

Oman does not currently appear on any of the USTR lists. 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 2002, \$30.2 million worth of Oman's imports to the United States benefited from the GSP program, accounting for 7.8% of its total exports to the U.S. During the first 11 months of 2003, \$37.3 million worth of Oman's goods (or 6.5% of Oman's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 38.6% from the same period in 2002.

PAKISTAN

IIPA recommends that Pakistan be designated as a Priority Foreign Country. See IIPA's 2004 Pakistan country report at <http://www.iipa.com/rbc/2004/2004SPEC301PAKISTAN.pdf>. 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. IIPA's petition remains pending. In 2002 and again in 2003, IIPA recommended that Pakistan be elevated to the Priority Watch List, noting the alarming rise of pirate optical disc production. USTR, in keeping Pakistan on the Watch

List both years, recognized Pakistan's position as "one of the world's largest exporters of pirate CDs and optical media" (2002). USTR's 2003 Special 301 Announcement described Pakistan as the "fourth largest source of counterfeit and piratical goods seized by the U.S. Customs Service" in 2002, and notes again the substantial increase in optical media production in 2002.

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 \$89.9 million worth of products into the United States without duty in 2002 (3.9% of its total exports to the U.S.), and \$84.6 million worth of products (or 3.6% 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 2003.

PALESTINIAN AUTHORITY

The Palestinian Authority does not currently appear on any of the USTR lists. 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 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 2002, \$142,124 of products imported from the West Bank benefited from the GSP program, representing 54.8% of the Palestinian Authority's total exports to the U.S. During the first 11 months of 2003, \$254,551 of products (or 59.2% 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 90.4% increase over the same period in 2002.

PANAMA

Panama does not currently appear on any of the USTR lists. 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 amid 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.

In 2002, \$2.5 million worth of Panamanian imports to the United States benefited from the GSP program, accounting for 0.8% of its total exports to the U.S. During the first 11 months of 2003, \$4.9 million worth of Panamanian goods (or 1.9% 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 142.2% increase from the same period in the previous year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$37.7 million worth of Panamanian goods entered the U.S., accounting for 12.8% of total exports to the U.S. in 2002. During the first 11 months of 2003, \$32 million worth of Panamanian goods (or 12.2% of Panama's total exports to the U.S. from January to November) entered under the CBI, representing a 11.5% decrease over the same period in the previous year. Under the Caribbean Basin Trade Partnership Act (CBTPA), which has IPR criteria similar to CBI and GSP, \$3.9 million worth of Panamanian goods entered the U.S. in 2002. During the first 11 months of 2003, \$3.5 million worth of Panamanian goods (or 1.3% of Panama's total exports to the U.S. from January to November) entered the U.S. under the CBTPA.

PARAGUAY

IIPA recommends that Paraguay continue to be subject to Section 306 monitoring, where it has been on the USTR 301 lists since 1999. See IIPA's 2004 Paraguay country report at <http://www.iipa.com/rbc/2004/2004SPEC301PARAGUAY.pdf>. The bilateral history of engagement between the U.S. and Paraguay has been a lengthy and intricate one. 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. The Memorandum of Understanding expired in January 2003, but USTR and Paraguay have agreed to extend its provisions until it can be renegotiated. The 2003 USTR Special 301 Announcement notes the lack of improvement in Paraguay, including “poor internal enforcement and weak border enforcement.” Paraguay therefore continues to be subject to Section 306 monitoring in 2003. In December 2003, a second IPR MOU was signed by both governments.

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 2002, \$12.2 million worth of Paraguayan imports to the United States benefited from the GSP program, accounting for 28.8% of its total exports to the U.S. During the first 11 months of 2003, \$14.4 million worth of Paraguayan goods (or 31.4% 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 25.7% increase from the same period last year.

PEOPLE’S REPUBLIC OF CHINA

IIPA recommends that China continue to be subject to Section 306 monitoring, as it has been since 1997. See IIPA’s 2004 People’s Republic of China country report at <http://www.iipa.com/rbc/2004/2004SPEC301CHINA.pdf>. 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. 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

IIPA recommends that Peru remain on the Watch List, where it has been since 2001. See IIPA's 2004 Peru country report at <http://www.iipa.com/rbc/2004/2004SPEC301PERU.pdf>. USTR first 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. USTR’s 2003 Special 301 Announcement noted that Peru “took some steps to destroy pirated and counterfeit products” in 2002, but “piracy rates for all copyright industries remained high, in particular for sound recordings.” Lack of prosecutions and deterrent sentences remain serious problems, so Peru remained on the Watch List in 2003.

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 2002, \$165.5 million worth of Peru’s imports to the United States benefited from the GSP program, accounting for 8.5% of its total exports to the U.S. During the first 11 months of 2003, \$100.3 million worth of Peruvian goods (or 4.7% 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 decrease of 36% over the same period in 2002. An additional \$381.8 million worth of Peruvian products benefited from the ATPA in 2002, accounting for 19.6% of total exports to the United States. In the first 11 months of 2003, an additional \$1.1 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 271% increase in ATPA benefits from the same period in 2002.

PHILIPPINES

IIPA recommends that the Philippines remain on the Priority Watch List, where it has been situated since 2001, and that an out-of-cycle review (OCR) be conducted. See IIPA’s 2004 Philippines country report at <http://www.iipa.com/rbc/2004/2004SPEC301PHILIPPINES.pdf>. 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 1998, IIPA, asking USTR to keep the Philippines on the Watch List, commended the government on the law, 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, and USTR agreed, to keep the Philippines on the Priority Watch List and conduct an out-of-cycle review (OCR) due to rampant pirate optical disc production and to review whether the Philippines had passed and implemented an optical disc law. In 2003, IIPA recommended, and USTR agreed, to keep the Philippines on the Priority Watch List. The 2003 USTR Special 301 Announcement noted that optical media piracy had increased to the point where the Philippines was a net exporter of pirated optical media.

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 2002, \$707.7 million worth of Philippine imports to the United States benefited from the GSP program, accounting for 6.5% of its total exports to the U.S. During the first 11 months of 2003, \$824.8 million worth of Philippine goods (or 8.9% of the Philippines’ total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 27.7% from the same period in 2002.

POLAND

IIPA recommends that Poland remain on the Priority Watch List and that an out-of-cycle review (OCR) be conducted later in 2004. See IIPA’s 2004 Poland country report at <http://www.iipa.com/rbc/2004/2004SPEC301POLAND.pdf>. To recap Poland’s Special 301 placement in recent years, in its 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. The 2003 USTR Special 301 Announcement commented that the situation in Poland (including the Warsaw Stadium market) has not changed, and placed Poland on the Priority Watch List.

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 2002, \$328.8 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 2003, \$334.1 million worth of Polish goods (or 27.9% of Poland'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 9.9% from the same period in 2002.

QATAR

Qatar does not currently appear on any of the USTR lists. 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

IIPA recommends that Romania stay on the Watch List, where it has been placed since 1999. See IIPA's 2004 Romania country report at <http://www.iipa.com/rbc/2004/2004SPEC301ROMANIA.pdf>. 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 has consistently agreed. Romania is making legal reforms, including its February 2001 deposit of the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT). The USTR 2003 Special 301 Announcement noted that Romania "increased raids and seizures of materials in 2002," but "poor border enforcement, the low priority level given to piracy . . . and the lack of resources dedicated to the issue" are continuing problems.

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 2002,

\$102.8 million worth of Romania's imports to the United States benefited from the GSP program, accounting for 14.8% of its total exports to the U.S. During the first 11 months of 2003, \$103 million worth of Romanian goods (or 15.3% 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 7.8% increase over the same period in 2002.

RUSSIA

IIPA recommends that Russia remain on the Priority Watch List, a status it has held since 1997, and that an out-of-cycle review (OCR) be conducted. See IIPA's 2004 Russia country report at <http://www.iipa.com/rbc/2004/2004SPEC301RUSSIA.pdf>. 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. The USTR 2003 Special 301 Report notes that Russia made considerable progress over the last year in revising intellectual property laws, but still needs amendments to the copyright laws in order to be compliant with TRIPS. Increasing piracy of optical media and ineffective enforcement of intellectual property laws remain serious problems, so Russia was kept on the Priority Watch List in 2003.

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."² USTR also pointed to other problems such as weak enforcement and "[l]ack of an effective OD law." In 2002, \$380.7 million worth of Russia's imports to the United States benefited from the GSP program, accounting for 5.7% of its total exports to the U.S. During the first 11 months of 2003, \$376.6 million worth of Russian goods (or 4.9% 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 9.8% increase from the same period in 2002.

SAUDI ARABIA

IIPA recommends that Saudi Arabia remain on the Watch List where it has been since 1996, and that an out-of-cycle review (OCR) be conducted. See IIPA's 2004 Saudi Arabia country report at <http://www.iipa.com/rbc/2004/2004SPEC301SAUDIARABIA.pdf>. 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 and 2003, 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. In its 2003 Special 301 Announcement, USTR commented that "Saudi Arabia has made great strides in fighting copyright piracy . . . over the past year" and is working to revise its intellectual property laws, but "the United States remains concerned about continued high losses experienced by U.S. copyright . . . industries."

SERBIA AND MONTENEGRO

Serbia and Montenegro have never appeared on a USTR Special 301 list. This year, in its Special Mention section (http://www.iipa.com/rbc/2004/2004SPEC301SERB_MONT.pdf), IIPA highlights certain legislative and enforcement deficiencies, specifically with respect to the business software and recording industries.

SINGAPORE

IIPA highlights copyright concerns in Singapore in its Special Mention section this year. See IIPA's 2004 Singapore country report at <http://www.iipa.com/rbc/2004/2004SPEC301SINGAPORE.pdf>. Singapore

² 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.

does not currently appear on any of the USTR lists. 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.

SLOVAKIA

Slovakia is currently on the Watch List, where it has been since 2001. Slovakia was originally placed on the Watch List because of concerns in the area of patent protection. The 2003 USTR Special 301 Announcement also noted that “home CD-burning is on the rise and pirate CDs continue to be available on the public market in Eastern Slovakia.”

SOUTH AFRICA

South Africa does not currently appear on any of the USTR lists. 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 2002, \$553 million worth of South Africa’s exports to the United States benefited from the GSP program, accounting for 13.1% of its total exports to the U.S. During the first 11 months of 2003, \$610.7 million worth of South Africa’s exports to the United States (or 13.7% of South Africa’s total exports to the U.S. from January to November) benefited from the GSP program, representing an increase of 24.5% over the same period in 2002. South Africa also participates in the African Growth Opportunity Act (AGOA), another trade program which contains a basic intellectual property rights protection component. In 2002, \$789.6 million worth of South Africa’s exports to the United States benefited from the AGOA program, accounting for 18.6% of its total exports to the U.S. During the first 11 months of 2003, \$900.3 million worth of South Africa’s exports (or 20.2% of the country’s total exports to the U.S.) benefited from the AGOA program, representing a 25.6% increase over the same period in the previous year.

SOUTH KOREA

IIPA recommends that South Korea be elevated to the Priority Watch List, as opposed to its current status on the Watch List. See IIPA’s 2004 South Korea country report at <http://www.iipa.com/rbc/2004/2004SPEC301KOREA.pdf>. 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, and preparation of draft legislation on “exclusive transmission rights for sound recordings and performances.” USTR’s 2003 Special 301 Announcement revealed, however, that these steps fell short of the specific pledges the Korean government made to the United States to improve IPR protection and enforcement. In addition, new problems have arisen regarding “alleged infringement of a U.S. industry’s IP in the creation/promulgation of a new telecommunications standard (WIPI)” and “pirates’ ability to obtain rights to register and distribute U.S. films in the Korean market.” Other existing problems have yet to be resolved, including

“protection of temporary copies, reciprocity provisions regarding database protection, . . . *ex parte* relief, [and] the lack of full retroactive protection of pre-existing copyrighted works.” For 2003, South Korea was kept on the Watch List, but USTR outlined several areas in which the country must take action in order to avoid being elevated to the Priority Watch List. As a result, USTR announced that it would conduct an out-of-cycle review in the Fall. Having concluded the out-of-cycle review in December of 2003, USTR announced in January of 2004 that it had elevated South Korea to the Priority Watch List, noting that “growth of online music piracy has caused serious economic damage to both domestic and foreign recording companies, and continued piracy of U.S. motion pictures in Korea has resulted in millions of dollars in lost revenues for U.S. and Korean copyright holders.”

SPAIN

IIPA recommends that Spain be added to the Special 301 Watch List in 2004. See IIPA’s 2004 Spain country report at <http://www.iipa.com/rbc/2004/2004SPEC301SPAIN.pdf>. Spain does not currently appear on any USTR lists. Spain first 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. Though IIPA did not make any formal recommendation for Spain in 2002, it did note certain copyright issues in its Special 301 cover letter to USTR that year.

TAIWAN

IIPA recommends that Taiwan remain on the Priority Watch List, where it has been situated since 2003, and that an out-of-cycle review (OCR) be conducted. See IIPA’s 2004 Taiwan country report at <http://www.iipa.com/rbc/2004/2004SPEC301TAIWAN.pdf>. 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. The 2003 USTR Special 301 Announcement described the numerous steps Taiwan took in 2002 – their “Action Year for IPR.” Positive measures

included expanding an interagency task force to 220 people, opening warehouses to store seized pirated goods and manufacturing equipment, and introducing an amended copyright law to strengthen IPR protection and bring Taiwan into compliance with TRIPS and other international IPR standards. These steps, however, have not produced any noticeable results, and “piracy and counterfeiting levels remain unacceptably high.” USTR therefore kept Taiwan on the Priority Watch List in 2003.

TAJIKISTAN

IIPA recommends that Tajikistan remain on the Watch List, where it has stayed since 2000. See IIPA’s 2004 CIS country report at <http://www.iipa.com/rbc/2004/2004SPEC301CIS.pdf>. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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, and USTR agreed, that Tajikistan be kept on the Watch List. In its April 30, 2001 Special 301 Announcement, USTR noted Tajikistan’s failure “to fulfill all of its intellectual property commitments under the 1993 U.S.-Tajikistan Trade Agreement,” citing failure to adhere to the Geneva Phonograms Convention as well as “weak enforcement of intellectual property rights” and failure to implement criminal provisions for IPR violations as required by the bilateral agreement. For these reasons, as well as the lack of protection for foreign sound recordings and retroactive protection for works or sound recordings, IIPA again recommended and USTR again kept Tajikistan on the Watch List in both 2002 and 2003.

THAILAND

IIPA recommends Thailand be elevated to the Priority Watch List in 2004. See IIPA’s 2004 Thailand country report at <http://www.iipa.com/rbc/2004/2004SPEC301THAILAND.pdf>. Thailand is currently on the Watch List. 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 submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners. In May 2003, the petition was withdrawn. The U.S. government has since that time heavily engaged with Thailand in securing needed regulations to control pirate optical discs and ramped up enforcement efforts.

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. In 2003, IIPA recommended that Thailand be elevated to the Priority Watch List, citing increased concerns over rampant optical disc piracy for export. In the 2003 USTR Special 301 Announcement, in which Thailand was retained on the Watch List, USTR noted the United States' concern about "the explosion of copyright piracy within [Thailand's] borders," and noted that optical media piracy, signal theft and cable piracy all continued to increase.

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 2002, \$2.3 billion in Thailand's exports to the United States benefited from the GSP program, accounting for 15.6% of its total exports to the U.S. During the first 11 months of 2003, \$2.5 billion worth of Thai goods (or 17.9% 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 16.7% over the same period in the previous year.

TURKEY

IIPA recommends that Turkey stay on the Watch List, where it has been located since 2001. See IIPA's 2004 Turkey country report at <http://www.iipa.com/rbc/2004/2004SPEC301TURKEY.pdf>. 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.” In 2003, in acknowledgment of resolutions to the broadcast regulation issue and the false licensee issue, IIPA recommended that Turkey remain on the Watch List. USTR, agreed, and in its May 1 announcement, USTR noted “some positive movement” on these issues.

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. 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].” Competitive need waivers under the GSP program were granted back to Turkey in 2002. The GSP case against Turkey remained pending for almost 8 years. Finally, in 2003, IIPA was notified formally that the GSP investigation was closed in 2001. In 2002, \$472.4 million worth of Turkey’s exports to the United States benefited from the GSP program, accounting for 13.4% of its total exports to the U.S. During the first 11 months of 2003, \$649.3 million worth of Turkish goods (or 18.7% of Turkey’s total exports to the U.S. from January to November) entered the U.S. under GSP, representing an increase of 52.2% over the same period in the previous year.

TURKMENISTAN

IIPA recommends that Turkmenistan remain on the Watch List, where it has been since 2000. See IIPA’s 2004 CIS country report at <http://www.iipa.com/rbc/2004/2004SPEC301CIS.pdf>. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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. In its 2001 Special 301 submission, IIPA suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine for much more serious piracy problems) be listed, and for filing purposes only, grouped them together 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. USTR announced the same decision in 2003, adding, "the Customs Code does not provide the proper authority to seize material at the border," which is a necessity for proper border enforcement.

UKRAINE

IIPA recommends that Ukraine remain a Priority Foreign Country, as it has been since 2001. See IIPA's 2004 Ukraine country report at <http://www.iipa.com/rbc/2004/2004SPEC301UKRAINE.pdf>. 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. Hearings were again held with respect to Kazakhstan and Uzbekistan on October 7, 2003. 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 re-institute 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. Although production of pirated media has declined, USTR extended Ukraine's status as a Priority Foreign Country in 2003, noting that "any positive movement on copyright is still overshadowed by the continued lack of adequate OD media protection." 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.

UNITED ARAB EMIRATES

THE UAE does not currently appear on any USTR lists. 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.

URUGUAY

IIPA highlights copyright concerns in Uruguay in its Special Mention section this year. See IIPA's 2004 Uruguay country report at <http://www.iipa.com/rbc/2004/2004SPEC301URUGUAY.pdf>. Uruguay currently is placed on the Watch List. 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 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." In 2002, Uruguay amended its copyright law, and the new law went into effect January 2003. The 2003 USTR Special 301 Announcement noted that the new amendments "represent an improvement . . . and contain many provisions that upgrade the prior Uruguayan copyright scheme." These changes convinced USTR to downgrade Uruguay to the Watch List in 2003, but they noted that enforcement and transshipment are problems that still need to be addressed.

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. In January of 2003, Uruguay enacted amendments to its copyright law after a decade of debate. Noting that such action was a major achievement, notwithstanding the fact that the amended law fell short in several key areas, IIPA requested to withdraw its GSP petition against Uruguay. In the fall of 2003, USTR acknowledged that it would not act on this GSP petition. In 2002, \$68.2 million worth of Uruguay's exports 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 2003, \$48.6 million worth of Uruguayan goods (or 21.9% 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 22.5% decrease from the same period in 2002.

UZBEKISTAN

IIPA recommends that Uzbekistan retain its position on the Watch List, where it has remained since 2000. See IIPA's 2004 CIS country report at <http://www.iipa.com/rbc/2004/2004SPEC301CIS.pdf>. 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 ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). 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. Again, on October 7, 2003, the U.S. government held hearings with respect to Uzbekistan. 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 suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine for much more serious piracy problems) be listed, and for filing purposes only, grouped them together 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." USTR's 2003 Special 301 Announcement cited the same problems, added that the Customs Code does not give proper authority to seize material at the border, and kept Uzbekistan on the Watch List.

In 2002, \$11.1 million worth of Uzbek exports 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 2003, \$2.2 million worth of Uzbek exports to the United States (or 3% of Uzbekistan's total exports to the U.S. from January to November) benefited from the GSP program, representing an decrease of 79.8% from the same period in 2002.

VENEZUELA

Venezuela is currently on the Watch List, and has been remained there 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 2002, \$581.8 million worth of Venezuela's exports 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 2003, \$561.3 million worth of Venezuelan goods (or 3.8% 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 5.3% decrease from the same period in the previous 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.” USTR’s 2003 Special 301 Announcement commented that Venezuela’s commitment to protection of intellectual property rights appeared to be decreasing in 2002. Piracy and counterfeiting increased, while deterrence and prosecution levels stayed low. USTR kept Venezuela on the Watch List in 2003, adding that it intended to review the country’s progress later in the year.

VIETNAM

IIPA highlights copyright concerns in Vietnam in its Special Mention section this year. See IIPA’s 2004 Vietnam country report at <http://www.iipa.com/rbc/2004/2004SPEC301VIETNAM.pdf>. Vietnam is currently on the Watch List. 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.” Vietnam remained on the Watch List in 2003 as well; the 2003 USTR Special 301 Announcement commented that “Vietnam has increased the number of administrative and law enforcement actions against IPR violations, but effective enforcement remains the exception rather than the norm.”